

Submission to the National Inquiry into Discrimination against
People in Same-Sex Relationships:
Financial and Work-Related Entitlements and Benefits

Anti-Discrimination Commission Queensland
June 2006

1. Jurisdiction

The Anti-Discrimination Commission Queensland (ADCQ) is responsible for administering the Queensland *Anti-Discrimination Act 1991*. The Commission works to promote fair treatment and equality of opportunity and to protect people from unlawful discrimination and public vilification. One of the functions of the Commission is to foster community understanding and acceptance of human rights principles in Queensland. It is in this capacity that the ADCQ makes a submission to the Human Rights and Equal Opportunity Commission's Inquiry. The content of this submission was considered with due regard for the *International Covenant on Civil and Political Rights* and the *Convention on the Rights of the Child*.

2. Background

In 2004 the ADCQ established a suite of Community Advisory Committees to provide strategic advice on matters relating to reducing discrimination in Queensland and supporting vulnerable communities. The membership of the Lesbian, Gay, Bisexual, Transgender and Intersex (LGBTI) Community Advisory Committee includes experts from relevant organisations (please refer to Attachment A). The Committee has identified workplace discrimination, economic rights, HIV/AIDS discrimination, marriage equity and parenting and adoptions rights as particular areas of interest. Since 2004 the Commission has established effective working relationships with members of the Committee and their respective organizations. This submission has been researched and compiled by the ADCQ but it relies heavily on the advice, information and experience of expert members of the LGBTI Community Advisory Committee.

3. Inquiry Terms of Reference

Committee members expressed a view that the Inquiry provided a genuine opportunity for significant progress in areas relating to work related entitlements and financial rights. The Human Rights and Equal Opportunity Commission were commended for their rights based approach to the Inquiry but concern was noted in regard to the scope of its terms of reference. These concerns included:

- that same sex relationship recognition cannot be justifiably separated from other human rights – including financial rights and workplace entitlements;
- that formal recognition of same-sex relationships is critical to securing general legal parity/equality;
- the right to legal equality and non-discrimination are clearly articulated in Australia's international human rights obligations. It may have been useful for the Inquiry to conduct comparative analysis with international best practice models– to determine improvements that may apply to/ benefit the Australian context.

4. Commonwealth Laws

Members of the Advisory Committee provided careful consideration to Commonwealth laws (as relating to the scope of the Inquiry) which require amendment to provide equal treatment for same sex couples and children of same sex couples. The areas of law considered included:

- Workplace leave entitlements;
- Social security benefits;
- Tax concessions;
- Medicare and pharmaceutical benefits scheme;
- Superannuation entitlements;
- Workers' compensation;
- Veteran's pensions/entitlements;
- Parliamentary entitlements;
- Judicial pensions; and
- Inheritance

Committee members did not identify any additional areas of law (Commonwealth) outside of those appearing in the *Same-Sex: Same Sex Entitlements Discussion Paper*. Committee members emphasised that the language in Commonwealth legislation is ambiguous and non-specific in relation to same-sex relationships/rights. It was suggested that the legal language should plainly articulate the rights of same sex couples and (where appropriate) their children.

Workplace leave entitlements

Committee members noted the definitions used in relation to parental and carers leave (*Workplace Relations Act 1996*) refers to de facto spouse as an opposite sex couple who cohabit in a genuine domestic relationship.

A number of Commonwealth Departments and Agencies currently do not recognise same-sex couples for the purposes of leave in their workplace agreements.

Recommendation: That the definition of de facto spouse be amended to clearly include same-sex couples. This amendment should be made (where appropriate) across all relevant Commonwealth Legislation.

Social security benefits

Committee members noted that eligibility criteria for receiving Commonwealth Benefits (under the *Social Security Act 1991*) refers to 'partner' as a relationship with a member of the opposite sex. This is occasionally advantageous for persons in same-sex relationships – they are able to claim support in spite of their genuine relationship status. The definition of 'partner' is unfavourable for same-sex couples in claiming specific benefits, including partner bereavement payments, widow allowance and access to health care cards and pensioner cards. Members of the Advisory Committee indicated that they were interested in full citizenship for the gay and lesbian community in Queensland. Implicit in this, is that

citizenship rights and responsibilities are applied and shared equally and with fairness across the community.

Recommendation: That the Social Security Act be amended to define a 'member of a couple' as a same or opposite sex couple.

Tax concessions

Committee members identified a range of tax concessions that are available to heterosexual couples but not same-sex couples including:

- rebates for 'dependents';
- rebates for medical expenses incurred by the taxpayers 'dependents';
- rebates for superannuation made on behalf of a low income or non working same-sex partner;
- pensioner rebates;
- child care rebates; and
- Medicare levy

The above concessions all exclude persons in same-sex relationships. Persons in same-sex relationships and with parental responsibilities may not be reimbursed for any payment for his or her partner's child care costs. Similarly, non-biological parents are not able to be reimbursed for medical expenses incurred by their partner's child. Commonwealth taxation concessions do not recognise the rights of non-biological parents – even in circumstances where the non-biological parent may be the primary care provider. Community members identified presumptive parenting rights as being critical for the gay and lesbian community and for the rights of children belonging to same-sex families.

Recommendation: Note the above recommendation

Pharmaceutical Benefits Scheme

Pharmaceutical benefits entitlement cards can be issued to individuals, couples and families that meet specific eligibility criteria. The *National Health Act* defines a family as including a person's spouse and children. The definition of spouse includes de facto arrangements but the couple must be of opposite sex. Subsequently same-sex couples are denied access to these health concessions.

The Medicare safety net operates similarly to the Pharmaceutical Benefits Scheme. A family is defined under the *Health Insurance Act* as an individual, their spouse and their children. Cohabitation is also a requirement under the Act.

Recommendation: Note the above recommendation.

Superannuation

In 2004 a number of amendments were made to the *Superannuation Industry Act 1993* to broaden the definition of dependent to include 'interdependency relationships'. These amendments mean – in general terms – that same-sex partners are entitled to receive the

same benefits as married or heterosexual de facto couples. Community members expressed concern regarding the practical application of the law and the burden of proving the genuine status of their relationship in such a way that it satisfies the requirements of the Act.

Community members further noted that same-sex couples do not have access to the option of splitting superannuation contributions. The *Superannuation Act 2005* defines as spouse as a person involved in a marital or a marital like (opposite sex) relationship. The Commonwealth Government is Australia's largest employer. It is critical that their entitlements are awarded non-differentially.

Recommendation: That specific legislation pertaining to the superannuation rights of Commonwealth employees, members of the Australian Defence Force and parliamentarians be amended to include same sex-partners. In addition, the definition of 'marital-like relationship' should be replaced with relationship status or domestic relationship to make superannuation contribution splitting options available to same-sex couples.

Worker's Compensation, Veterans' pensions/entitlements, Parliamentary entitlements and Judicial Pensions

The *Parliamentary Entitlements Act 1990* refers to a suite of benefits available to the 'spouse' of Commonwealth Parliament. The definition of 'spouse' excludes same-sex couples.

The *Judges Pensions Act 1968* sets out the rights of a 'spouse' who survives a deceased judge. The definition of 'spouse' includes a person who was in a marital relationship with the deceased at the relevant time. A person is considered to be in a 'marital relationship' if the person ordinarily lived with the deceased on a permanent and domestic basis. The Act uses the terms husband and wife and subsequently appears to exclude same-sex relationships.

The *Veterans' Entitlements Act 1986* details the financial benefits to be awarded to veterans, their 'dependents' and 'partners'. A 'partner' arrangement is defined as a legal marriage or persons who are living in an opposite-sex marriage like relationship. A 'dependent' is defined as a 'partner', 'widow' or child of the veteran. Same-sex couples are excluded from the full range of benefits available to a heterosexual partner or dependent.

The *Safety, Rehabilitation and Compensation Act 1988* defines 'spouse' in a manner that excludes same-sex partners. The definition of 'dependent' includes a 'spouse' and various relatives of the employee but omits any reference to the entitlements of same-sex partners.

Recommendation: Committee members stressed that the above items of legislation are clear examples of discrimination and differential treatment on the basis of sexuality. Definitions of 'spouse' and 'dependent' should be broadened to provide entitlement/protections to same-sex couples/families. Specifically the term marital relationship or marital status should be changed to relationship status.

Migration

Committee members expressed concern about the potential for discrimination regarding Australia's Interdependency Visa category (Subclass 310). Interdependency visas are for persons 18 years or over who are involved in an interdependent relationship with an Australian or New Zealand citizen or permanent resident. This visa is used generally issued to same-sex partners. The Department of Immigration, Multicultural and Indigenous Affairs has been unable to provide information regarding who else may access temporary residency in Australia using this visa subclass.

The Interdependency visa is the only visa that is available for a person who is a same-sex partner of an Australian citizen/resident. A same-sex partner of an Australian citizen/resident cannot be included as a family member of the family unit on the visa application – even in cases where the same-sex couple has been married lawfully in another country. This is in contrast to heterosexual persons who migrate to Australia who are entitled to bring their families and de facto partners with them.

Applying for an Interdependency visa is a two stage process. Individuals are required to apply for a temporary and permanent visa on the one application. Persons are granted a temporary visa if they meet all of the relevant legal requirements. As evidence of their eligibility to work legally in Australia, persons with a Subclass 310 visa are required to produce the visa when applying for employment. Committee members suggest that some Australian employers are familiar with the Subclass 310 visa category and aware that it is issued to same-sex couples. They expressed concern that gay and lesbian persons who are temporary residents under this visa category are particularly vulnerable to employment discrimination.

This approach to partner migration is differential and places individuals in the precarious position of having their sexuality flagged each time they apply for paid work in Australia. Committee members further noted that this approach to partner migration does not encourage diversity in Australia's workforce and shows no regard for privacy.

Recommendation: That the Spouse Visa category (for heterosexual couples) and the Interdependency Visa category be merged into a single Partner/Domestic Relationship Visa category.

5. State Laws

Amendments to the *Queensland Acts Interpretation Act 1954* has redefined the meaning of de facto partner across a suite of Queensland legislation, providing enhanced protections for individuals in same-sex relationships. The changes have had positive implications across a variety of areas of law including:

- intestacy, wills and family provision;
- workers compensation schemes;
- motor accident compensation;
- compensation due to criminal injury or tort liability;
- division of property on separation; and
- stamp duty exemptions.

Overview – Queensland’s legislative environment

Committee members noted that gay and lesbian couples in Queensland have a high level of protection in relation to their financial rights and workplace entitlements. This statement was qualified by references to possible employment discrimination, particularly in regional centres in Queensland. Committee members were also cognizant that Queensland legislation offers more comprehensive protections in regard to financial rights/workplace entitlements for same-sex couples than legislative environments in a number of other Australian states. Committee members expressed an interest in legislative uniformity across the states to prevent the incursion of less favourable protections when moving interstate. Committee members felt that there may be some value in identifying Queensland as a case model for minimum standards of protections in this area.

Discretionary trusts

Committee members identified discretionary trusts as a possible area of discrimination in the Queensland context. Discretionary trusts are a means to manage business affairs and to facilitate the management of estates. There are a number of significant taxation benefits in declaring a Trust as a Family Trust. Relevant legislation prevents same-sex couples from holding equal holdings in the management of the Trust. The Inquiry may wish to investigate the details of this matter further.

Additional matters

Though Committee members articulated the view that Queensland has reasonable legislative protections in relation to the scope of this Inquiry, they expressed particular concern in regard to a range of human rights issues including:

- presumptive parenting rights;
- adoption rights;
- reproductive/fertility rights;
- formal models for relationship recognition;
- marriage equity;
- the legal age of consent;
- relationship registration scheme;
- Birth Certificates; and
- recognition of the biological and non-biological parents.

Committee members acknowledge that these issues are related to but outside the specific mandate of this Inquiry. The ADCQ and members of the LGBTI Community Advisory Committee strongly encourage the Human Rights and Equal Opportunity Commission to consider the above matters in their future work.

6. Conclusion

The ADCQ strongly supports the intention of this Inquiry as it seeks to identify areas of discrimination and inconsistency within Commonwealth, State and Territory laws. It supports an expansion of the definition of the term 'spouse' across all relevant Commonwealth legislation to include same-sex couples. This means significant reform across areas including superannuation, taxation, Medicare, veteran's affairs, workers' compensation, immigration and social security to ensure that members of the gay and lesbian community are not disadvantaged or treated differentially in important aspects of daily life. The ADCQ further supports shifts in State and Commonwealth legislative language that is heterosexist, exclusive or ambiguous in recognising the rights of same-sex couples and same-sex families.

Finally, the ADCQ would like to emphasise the profound importance of ensuring that Commonwealth and State legislation is:

- non-discriminatory;
- aligned with Australia's international human rights obligations;
- a reflection of the lived realities of Australian individuals, couples, families and communities;
- a standard that has strong symbolic and education value regarding equity and equal treatment.

Attachment A

Attending organisations represented on Lesbian, Gay, Bisexual, Transgender and Intersex Community Advisory Committee

ORGANISATION
Action Reform Change Queensland
Young Workers Advisory Service
Queensland AIDS Council
Legal Aid Queensland
Queensland University of Technology
Equity Office, University of Queensland
Open Doors