



Your Ref:
Our Ref: 04/08/0061
Enquiries: Yvonne Henderson

Committee Secretary
Senate Standing Committee on Legal and Constitutional Affairs
Department of the Senate
PO Box 6100
Parliament House
Canberra ACT 2600
Australia

Dear Secretary

Inquiry into the Same-Sex Relationship (Equal treatment in Commonwealth laws-Superannuation Bill 2008)

The Western Australian Equal Opportunity Commission appreciates being given the opportunity to contribute to this important inquiry.

In 2006 the EOC made a submission to the *National inquiry into discrimination against people in same-sex relationships regarding financial and work-related benefits and entitlements* held by the Human Rights and Equal Opportunity Commission.

In that submission (a copy of which is attached for your information), the Commission noted:

The EOC believes there is no basis on which same sex couples should be denied access to financial and work related benefits merely as a result of being a same sex rather than a heterosexual couple.

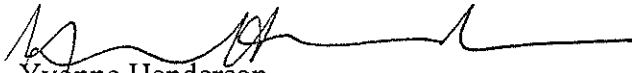
Whilst same sex couples are unable in Australia at present to marry and derive the automatic benefits that flow from legal recognition of a marriage this in fact highlights the need to ensure that in the same way that de facto heterosexual relationships are now widely recognised and accorded many benefits previously only available to married couples that these same rights should be extended to same sex couples.

Many entitlements that flow from Federal legislation to heterosexual couples are intended to recognise the special position of a partner in an on-going relationship. Thus benefits that flow to partners from superannuation funds; from tax concessions; from pension entitlements; from health concessions are premised on the recognition of existence of a relationship.

The EOC supports the Bill which will end the discriminatory provisions relating to the Commonwealth government (defined benefit) superannuation schemes and related taxation legislation, as well as acts that regulate the superannuation industry.

Discrimination on the basis of sexuality has largely been removed from state and territory laws. This bill will take equality for same-sex couples and their children to the next level by introducing long overdue Commonwealth reforms, removing discrimination from superannuation laws as the first step.

Yours sincerely,



Yvonne Henderson

COMMISSIONER FOR EQUAL OPPORTUNITY

30 JUL 2008

Enc: copy EOC submission to 2006 National inquiry into discrimination against people in same-sex relationships regarding financial and work-related benefits and entitlements

**National inquiry into discrimination against people in
same-sex relationships regarding financial and work-
related benefits and entitlements**

Submission

**Equal Opportunity Commission Western Australia
August 2006**

**Ms Yvonne Henderson
Commissioner for Equal opportunity WA**

Phone: 08 9216 3900
Level 2, Westralia Square
141 St Georges Terrace, Perth WA 6000

1. Introduction

The Western Australian Equal Opportunity Commission (EOC) supports the removal of all forms of discrimination against same sex couples.

The Commission commends the Human Rights and Equal Opportunity Commission on its decision to investigate this matter.

The EOC believes there is no basis on which same sex couples should be denied access to financial and work related benefits merely as a result of being a same sex rather than a heterosexual couple.

Whilst same sex couples are unable in Australia at present to marry and derive the automatic benefits that flow from legal recognition of a marriage this in fact highlights the need to ensure that in the same way that de facto heterosexual relationships are now widely recognised and accorded many benefits previously only available to married couples that these same rights should be extended to same sex couples.

Many entitlements that flow from Federal legislation to heterosexual couples are intended to recognise the special position of a partner in an on-going relationship. Thus benefits that flow to partners from superannuation funds; from tax concessions; from pension entitlements; from health concessions are premised on the recognition of existence of a relationship.

To deny the existence of partners in a same sex relationship undoubtedly disadvantages those persons and may deny them benefits which were intended for persons in particular circumstances for example on the death of a partner. Such discrimination has no logical or moral foundation and serves only to marginalise and treat as second class citizens those in same sex relationships. Many of these taxpayer funded benefits have undoubtedly been contributed to by gay and lesbian members of the community through their payment of taxes. In any event the benefits are designed for a particular 'need' rather than as a reward for paying taxes.

Society has changed a great deal in the last 50 years. Most Australian states have outlawed discrimination based on marital status and also on sexual orientation. Thus most members of same sex couples could bring complaints to state equal opportunity bodies where the discrimination was based on either or both of these attributes.

It is clearly an outdated anachronism that financial and other benefits are denied to members of same sex partnerships. It is also repugnant to notions of fairness and equality of treatment.

The EOC supports the outlawing of such forms of discrimination.

2. Functions of WA Commissioner

The Equal Opportunity Commissioner for Western Australia is responsible for the administration of the *Equal Opportunity Act 1984 (The Act)*. The Commissioner provides information about *The Act*, investigates and conciliates complaints, conducts community education and training and develops programmes to promote equal opportunity.

3. Background

The *Equal Opportunity Act 1984* makes unlawful discrimination on a range of grounds in relation to various areas of public life. The grounds included in the Act are as follows (in brackets is the year in which were added to those originally included in 1984):

- a. Sex
- b. Marital status
- c. Political conviction
- d. Pregnancy
- e. Race
- f. Religious conviction
- g. Sexual harassment
- h. Impairment (1988)
- i. Age (1992)
- j. Family responsibilities (1992)
- k. Family status (1992)
- l. Racial harassment (1992)
- m. Gender history (2000)
- n. Sexual orientation (2002)

The EOC also conciliates complaints on the ground of spent convictions (1988) and victimisation.

4. Terms of reference of inquiry

The Inquiry strongly encourages submissions which identify and analyse any State and Territory laws which may discriminate against same-sex couples with respect to financial and work-related entitlements and benefits.

The issues raised in the terms of reference which have relevance to Western Australian statutes:

- intestacy, wills and family provision claims
- workers compensation schemes
- motor accident compensation
- compensation due to criminal injury or tort liability
- public sector superannuation schemes
- division of property on separation

- stamp duty exemptions.

The Inquiry encourages submissions that provide:

- (a) information and analysis about State and Territory laws which discriminate against same-sex couples, and any children of same-sex couples, in the context of financial and work-related benefits and entitlements
- (b) examples of the impact that discriminatory State and Territory laws have had on the lives of same-sex couples and any children of same-sex couples.

5. Sexual orientation discrimination legislation in WA

Following an election commitment in 2001, the Gallop Labor Government established a Ministerial Committee to assist in the development of amendments to legislation to end discrimination against lesbian, gay and bisexual people.

The Ministerial Committee made 47 recommendations, the large majority of which were supported by the government. Several were referred to other agencies for review and comment, including those relating to sexual orientation vilification and a proposal to extend the definition of goods and services (for all grounds in *The Act*) to include all services of government.¹

6. The government subsequently enacted the *Acts Amendment (Lesbian and Gay Reform) Act 2002* which comprehensively amended Western Australian statutes to remove discrimination against lesbian, gay and bisexual people and to provide avenues of legal redress for discrimination.
7. A summary of Acts amended by the *Acts Amendment (Lesbian and Gay Reform) Act 2002*, is set out below:
 - a. Administration Act 1903 – deals with entitlements to participation and distribution of intestate estates and reflects recognition under the *Artificial Conception Act* that a child's deemed parents may both be female.
 - b. Adoption Act 1994 – definition of 'birth parent' amended to recognise same sex parent under *Artificial Conception Act* and consequential amendments, also to enable same sex partners to apply to adopt a child.
 - c. Artificial Conception Act 1985 – amended to deem a same-sex partner of a woman who has undergone artificial fertilisation procedure as the parent of the child (including the unborn child) where that partner has consented to the procedure. This

¹ Report of the Ministerial Committee on Lesbian and Gay law reform, June 2001

- extends existing provisions that deem the consenting partner of a heterosexual couple to be the father of the child.
- d. Births, Deaths and Marriages Registration Act 1998 – to enable the deemed parent under the *Artificial Conception Act* to register the child’s birth and be named on the birth certificate as the other parent.
 - e. Cremation Act 1929 – prevents a cremation occurring where a next of kin objects and includes the de facto partner (including same sex partner) of a deceased as one of the next of kin.
 - f. Criminal Code - repeals criminal offences of indecency and gross indecency where limited to acts between males; age of consent for sexual penetration of a male is amended from 21 to 16; defence to a charge of sexual penetration of a juvenile of either sex between the age of 13 and 16 that the accused believed the juvenile was 16 or above is strengthened and applies only where the person is not more than 5 years older than the juvenile.
 - g. Family Court Act 1997 – includes reference to a deemed parent under *Artificial Conception Act* - such a parent to have the same responsibilities as the father of a child born to a single woman
 - h. Guardianship and Administration Act 1990 – definition of ‘nearest relative’ amended to include same sex partners; defines a ‘de facto’ partner as defined in the *Interpretation Act 1984* when dealing with who may consent to medical and dental treatment.
 - i. Human Reproductive Technology Act 1991 – allows a lesbian couple access to invitro fertilisation procedures
 - j. Human Tissue and Transplant Act 1982 – ‘senior available next-of-kin’ to include same sex partners in relation to the removal of human tissue for transplant or post mortem examinations.
 - k. Inheritance (Family and Dependents Provision) Act 1972 – the same sex partner of a deceased person is entitled to apply, and a child may have a deemed parent under *Artificial Conception Act*
 - l. Interpretation Act 1984 – definition of ‘parent’ includes ‘deemed parent’ under *Artificial Conception Act* and an adoptive parent under the Adoption Act
 - m. Law Reform (Decriminalisation of Sodomy) Act 1989 – repealed
 - n. Members of Parliament (Financial Interests) Act 1992 – definition of de facto spouse amended to include same sex partner
 - o. Parliamentary Superannuation Act 1970 – provisions apply to a same sex partner of a member or former member.
 - p. Public Trustee Act 1941 – includes reference to same sex partner of deceased person with respect to administration of an estate by Public Trustee

- q. State Superannuation Act 2000 – same sex partners included in definition of ‘spouse’ of a worker; changes to definitions for all schemes in the *State Superannuation Regulations 2001*.
 - r. The Equal Opportunity Act 1984 was amended to make unlawful discrimination on the ground of sexual orientation, in the areas of work; education; access to places and vehicles; goods, services and facilities; accommodation; land; clubs and application forms.
8. Consequential amendments were made to the *Stamp Act 1921*, the *Coroners Act 1996*, the *Fatal Accidents Act 1959*, the *Criminal Injuries Compensation Act 1985* and the *Workers Compensation and Rehabilitation Act 1981*. These Acts cover property related benefits, compensation schemes, consumer and business legislation.
 9. The Industrial Relations Act 1979 was amended in July 2002 to provide the Industrial Commission with the power to amend awards to “to ensure that the award does not contain provisions that discriminate against an employee on any ground on which discrimination in work is unlawful under the *Equal Opportunity Act 1984*”.²
 10. In 2002 The State Government also enacted the *Acts Amendment (Equality of Status) Act 2002* which in part was concerned to remove “discrimination against the partners in certain relationships other than marital relationships [including same sex partners] in matters such as transfer of property, dependent spouse rebate, compensation schemes, health related legislation and inheritance.” Sixty-one (61) statutes were amended ranging from the *Wills Act 1970*, the *Liquor Licensing Act 1988* and the *Minimum Conditions of Employment Act 1993*.

Generally, the amendments ensure that existing statutory provisions that provide rights or entitlements apply equally to partners, whether, married or de facto, of the opposite or same sex.³

11. **Equal Opportunity Act 1984 - exceptions**

The amendments to *The Act* in 2002 included a number of exceptions where it is not unlawful to discriminate against someone because of their sexual orientation and these exceptions include:

- Accommodation provided in private households
- Accommodation provided by a religious body

² Industrial Relations Act 1979, S40B(1)(c)

³ McGinty, the Hon J. Attorney General, 2nd reading speech, Acts Amendment (Equality of Status) Bill, 2002. Hansard p 746-751

- Disposal of an estate or interest in land by will or by way of a gift
- Measures intended to achieve equality or meet special needs
- Employment, education or training at a religious educational institution
- Admission as a member, and benefits provided to members, of a voluntary organisation
- Compliance with an order of a Court or Tribunal
- The provision of charitable benefits.

12. Financial and work-related benefits

The legislative changes introduced in Western Australian in 2002 to all intents and purposes have removed all discriminatory provisions within the jurisdiction. Complaints received by the WA Equal Opportunity Commission have not been high, which could indicate a high level of compliance, as well as reflecting the comprehensive extent of the changes.

13. Complaints/enquiries data – sexual orientation

In the four years since the WA Equal Opportunity was able to conciliate complaints on the ground of sexual orientation, 23 formal complaints have been received. (see Table 1 below). The Commission continues to receive a wide range of enquiries relating to sexual orientation which can be requests for information about rights and responsibilities, as well as student and general enquiries.

Table 1

	02/03	03/04 ⁴	04/05	05/06 ⁴
Enquiries	168	52	41	29
Complaints	4	6	7	6

Of the six complaints lodged in 2006 – one was in the area of employment, five related to the provision of goods and services.

14. Conciliated complaints

Most of the complaints lodged with the Commission on the ground of sexual orientation are not specifically relevant to this inquiry. Some examples of complaints from people which go to the entitlements in employment are discussed in more detail in 14. – Employment related complaints.

The complaints received by the Commission do however, on the whole continue to reflect ongoing of discrimination and prejudice in the community against lesbian and gay people. For example,

⁴ Equal Opportunity Commission, Annual Report 2006/07 – unpublished at time of writing. Earlier Annual Reports are available on www.eoc.wa.gov.au.

complaints have been received about harassment and abuse both in employment and in the provision of goods and services. Similarly inappropriate sexual advances were the impetus for a complaint by a woman about a work colleague.

One complaint related to differential fees being levied by an introduction agency.

It is interesting to note that 8 of the 14 complaints which were closed during the period July 02 – May 06 – were not able to be conciliated and were referred, under Section 93 (1) of the Act, to the Equal Opportunity Tribunal or since January 2005, the State Administrative Tribunal.

15. Employment related complaints

The following case summaries illustrate the nature of complaints which have been brought to the Commission relating to work-related issues. They both arose in circumstances where same-sex partners applied for employment with the same employer and were allegedly rejected on the basis of their relationship. Both were referred to the Equal Opportunity Tribunal/State Administrative Tribunal

- a. A young woman alleged sexual orientation discrimination when she was denied permanent employment at the mine-site where her partner worked. The employer denied unlawful discrimination. After attempts to conciliate were unsuccessful, the Commissioner referred the matter to the Equal Opportunity Tribunal, where a monetary settlement was reached in mediation.
- b. A man applied for a position as a caretaker, with his gay partner. The position was advertised as being suitable for a couple. The strata company manager interviewed him on behalf of the body corporate and gave him the impression he had the position but for the formalities. When the manager discovered the applicant was gay, his application went no further. When asked whether it was because of his sexuality, the manager stated: 'Well yes.'

The case was unable to be conciliated and has been referred to the State Administrative Tribunal.

16. Conclusion

The Commission appreciates being given the opportunity to contribute to this important enquiry.

As can be seen from the foregoing, the comprehensive reforms implemented by the State Government have removed discriminatory laws and provided redress for lesbians and gays who are discriminated against because of their sexual orientation.

The State laws however are limited in their application and it is clear that in the Commonwealth sphere, discriminatory laws relating to financial and work-related benefits are still in existence.

The International Covenant on Civil and Political Rights obliges Australian governments, state and federal to implement effective mechanisms for people to seek redress for breaches of their rights. Currently the Human Rights and Equal Opportunity Act 1986 only provides redress for people discriminated against on the ground of their 'sexual preference' in the area of employment. Complainants have no access to formal determination of a remedy by a Court. The ICCPR requires that all people receive equal protection of the law and that they are free from discrimination. The current limited protection and lack of access to effective remedies is arguably in breach of this Convention.

The Western Australian Equal Opportunity strongly supports the move by the Human Rights and Equal Opportunity to rectify this continuing abrogation of our human rights obligations.

The Commission would support the introduction of an Act dedicated to the prohibition of discrimination on the grounds of sexual orientation.