

Supplementary Submission to the Human Rights and Equal Opportunity Commission

“Same-Sex: Same Entitlements”

Australian Lawyers for Human Rights Inc (ALHR) is a national network of Australian lawyers active in practising, and promoting awareness of, human rights law in Australia. ALHR’s membership of over 1,000 has active national, State and Territory committees.

ALHR appreciates the opportunity to make this supplementary submission to the national inquiry into discrimination in financial and work-related entitlements and benefits against people in same-sex relationships.

ALHR thanks the Commission for the opportunity to provide evidence in person. This supplementary submission will address the questions taken on notice at that hearing as well as providing comments on a recent international legal development relevant to the Inquiry.

Questions taken on notice

NIB v Hope

The Commission asked for further information about a 1996 decision of the NSW Supreme Court, *NIB Health Funds Ltd v Hope and Anor* 30060/95 NSWSC (“Hope case”). The Hope case followed a growing trend in case law during the 1990’s towards same sex couples claiming entitlements as “dependants” rather than as “spouses”. The body of case law demonstrates that, claiming entitlements on the basis of being a dependant has met with more success than making claims as a spouse.¹ According to Milbank “this is not surprising, as there is less of an ideological challenge to traditional notions of family in acknowledging same sex couples as dependants rather than as spouses.²” In turn, successful cases have

¹ Cases where protection of the family was not extended to same sex couples as spouses include: *X v UK* (1996) 20 EHRR CD 6; *Kerkhoven v The Netherlands* [1993] Fam Law 102; *B & L v United Kingdom* (App. No. 36536/02), 13 September 2005 the ECtHR; *Karner v Austria* (2003) 38 EHHR 528; *Estevez v Spain* ECtHR, 10 May 2001.

² See Milbank paper at: <http://www.murdoch.edu.au/elaw/issues/v3n3/milbank.html#n39>

broaden the meaning of dependant from being substantially or wholly financially dependant to encompass interdependence both emotionally and financially.

The details of the Hope case were, in brief, that NIB had refused to allow a "family" or "concessional" rate for two males in a same sex relationship who were raising the biological son of one of them. The men claimed they were entitled to the concessional rate because they met the criteria as "dependants". The men demonstrated financially interdependence in that they had a joint mortgage, joint bank accounts, and joint ownership of a motor vehicle. They also demonstrated emotional interdependence. In determining the matter, the NSW Equal Opportunity Tribunal offered this description of dependent: "an ordinary word having normal connotations of reliance and need, trust, confidence, favour and aid in sickness and in health including social and financial support and its normal meaning is not limited to financial dependence..." The Tribunal found that the men met the criteria of dependants and that the health fund was guilty of unlawful discrimination. In so finding it stated "the homosexuality of the Complainants was the significant factor in the decision to refuse them concessional status."

In upholding the Tribunal's decision, McInerney J of the New South Wales Supreme Court affirmed it was an invalid application of the term dependent to exclude a same-sex couple and their child from coverage under the family policy. This decision stands as good authority on the meaning of the word dependant and in many respects the description offered by the Tribunal bears a strong resemblance to the relevant factors proposed by the Commission to determine a de facto relationship as described in the second paper .

"Other Status" or "Sex"

The Commission also asked for ALHR's view as to which ground under international law, ought discrimination against same sex couples fall; "sex" or "other status". As stated in our oral evidence, there is a diversity of academic opinion on this issue. There is certainly case law which holds that discrimination on the basis of sexual orientation falls under the ground of "other status" (see *Salgueiro da Silva Mouta v Portugal* [2001] 31 EHRR 47 at paragraph 28.)

In ALHR's submission, a case could be brought by same-sex couples under either ground depending on the circumstances. It may be that both "sex" and a person's status as a member of a same-sex couple may be relevant grounds for bringing a claim of discrimination. For example, a person who is a post-operative male to female transsexual living as a woman in a relationship with a man may be denied a marriage licence and thus other benefits (as was the

case in *Goodwin v UK* (2002) 35 EHRR 447). The complainant may be able to bring a claim of discrimination on the basis of their status as a member of a same-sex couple or because of their biological sex. In the Goodwin case, the court took the view that the complainant's right to marry was infringed because of her biological sex. However, the argument could also be made that the complainant was denied the right to marry because her biological sex meant she was in a same-sex relationship.

ALHR notes that in the recent UK case of *Wilkinson & Kitzinger v The Lord Chancellor* [2006] EWHC 2022 (Fam), the Petitioner (a University Professor) sought a declaration that her same-sex marriage solemnised in Canada was also a marriage under UK law. The Court noted her right to make the claim under the "other status" or "sex" grounds of Article 14 of the European Convention on Human Rights. While the court found that the right to marry under Article 12 had been breached, it determined that the recent introduction of the UK's *Civil Partnerships Act 2004* overcame the breach in that no unequal treatment or discrimination flowed under Article 14 because the new regime ensured the bestowal of equal benefits and entitlements as marriage.

ALHR's submission is that the Commission ought not to narrow the options for complainants by nominating one ground or the other as the appropriate ground for a member of a same-sex couple to issue a claim of discrimination under.

Definition of "marriage-like relationship"

Finally, the Commission asked why ALHR labelled the definition of "marriage-like relationship" under the *Social Security Act 1991* as "complex and highly subjective" in comparison to other definitions in Commonwealth legislation. The legislation requires a decision maker to carry out a "multifactorial test". Unlike the other examples noted, the Social Security Act test seems to be more inclusive and to capture a wider nature of relationships. ALHR highlighted this definition to demonstrate the range of definitions available in Commonwealth legislation clearly serving different objectives. It appears that the intention of the definition utilised in the Social Security Act is to capture as many relationships as possible (to limit the payment of certain benefits), whereas other legislation appears to exclude as many people as possible (again to limit the payment of certain benefits). What all the definitions highlighted have in common is the exclusion of same-sex couples, regardless of how many of the relevant factors the relationship satisfies.

ALHR notes that the definition proposed in the Commission's research paper also comprises a multifactorial test. However in ALHR's submission the Commission's proposed definition

is far superior to that under the Social Security Act. For example even if Social Security Act included same-sex relationships, it does not indicate if any one factor is more important than another or if one factor is essential to the test. Finally, the Social Security Act definition is so detailed as to be prescriptive.

Recent Legal Development

ALHR wishes to draw the Commission's attention to a decision of *Mark Lewis and Dennis Winslow, et al. v. Gwendolyn L. Harris, etc., et al.* (A-68-05)³ handed down on 25 October 2006, in the United States, where the New Jersey Supreme Court found that denying committed same-sex couples the financial and social benefits and privileges given to their married heterosexual counterparts bears no substantial relationship to a legitimate governmental purpose. The Court held that under the equal protection guarantee of Article I, Paragraph 1 of the New Jersey Constitution, committed same-sex couples must be afforded on equal terms the same rights and benefits enjoyed by opposite-sex couples under civil marriage statutes. Further, the court compelled action by the legislators of New Jersey, giving them 180 days to create a statutory scheme providing full rights and benefits to same-sex couples.

This is a landmark decision. Not only did the court consider that same sex couples suffer economic and financial inequities due to a lack of recognition of their relationships, but also that this discrimination was borne by their children. In the end the court determined that same sex couples are entitled to the same rights and benefits afforded to married heterosexual couples.

The Court stated that "the issue is not about the transformation of the traditional definition of marriage, but about the unequal dispensation of benefits and privileges to one of two similarly situated classes of people."⁴

It is interesting to note that the Court used the history of the State of New Jersey as a progressive jurisdiction committed to eliminating discrimination to anchor its reasoning. The court stated that equality of treatment is a dominant theme of New Jersey's laws and a central guarantee of its State Constitution as fitting for a state with so diverse a population. In bringing people in same sex relationships into a group or class deserving of equal treatment the Court stated "Article I, Paragraph 1 protects not only the rights of the majority but also

³ See http://graphics8.nytimes.com/packages/pdf/national/20061025_decision.pdf

the rights of the disfavored and the disadvantaged; they too are promised a fair opportunity for ‘pursuing and obtaining safety and happiness’.⁵”

ALHR notes in particular the court’s reflections on the future as relevant to the Commission’s current task; “Plaintiffs’ quest does not end here. They must now appeal to their fellow citizens whose voices are heard through their popularly elected representatives.”⁶

Similarly, the right of same-sex couples and their children in Australia relies upon their fellow citizens and the integrity of its elected representatives to live up to their obligations at international and domestic law to end the unequal and discriminatory treatment against them in their financial, employment and workplace benefits.

ALHR wishes the Commission well in its finalisation of this Inquiry and hopes that the final report will identify publicly the myriad of discriminatory laws affecting same sex couples and their children as well as the unjust impacts such inequality has upon their lives.

16 November 2006

⁴ See page 48.

⁵ See pages 51-56.

⁶ See pages 63-64.