



**Submission of the
New South Wales Young Lawyers Human Rights
Committee**

**Implementation of the Same Sex: Same Entitlements Bill
2007**

7 September 2007

Authors: Anthony Levin
Celia Oosterhoff

Contact: Louise Jardim
Chair, NSW Young Lawyers Human Rights Committee
hrc.chair@younglawyers.com.au

Human Rights Committee
NSW Young Lawyers
Level 6 170 Phillip Street
Sydney NSW 2000

Senator Lyn Allison
62 Wellington Pde
East Melbourne VIC 3002
Email: senator.allison@aph.gov.au

Dear Senator

**SUBMISSION OF NSW YOUNG LAWYERS HUMAN RIGHTS
COMMITTEE - IMPLEMENTATION OF SAME-SEX: SAME
ENTITLEMENTS BILL 2007**

The Human Rights Committee of New South Wales Young Lawyers ('YLHRC') is a group of law students and lawyers who are concerned with a range of human rights issues in both Australia and abroad.

The YLHRC is grateful for the opportunity to make a submission regarding the implementation of the *Same-Sex: Same Entitlements Bill 2007*. The YLHRC is concerned with the effect the Bill will have on human rights and the nexus with Australia's international obligations.

SUBMISSION ON COSTS OF THE IMPLEMENTATION OF THE SAME-SEX: SAME ENTITLEMENTS BILL 2007

The Young Lawyers Human Rights Committee (“the **Committee**”) would like to express its full support for the implementation of the **Same-sex: Same Entitlements Bill 2007** (“the **Bill**”). In this respect, the Committee endorses the Human Rights and Equal Opportunity Commission's (HREOC) recommendations made in relation to the current omnibus Bill.

Reform such as that proposed by the Bill is crucial to ensuring that gay, lesbian and transgender people receive equal treatment under all laws of the Commonwealth, States and Territories in Australia. The Committee submits that the reform proposed by the Bill would ensure that substantive recognition is given to, *inter alia*, Articles 2 and 26 of the *International Covenant on Civil and Political Rights* (ICCPR), and Articles 2 of the *International Covenant on Economic, Social and Civil Rights* (ICESCR) and the *United Nations Convention on the Rights of the Child* (CROC) as they relate to the Gay, Lesbian and Transgender communities.

Whilst the Committee fully supports the implementation of the Bill, the Committee does not possess the resources or expertise to exhaustively address all the fiscal implications of the amendments proposed by the Bill. The analysis proffered in this submission is therefore intended to reflect some of the key issues raised by the proposed legislation, with reference to comparable jurisdictions. It is hoped that this will assist the Senate Inquiry to facilitate the effectiveness of current and future amendments.

Human Rights Over Financial Imperatives

In considering the omnibus Bill, some discussion has occurred about the cost of implementation. YL wishes to address this issue by submitting that the need to implement comprehensive human rights reform for same sex couples should be the predominant criterion upon which the Bill is assessed. Although international law has regard to the notion of ‘progressive realisation’ in adjudging a nation’s implementation of human rights norms, that notion was primarily formalised in Article 2(3) ICESCR to accommodate *developing* nations with burgeoning political and economic infrastructure. Evidently, Australia is not a developing nation. Consecutive budgetary surpluses would indicate otherwise.

Further, Article 4 of ICESCR states that:

*“The States Parties to the present Covenant recognize that, in the enjoyment of those rights provided by the State in conformity with the present Covenant, the State may subject such rights only to such limitations as are determined by law only in so far as this may be **compatible with the nature of these rights and solely for the purpose of promoting the general welfare in a democratic society.**”*

The Commonwealth Government cannot justify the continued denial of fundamental rights to same sex couples on the basis of Article 4. For example, the current state of

the law in relation to property division or social security engenders ‘limitations’ which simply exclude same sex couples. Indeed the test for a ‘reasonable limitation’ on any right, is that there must be some ‘proportionality’ between the limitation of the right and the reason for the limitation. To date, the government has provided the United Nations with no formal reason for limiting ICESCR rights to heterosexual couples. If forced to interpolate, the only discernible reason for limitation would be the desire *not* to sanction same sex relationships in Australian society. (The amendment to s 5 of the *Marriage Act* provides further evidence of that desire.)

One cannot assume the legitimacy of such reasoning in a democracy. The *Marriage Act* already prevents same sex couples from formally recognising their relationships through marriage, and the federal government has also overturned state laws such as those in **the ACT** which sought to afford a diminished form of recognition through civil unions. The comprehensive exclusion of same sex couples from rights and entitlements under other federal laws is arguably grossly disproportionate to the desired end, especially since same sex couples will continue to live together regardless of whether they can formalise their relationships.

Further, the proposed reason fails to meet a concomitant criterion, which is that it is “*solely for the purpose of promoting the general welfare in a democratic society*”. Arguably, the limitation on same sex rights actually undermines the general welfare of Australian democracy, which is addressed in the next section.

The Social Cost of the Status Quo

The Committee recognises the significant ‘social cost’ incurred and intangible damage done in allowing ongoing systemic discrimination against Gay, Lesbian and Transgender people and their families in the areas identified by the Bill . Specifically, in recognising the inherent social function of legislation as both reflecting and establishing social norms, failure to extend the same protections and entitlements to same sex couples affirms their marginalisation from “mainstream” society. It represents a harsh statement by the law that same sex couples are outsiders and that their need for protection as human beings is somehow less than that of heterosexual couples.¹

As stated by the Supreme Court of Canada in *M. v. H.*,² which upheld the right to seek spousal support from a same-sex partner with whom one has cohabited, the exclusion of these couples promotes the view that they are:

“less worthy of recognition and protection. It implies that they are judged to be incapable of forming intimate relationships of economic interdependence as compared to opposite-sex couples...it perpetuates the disadvantages suffered by individuals in same-sex relationships and contributes to the erasure of their existence.”

The majority held that the exclusion was not rationally related to the objectives

¹ *Minister for Home Affairs & Anor v Fourie and Anor* [2005] ZACC 1 [71]-[72] (Sachs J for the court).

² *M. v. H.*, [1999] 2 S.C.R. 3, (1999), 171 D.L.R. (4th) 577, per Justices Cory and Iacobucci.

underlying the spousal support provisions in Part III of the *Family Law Act*, which they characterised as dealing equitably with the economic needs of persons in interdependent relationships and the alleviation of claims on the public purse by privatizing the costs of family breakdown. By analogy, the Canadian court's reasoning is equally applicable to the Australian legal context.

The consequence of hidden segregation is that they can serve to sanction homophobic violence and intimidation. Any attempt to comprehensively analyse the financial cost of implementation must factor in the cost of policing and prosecuting homophobic crime, as well as supporting the victims of such crime. Research in the United States of America and Australia leaves little doubt that stigmatisation of sexuality is a significant contributor to both the high rates of violence towards boys perceived as gay and to male youth suicide.³ The 1994 Legislative Council Standing Committee on Social Issues report entitled "Suicide in Rural New South Wales" found that this was particularly the case in rural New South Wales, where support services, such as counselling, are not readily available.

Young Lawyers HRC submits that the present gamut of discriminatory federal legislation provides tacit support to entrenched homophobic elements that negatively impact upon social integration and the psychological health of young gay men and women. In its submission to HREOC, the Australian Medical Association noted that in relation to intersex people:

*"anecdotal research indicates that experiences or expectations of discriminatory treatment may lead to decreased accessing of healthcare facilities. This has flow on effects for untreated mental and physical health problems."*⁴

The same affects can no doubt be observed in relation to same sex couples in general. This not only represents an indirect cost to the Australian taxpayer and the government, but it undermines the general welfare of society which the government is intent on protecting, by increasing levels of crime, increasing the risk of undiagnosed mental health problems, and reducing social cohesion. For the purposes of Article 4 (ICESCR), it therefore cannot be argued that the sole purpose for limiting rights is to promote 'general welfare'.

Actual Financial Costs

Even if one does turn attention to the financial impact of the omnibus legislation, comparison with similar legislation in foreign jurisdictions shows that the actual cost of implementation is marginal.

The Federal Government has so far mounted two main arguments against reform:

³ Mr Bob Debus Hon, Second Reading Speech, *Crimes Amendment (Sexual Offences) Bill*, Hansard , Legislative Assembly, 7 May 2003. Research has found that young gay men are up to 300 per cent more likely to commit suicide than their heterosexual peers, making suicide the leading cause of death among young gay men.

⁴ Human Rights and Equal Opportunity Commission, *Same Sex: Same Entitlements, National Inquiry into Discrimination against People in Same-Sex Relationships: Financial and Work-Related Entitlements and Benefits*, May 2007, p 365.

firstly, because implementing reform will cost taxpayers millions of dollars; and secondly because ensuring equality in partner/de facto pension and welfare rights would actually decrease the pensions of current gay “couples” as two individual pensions is larger than the joint “spousal/partner” pension.

YL HRC rejects both these assertions.

The Costs to Taxpayers & Law Reform in Other Jurisdictions

The government’s argument about the cost to taxpayers is unfounded. It should be noted that in the common law nations who have considered similar reform, the federal governments of the United Kingdom, the United States of America and Canada all engaged in comprehensive costing assessments in order to address the economic imperatives of particular amendments.

In 2000, in a parallel to the current proposed omnibus Bill, the Canadian Federal government passed omnibus Bill C23 ([Modernization of Benefits and Obligations Act](#), S.C. 2000, c. 12) which amended 68 federal statutes to extend full benefits and obligations to persons in same-sex relationships (similarly leaving ‘the right to marry’ out of the list of amendments). At that time, the Department of Justice Canada stated that

“...obligations as well as benefits will be conferred on same-sex couples. The fiscal impact of these amendments will be minimal if any at all.”⁵

Although it should be acknowledged that the Canadian systems of taxation, health care and social security are different to Australia’s, they are not so markedly different that they are beyond useful comparison.

Similarly, prior to the passage of the *Civil Partnership Act 2004* (UK) in the United Kingdom, the government published the Final Regulatory Impact Assessment which stated that:

“Overall, the costs identified in this RIA [Regulatory Impact Assessment] justify the social policy reasons for introducing a civil partnership scheme for same-sex couples.”⁶

The RIA identified the costs of implementation of the scheme in relation to individuals, businesses, charities and government. It concluded that it would have an ‘overall low impact on businesses’, ‘no impact on charities other than responsibilities as employers’, and that ‘the greatest impact will be felt by local and central governments’. Thus, the impact on tax payers was essentially assessed as being minimal. The main source of impact on the private sector was the increased burden on private pension schemes. **However, given the Australian federal government’s recent amendments to superannuation laws**, under which many funds already pay survivor benefits to same sex couples, this effect is unlikely to be replicated in

⁵ Attorney General Anne McLellan, February 11 2000, www.justice.gc.ca/en/news/nr/2000/doc_25019.htm

⁶ Prepared by the Government of the United Kingdom; available at <http://www.berr.gov.uk/files/file23829.pdf>

Australia.

In terms of the impact upon government, this was assessed by the RIA as being twofold:

1. initial set-up costs; and
2. ongoing costs associated with changes to government pension schemes and administrative arrangements for dissolution in the event of relationship breakdown.

The RIA identified that the *Civil Partnership Act* also required additional resources to upgrade court IT programmes to cope with changes, and allocate funding for public awareness and judicial education programs. It is feasible that some of these costs could apply to the implementation of the Bill in Australia. However, in the absence of a comprehensive financial impact assessment for the Bill, and acknowledging certain structural differences between the UK and Australian systems of government, it is impossible to prejudge the potential economic impact .

Nevertheless, the overall conclusions of the RIA about the social policy reasons for reform reflect the position taken in the United States. For example in 2004, the Congressional Budget Office of the U.S. Federal Government prepared an analysis of the potential budgetary effects of recognising same sex marriages. It concluded that despite various uncertainties:

*“any effect of same-sex marriage on federal revenues would be small.”*⁷

Further, the report concluded that although recognising same sex marriages would increase outlays for Social Security and the Federal Employees Health Benefits (FEHB) program, the effects on other programs would be “negligible”. While there is a significant technical difference between changing the definition of ‘marriage’ in the *1996 Defense of Marriage Act* (Public Law 104-199) in order to recognise same sex marriage, and changing the definition of ‘de facto’ under the *Same Sex: Same Entitlements Bill 2007 (Cth)*, the practical effects of such changes on same sex rights and entitlements are closely related. Thus, one can conclude that the practical *impact* of substantive changes at a federal level would be comparable. The cost to the federal government would likely also be small.

There are also some additional factors to consider when assessing financial imperatives. These include:

- uniform national regulation of all rights and entitlements is to be preferred to a fragmented system of divergent state and federal laws;
- any increases in federal expenditure is likely to be offset by increases in revenue as a result of changes which actually *disadvantage* same sex couples. This is because the status quo involves both positive and negative discrimination against

⁷ Congressional Budget Office, *The Potential Budgetary Impact of Recognizing Same-Sex Marriages*, to the Committee on the Judiciary, US House of Representatives, June 21 2004. Available at www.cbo.gov/ftpdoc.

gay and lesbian people. So much was recognised in the HREOC Research Paper.⁸

Australia: A Unique Jurisdiction for Human Rights Protection

Notably, Australia is one of the last common law nations not to have enshrined some form of national Human Rights Act. In Canada, the *Charter of Rights and Freedoms* bolstered the cause of litigants in landmark cases such as *Moore v Canada (Treasury Board)*, 1997 CanLII 1577 (CHRT),⁹ by providing hard legal justification for recognising same sex entitlements. This in turn partly led to the passage of Canada's own omnibus legislation.

In Australia, opponents of a National Bill of Rights have argued tirelessly that the *marriage* of our common law and administrative law principles obviates the need for any Bill of Rights, by expressing the antecedent principles of the human rights movement.

The trade-off for same sex couples is the inevitable lag-time between the common law's languid expression of fundamental rights, and the current tenor of human rights discourse. For many couples, the common law has to date failed them. This is largely due to the limited role judicial interpretation can play in protecting rights which parliament never intended to uphold. The decision in *The Roll-over Relief Claimant and Commissioner of Taxation* [2006] AATA 728 (23 August 2006) demonstrates that in the absence of clear legislative intent, a court or tribunal perpetuating the common law (or administrative law) tradition is nevertheless bound by parliamentary intent as far as it is cognisable from the Act in question and any relevant extrinsic material such as Explanatory Memoranda.

As a result, the Tribunal in *Roll-over* referred to the fact that taxation laws were partly exempt from the operation of the *Sex Discrimination Act 1984* (Cth) (one of Australia's few substantive codifications of the ICCPR), concluding:

"The EM to the Tax Bill in its terms made it clear that in conformity with the SD Act, the 1936 Act was to be amended so as to treat a man and a woman in a de facto relationship as spouses. It did not go so far as to include persons of the same sex, although if this had been the legislative intention, it would have been simple enough to do so..."

There will undoubtedly be many who consider that the definition of "spouse" should include persons of the same sex and the Tribunal itself has some sympathy with this point of view. It may be that at some time in the future the Act will be amended to this effect."

The Tribunal Member's comments in obiter, suggest that sympathy is insufficient to protect rights.

Despite the strict legalism of decisions affecting same sex rights, there have been

⁸ HREOC, *Same-Sex: Same Entitlements, National Inquiry into Discrimination against People in Same-Sex Relationships: Financial and Work-Related Entitlements and Benefits*, Areas of Federal Law that Exclude Same-Sex Couples and their Children, Research Paper, September 2006.

⁹ See also *Canada (Attorney General) v Moore (TD)* 1998 CanLII 9085 (FC)

exceptions which expose the inconsistent reasoning and fiscal opportunism of continuing discrimination. The ATO ruling in *ATO ID 2003/7* held that a same sex partner who was a “third party” to an “arrangement” under s148(2) of the *Fringe Benefits Tax Assessment Act 1986* (Cth) (FBTAA) was deemed to be an “associate”, such that a car provided by an employer and used by the employee’s same sex partner was subject to fringe benefits tax. As was noted in the HREOC Research Paper (September 2006), the only way the ATO could *deem* a partner to be an “associate” was to include them as a spouse, which then draws them into the definition of associate. From a strictly legalist interpretation, this contradicts other ATO rulings on the definition of ‘spouse’ which exclude ‘same sex partner’.¹⁰ As HREOC noted, the practical effect is that the ruling applies only the obligations under the FBTAA, not the benefits, of Fringe Benefit Tax rules to same sex couples.

Young Lawyers HRC therefore wishes to note, that the omnibus Bill will also serve to prevent future inconsistencies with regards to rights and obligations. The proposed omnibus Bill represents the advent of the ‘future’ to which the AAT adverted in *The Roll-Over Relief Claimant* [2006].

The Need for Further Law Reform

YL also recommends the drafting of a national Sexuality Discrimination Bill which includes provisions prohibiting discrimination and harassment on the basis of sexual orientation or gender identity. Such a Bill would also prohibit victimisation of those who blow the whistle on discrimination, and send a message that:

- gay and lesbian people are valued and equal members of society; and
- that homophobic violence and intimidation are unacceptable.

Further reform is necessary because, as Lise Gotell argues:

*“recognizing a right not to be discriminated against in housing, employment and commercial relationships is not the same as policy measures that could encourage oppressed sexual communities to live openly and freely...”*¹¹

Further reform would ensure the realisation of Article 26 of ICCPR.

The Right to Marry

YL notes that despite the important protections afforded by the Bill, same-sex couples are still denied the freedom to marry due to the definition of “marriage” under section 5 of the *Marriage Act 1961* (Cth). This right is specifically protected by Article 23(2) of the ICCPR, and supported by Article 1 of both the ICCPR and ICESCR in relation to self-determination. As was iterated in the South African case of *Fourie*:

“it follows that, given the centrality attributed to marriage and its consequences in our culture, to deny same-sex couples a choice in this respect

¹⁰ Interpretive Decisions: ATO ID 2002/731; ATO ID 2002/211.

¹¹ Lise Gotell, *Queering Law: Not by Friend*, Canadian Journal of Law and Society, 17(1), 89, 2002.

is to negate their right to self-definition in a most profound way."¹²

By this reasoning, a denial of the right to marry also breaches the right to take part in cultural life under Article 15(1)(a) of ICESCR.

Similarly, the absence of a civil alternative to marriage, providing same-sex couples the opportunity to publicly affirm their commitment to each other, denies formal recognition of their relationships and status as family units. This is widely recognised within the Gay, Lesbian and Transgender communities as a symbolic human rights issue. The Committee submits that an amendment to section 5 of the *Marriage Act* be included either in the current Bill or future Draft Bills to redress this final source of discrimination.

¹² *Minister for Home Affairs & Anor v Fourie and Anor* [2005] ZACC 1 [71]-[72] (Sachs J for the court)