



Submission to:

Same-Sex: Same Entitlements

***National Inquiry into Discrimination against
People in Same-Sex Relationships: Financial
and Work-Related Benefits***

Human Rights and Equal Opportunity Commission

June 2006

1. ACON (AIDS COUNCIL OF NSW INC)

ACON was formed in 1984 as part of the community response to the impact of the HIV/AIDS epidemic in Australia. Since 2000 ACON has been a health promotion organisation based in the gay, lesbian, bisexual and transgender (GLBT) community, with a central focus on HIV/AIDS.

ACON provides education, health promotion, care, support, and advocacy services for members of the GLBT community, including drug users and Indigenous people, to sex workers, and all people living with HIV/AIDS (PLWHA).

ACON has offices in Sydney, Illawarra, Northern Rivers, Hunter and Mid North Coast with an extensive range of outreach services. ACON is also home to the Community Support Network (CSN), the Positive Living Centre (PLC), the Lesbian and Gay Anti-Violence Project (AVP) and the Sex Workers Outreach Project (SWOP).

2. GENERAL COMMENT

ACON is pleased to make a submission to the National Inquiry into Discrimination Against People in Same-Sex Relationships: Financial and Work-Related Entitlements. The exclusion of same-sex relationships and same-sex parent families under federal and state legislation is one of the most important human rights issues in Australia today.

*The most important contribution to improved health and wellbeing of GLBTI people is likely to be increased legitimisation and acceptance of their lives, their relationships and the positive contribution they make to society. Legislative reform to remove discrimination and stigmatisation clearly has a large contribution to make.*¹

¹ M.Pitts, A.Smith, A.Mitchell, S.Patel (2006) *Private Lives: A Report on the Health and Wellbeing of GLBTI Australians*, Australian Research Centre in Sex, Health and Society, La Trobe University, Melbourne

In this submission we will be addressing the following terms of reference:

- Impact on the enjoyment of human rights of people in same-sex relationships and their children (1a)
- Impact on the equality of opportunity and treatment in employment or occupation for people in same-sex relationships (1b)

The submission will focus primarily on federal legislation as that is where the majority of legislative discrimination against people in same-sex relationships continues to exist.

This submission provides a brief overview of ACON's approach to advocacy for people in same-sex relationships, discusses the implications for ACON's two primary population groups, PLWHA and the GLBT communities, outlines the impact that discrimination has on the enjoyment of their human rights, and examines particular areas of federal and state legislation that impact on the health and wellbeing of these two groups. It concludes by offering a number of recommendations as to how federal and state laws can be reformed to ensure that same-sex relationships and same-sex parent families are treated equally before the law.

As part of our planning for this submission, we asked ACON staff, volunteers, board members, friends and associates to tell us their stories of discrimination through an online survey. We have used some of those experiences throughout the submission to highlight the personal impact that discrimination has on the lives of people in same-sex relationships across Australia.

3. ACON'S APPROACH TO ADVOCACY FOR PEOPLE IN SAME-SEX RELATIONSHIPS

ACON's submission to the inquiry is based on our understanding of the relationship between discrimination and social exclusion, and the health and wellbeing of individuals and the communities in which they live. As a health promotion organisation based in the GLBT community, with a focus on

PLWHA, our approach to improving the health and wellbeing of these two populations is informed by the recognition of the social determinants of health.

One of the most important social determinants of health, as recognised by the World Health Organisation (WHO), is social exclusion². People in same-sex relationships and their families are subject to social exclusion in Australia through a continual lack of legal recognition. This exclusion acts as a determinant of health in two ways. First, same-sex couples and their families are not able to access the numerous financial benefits and entitlements that are made available to couples and families through both federal and state legislation. This places greater burden on same-sex couples and their families in meeting the costs of everyday living, including medical and associated expenses.

Second, the lack of legal recognition of same-sex couples and same-sex families sends a strong government-sanctioned message that these relationships and family structures are not valued, which further enforces the homophobia and heterosexism that pervades Australian society. GLBT Australians are subject to high levels of discrimination in the workplace³, at school⁴, and on the street⁵. Many also face discrimination and exclusion from their biological family because of their sexual orientation. Alarming, there is evidence to suggest that GLBT people are also subject to discrimination when accessing medical services⁶.

² R Wilkinson and M Marmot (2003) *Social Determinants of Health: solid facts. 2nd Edition*, World Health Organisation, Copenhagen, p.16

³ See J.Irwin (2002), *The Pink Ceiling is Too Low: Workplace Experiences of Lesbians, Gay Men and Transgender People*, Australian Centre for Lesbian and Gay Research, University of Sydney, Sydney

⁴ See L. Hillier, A.Turner, A.Mitchell (2005) *Writing Themselves In Again: The 2nd National Report on the Sexual Health & Wellbeing of Same-Sex Attracted Young People in Australia*, Australian Research Centre in Sex, Health & Society (ARCSHS) La Trobe University, Melbourne Australia

⁵ See Attorney General's Department of NSW (2003) *You Shouldn't Have to Hide to Be Safe: A Report on Homophobic Hostilities and Violence Against Gay Men and Lesbians in NSW*

⁶ See Victorian Gay and Lesbian Rights Lobby (2000) *Enough is Enough: A Report on Discrimination and Abuse Experienced by Lesbians, Gay Men, Bisexuals and Transgender People in Victoria*, Melbourne

In most instances my partner and I act as individuals so that we do not experience harassment or discrimination when accessing services in a regional area. – male staff member, Regional NSW

Unsurprisingly, discrimination against same-sex attracted people, their relationships and their families, manifests itself through a number of poor health indicators. A survey of the health and wellbeing of 5476 GLBTI Australians in 2006 found that 33% had experienced depression⁷ and there is significant evidence to suggest a strong correlation between homophobia and higher levels of drug and alcohol abuse⁸. Removing legislative inequality against same-sex relationships will not end homophobia and homophobic abuse in Australian society, but it is an important step in challenging the stigmatization, discrimination and social exclusion experienced by GLBT Australians.

4. PEOPLE LIVING WITH HIV/AIDS (PLHWA)

Legal discrimination against same-sex couples in regards to financial and work-related benefits has a strong impact on the lives of people living with HIV/AIDS, given the prevalence of HIV/AIDS amongst gay men in Australia⁹. Whilst discrimination across all areas of federal legislation, and the remaining areas of state legislation, has negative financial and non-financial consequences for PLWHA, there are specific areas which are responsible for significant financial and non-financial burden. Examples of these include Medicare, Pharmaceutical Benefits Scheme and Carer's entitlements and are discussed in the relevant sections of this submission.

⁷ M.Pitts, A.Smith, A.Mitchell, S.Patel (2006) *Private Lives: A Report on the Health and Wellbeing of GLBTI Australians*, Australian Research Centre in Sex, Health and Society, La Trobe University, Melbourne, p.31

⁸ Above n3, at 43

⁹ J. Grierson, R. Thorpe, M. Sanders, M.Pitts (2005) *HIV Futures 4: State of the Positive Nation*, Australian Research Centre in Sex, Health and Society, Latrobe University, Melbourne Australia, p.ix (executive summary)

5. GLBT COMMUNITY

Gay, Lesbian, Bisexual and Transgender people are subject to widespread discrimination under federal law through a lack of comprehensive recognition of same-sex couples as spousal or de facto relationships. With the exception of the *Anti-Terrorism Act*¹⁰, same-sex relationships are not present in federal legislation.

The category of ‘interdependency’ used in immigration and superannuation legislation does provide rights for people in same-sex relationships, provided that they are able to satisfy the criteria necessary to prove that they are in a ‘interdependent’ relationship. Whilst recognising the benefit that the inclusion of the ‘interdependency’ category brings for some same-sex couples, ACON does not believe that ‘interdependency’ is an adequate model for the recognition of same-sex relationships under federal or state legislation.

At a state level, the non-biological parent in a same-sex relationship is not considered to be the legal parent of their partner’s children, regardless of whether they are acting as a primary care giver in their child’s life. A lack of legal recognition in a child-parent relationship creates a degree of uncertainty for both the child and parent and consequently has an impact on their health and wellbeing.

6. ENJOYMENT OF HUMAN RIGHTS FOR PEOPLE IN SAME-SEX RELATIONSHIPS

Lack of recognition of same sex partnerships means you don't even have the option to identify your relationship, whereby they are saying a substantial component of your life is actually irrelevant. – female staff member, Sydney

The legislative discrimination faced by same-sex couples and same-sex parent families contravenes the human rights guaranteed under a number of

¹⁰ Same-sex partner is defined as a ‘family member’ under s105.35(3) of the *Anti-Terrorism Act (No.2) 2005*

international human rights instruments. These include the ICCPR, the Convention on the Rights of the Child and ILO 111. Given the impact on an individual's health and wellbeing, it is arguable that the right to health of people in same-sex relationships guaranteed under Art 12 of ICESCR is also violated by legislative discrimination.

International Covenant on Civil and Political Rights

Following the decisions in *Toonen v Australia*¹¹ and *Young v Australia*¹², it is a contravention under international human rights law for states to make a distinction on the basis of sexual orientation in ensuring that all individuals enjoy the rights given under the ICCPR (Art 2), including being treated equally before the law and having equal protection of the law (Art 26). *Young* is particularly instructive given that the communication related to the denial of partnership entitlements to a person in same-sex relationship by the Australian Government. The Human Rights Committee's decision means that parties to the ICCPR should not discriminate against same-sex partnerships in relation to entitlements unless it can be shown that there are reasonable and objective criteria for doing so. However, there are a significant number of pieces of federal legislation that discriminate on the basis of sexual orientation, as well as some remaining state laws relating mainly to parenting rights.

Convention on the Rights of the Child

Same-sex couples are not properly recognised under any federal or state law in regards to children and families. Consequently in a same-sex parent family, it is only the biological parent who is legally recognised as a parent. This restricts the ability of the non-biological parent to exercise parental authority in regards to schools and medical care, and creates a level of uncertainty in areas such as inheritance and superannuation, and contact and child support in the event of family breakdown.

¹¹ *Toonen v. Australia* (488/92).

¹² *Young v Australia* (941/00)

By not recognising the relationship between a child and a non-biological parent, both state and federal governments are failing to act in the best interests of that child. This directly contravenes Art 3 of the Convention which states that “In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration”. Further, by only providing legal recognition for one of the parents in a same-sex relationship, it is arguable that both state and federal laws are violating Art 18 which provides that “States Parties shall use their best efforts to ensure recognition of the principle that both parents have common responsibilities for the upbringing and development of the child”.

Discrimination (Employment and Occupation) Convention (ILO 111)

Under Article 1(b) of the International Labor Organisation’s *Convention concerning Discrimination in Respect of Employment and Occupation*, discrimination in relation to employment and occupation is defined to include whichever particular status an individual member state determines. Australia has legislated to include sexual preference as grounds under which discrimination in respect of employment and occupation is unlawful¹³. Despite this, same-sex partners are still subject to legislative discrimination in the *Workplace Relations Act*, as they are not explicitly entitled to either paid or unpaid carer’s leave, as well as incidental areas such as superannuation. These issues are discussed further in the relevant sections of this submission.

Right to Health

Under Article 12 of the *International Covenant on Economic, Social and Cultural Rights*, all individuals are afforded the right to the enjoyment of the highest attainable standard of physical and mental health. In *General Comment 14: The Right to the Highest Attainable Standard of Health (Art 12)*, the Committee on Economic, Social and Cultural Rights concluded that ICESCR “proscribes any discrimination in access to health care and underlying determinants of health as well as to means and entitlements for

¹³ *Human Rights and Equal Opportunity Commission Regulations 1989 (Cth)*

their procurement on the grounds of ...sexual orientation...which has the intention or effect of nullifying or impairing the equal enjoyment or exercise of the right to health”¹⁴.

As discussed above in section 3, legislative discrimination is an important factor in the existing social exclusion of people in same-sex relationships in Australian society. As social exclusion and stigmatisation are recognised social determinants of an individual’s and a community’s standard of health, the lack of recognition of same-sex relationships under federal and NSW law contravenes the right to health guaranteed under Art 12 of the ICESCR.

7. COMMONWEALTH LEGISLATION

Medical expenses

Living with a serious illness such as HIV/AIDS means that PLWHA are subject to considerable medical expenses, with many experiencing difficulty in meeting the costs of such essential services. The 2004 HIV Futures IV survey found that the mean weekly medical expenses for PLWHA was \$50.90, and more than 50% of respondents experienced difficulty meeting the costs of medical services and complimentary therapies and just under half had difficulty paying for HIV/AIDS related medication¹⁵.

Given that GLBT people are more likely than heterosexuals to be susceptible to poor health in a significant number of areas¹⁶, ensuring that GLBT people are able to access medical services is also important. The discriminatory definition of ‘family’ under the Medicare Safety Net and the Pharmaceutical Benefits (PBS) Safety Net schemes further exacerbates the ability of PLWHA and GLBT to access medical services through the imposition of costs that people in heterosexual relationships are not subject to.

¹⁴ UN Committee on Economic, Social and Cultural Rights *General Comment No 14: The Right to the Highest Attainable Standard of Health (Art 12)*, E/C.12.2000/4, August 11, 2000.

¹⁵ Above n8, p.66

¹⁶ Above n6, p28

Medicare Safety Net

The primary purpose of the Medicare Safety Net scheme is to assist Australians in meeting 'out of pocket' (OUP) medical expenses, being those expenses not covered by the Medicare rebate. Under the scheme, the costs that a couple pay over and above the Medicare rebate count towards one safety net threshold of \$716.10. As same-sex couples are not considered to be a 'family' under the Act¹⁷, they each must incur costs of \$716.10 before they qualify for the safety net, as opposed to heterosexual couples who can combine their expenses together, and therefore incur less medical costs in order to receive the benefit.

Given that it is necessary for PLWHA to spend a significant amount each year on medical expenses, the exclusion of same-sex couples from the definition of 'family' under the *Health Insurance Act 1973* has significant consequences on the ability of PLWHA to meet the costs of essential medical services. Allowing same-sex couples to combine their expenses in order to reach the one threshold, would ensure that many PLWHA and GLBT people would save significantly on their medical costs.

As far as Medicare goes, we are not counted as a couple and therefore to reach the threshold we are treated as separate people and so we have to pay a lot more than other couples before we qualify for a discount. – female volunteer, Regional NSW

Pharmaceutical benefits scheme (PBS) safety net

The pharmaceutical benefits scheme safety net was established to ease the financial burden of individuals and families who spend a large amount of money each year on medications, by heavily subsidising the costs of medication, or in the case of concession card holders, providing medication free of charge, once a threshold spending amount has been reached. PLWHA fit within that category of persons who, due to an ongoing chronic

¹⁷ *Health Insurance Act 1973*, s10AA(1)

illness, are required to spend a large amount on continuing prescriptions such as anti-HIV/AIDS medication.

By excluding same-sex couples from the definition of 'de facto spouse', and thus 'family' under the *National Health Act 1973*¹⁸, PLWHA in same-sex relationships are required to reach the individual safety net threshold of \$960.10 (\$253.80 for concession card holders), whilst heterosexual couples can combine their PBS expenses to reach the same threshold. Therefore, PLWHA in same-sex relationships must pay double the amount in medication before they are entitled to the same benefits, meaning that one of the groups that the PBS Safety Net is designed to assist continues to face unnecessary disadvantage in meeting their medication costs.

While there is no empirical evidence on how much GLBT Australians spend on medication on average each year, the exclusionary definitions under the PBS also ensure that GLBT people in same-sex relationships are faced with higher costs when accessing medication.

Carer's entitlements

The nature of HIV/AIDS as a chronic illness, and the fact that many GLBT people do not maintain close contact with their biological family, means that in many circumstances the partners of PLWHA are required to take on a primary carer's role at times when their partner is sick. When a person living with HIV/ADS becomes ill, a partner may need to take extended time off work and other commitments to look after their partner, which places considerable financial and non-financial burden on both people.

Under both the *Workplace Relations Amendment (Work Choices) Act 2005* and its predecessor the *Workplace Relations Act 1996*, same-sex couples are not explicitly entitled to either paid or unpaid carer's leave as they are not defined as being part of an employee's immediate family¹⁹. Same-sex

¹⁸ *National Health Act 1953*, s4, 84B

¹⁹ *Workplace Relations Amendment (Work Choices) Act 2005*, s93D; *Workplace Relations Act 1996*, s250

partners do qualify for paid or unpaid sick leave if they live together, however, if they live apart they do not qualify. Difficulty also arises for parents who are not recognised legally in taking time off to care for their children. It should also be noted that having to prove to an employer that you live in the same household as your partner, rather than automatically receiving leave as the person's spouse, causes additional stress and burden at an already stressful time.

I thought it was odd that when my partner was in hospital after having a heart attack, I copped a bit of flack from the managers at work for having time off, yet a girl I work with had time off when her father had a heart attack – male, Perth

The Federal Government provides financial assistance to couples and families who employ carers to look after dependants and spouses who receive the disability support pension²⁰. Same-sex partners who hire a carer to care for a person living with HIV/AIDS are not eligible to receive the housekeeper rebate, which amounts to \$1,000 a year, because of the definition of 'spouse' under the *Income Tax Assessment Act*, which excludes same-sex couples²¹.

Superannuation

For many people superannuation is likely to be their most valuable asset after property, and consequently is an important part of an individual's financial security. The failure of the federal government to recognise same-sex relationships in a number of areas of superannuation has a significant impact on the financial and non-financial wellbeing of many PLWHA and GLBT people.

Superannuation and other forms of financial planning for the future are important for PLWHA, given the possibility that they will need to cease employment due to illness, as well as the high medical costs associated with

²⁰ *Income Tax Assessment Act 1936*, s159L

²¹ *Income Tax Assessment Act 1936*, s6

HIV/AIDS. In certain circumstances, PLWHA are either not eligible for disability or death benefit, or must wait for two years before they are covered. By excluding same-sex couples from a number of superannuation benefits, the federal government is further disadvantaging people for whom financial security is paramount.

I think that it is important that people such as my partner of 31 years and I are able to get superannuation benefits equal to that of a legally married heterosexual / de facto couple. We would be prepared to be legally recognised as a couple if that is required. One of us is nearing retirement age and would dearly love for the current laws on superannuation benefits to be changed. – male, Regional NSW

Death Benefits

Whilst the federal government has introduced legislation enabling same-sex interdependent partners to receive a death benefit from private super funds if their partner dies, the same possibility does not exist for those covered under public sector, commonwealth and military and defence super funds. People in same-sex relationships covered under these funds cannot nominate their same-sex partner as the beneficiary of their super death benefits, and therefore can only distribute their benefit to their partner through their estate, which attracts a much higher tax rate.

Because I work for a Commonwealth government department, my superannuation rules are different to people in private sector employment, and when I was in a relationship I couldn't nominate my partner as the recipient of my super benefit with any guarantee that she would get it. – female board member, Sydney

Contributions splitting

Contribution splitting has recently been introduced by the federal government to allow spouses to split their compulsory and personal contributions between themselves. The benefit is derived from being able to spread the cumulative value of the couple's super so that both remain under the individual tax-free

threshold of \$129,751. This option is not available to same-sex couples as they are not recognised as spouses²².

Spouse Co-contributions and Spouse Rebate

Where someone makes a contribution to their low-income spouse's super, they are entitled to an 18% income tax rebate for contributions up to \$3,000 each year. As same-sex relationships are not recognised under the definition of spouse in the *Income Tax Assessment Act 1936*, they are not entitled the spousal co-contribution rebate²³.

Aged Care

Older PLWHA and GLBT Australians are faced with considerable discrimination in regards to accessing aged care and appropriate medical services. With advances in anti-retroviral therapies (ART) PLWHA are living longer, presenting specific challenges to the provision of aged care in this country. The particular needs of GLBT people will also require incorporation. However, these issues are not being dealt with, as there are currently no government policies that acknowledge the existence of older GLBT Australians.

The main piece of legislation that deals with aged care, the *Aged Care Act 1997* (Cth), does not recognise same-sex relationships under its definition of 'member of a couple'²⁴. When determining the level of subsidy available to a person entering aged care, an assets test is applied under the act. For a person in a marriage or 'marriage-like' relationship, their assets are taken to be 50% of the sum of the value of both their's and their partner's assets. This assessment is not available for people in same-sex relationships, meaning that in many circumstances they will qualify for less assistance as they are not able to spread the value of their assets amongst two people.

²² *Superannuation Industry Supervision Regulations*, Div 6.7

²³ *Income Tax Assessment Act 1936*, s159TC

²⁴ *Aged Care Act 1997*, s44-11

Tax Concessions

There are a number of tax benefits afforded to couples through the *Income Tax Assessment Act 1936* and the *Income Tax Assessment Act 1997* as either rebates or credits, as well as increases in tax-free thresholds in some circumstances. The exclusion of same-sex couples from the definition of 'spouse' and consequently 'resident', 'relative' and 'dependent', means that people in same-sex relationships are denied these entitlements²⁵. Further, taxation benefits available with respect to a taxpayer's children, are not available to a non-biological co-parent as the law does not recognise the parent-child relationship.

My partner is currently studying full-time and therefore he is not earning as much. We don't have the options that are available to heterosexual couples to reduce my tax liability. Also, we don't have access to other benefits that are available to heterosexual couples. – male staff member, Sydney

Workplace Entitlements

Aside from difficulty in accessing carer's leave under the *Workchoices* legislation, people in same-sex relationships and their children are also discriminated against in relation to other leave entitlements.

Paternity leave

Under section 94T of the *Workchoices Act* a week's paternity leave is guaranteed to a male employee when his spouse gives birth to a child. No provision is made under the Act to allow for the female partner of a woman who has given birth to take time off to assist in the first week of the child's life. In many instances, this would place greater strain on the biological mother and child at a time when spousal support is needed.

Adoption leave

The exclusionary definition of spouse under the *Workchoices Act* means that both members of a same-sex couple are not able to take concurrent short

²⁵ *Income Tax Assessment Act 1936, s6*

adoption leave during the period when the child is first placed with their adopted parents²⁶. Given that the purpose of short adoption leave is to ensure that the child adjusts to their new parents and family as much as possible, the discrimination under the definition of spouse places greater hardship on same-sex parent families during this transition period.

Social Security

Section 4 of the *Social Security Act* 1991 requires a person to be in a relationship with a person of the opposite sex in order to be defined as being a 'member of couple'. This has both advantages and disadvantages for people in same-sex relationships in accessing social security entitlements.

Bereavement Allowance

The same-sex partner of a deceased person is not entitled to the bereavement allowance²⁷. The exception to this is where they have been receiving a carer payment for providing full-time care to the person who died.

Widow and Widow B Allowance

Lesbians and other women in same-sex relationships are not entitled to either the widow or widow b allowance as this entitlement is only made available to women who were in a heterosexual relationship and have either been widowed, deserted or divorced²⁸.

Youth Allowance

If a person is considered 'independent' for the purposes of Youth Allowance payments they do not have to be subject to a Parental Income Test or a Family Actual Means Test in order to receive Youth Allowance payments. One of the ways in which a person can qualify is to be a member of YA couple, as defined under s1067C of the Act. That definition excludes same-sex relationships, meaning that many young GLBT people face a significant

²⁶ *Workplace Relations Amendment (Work Choices) Act* 2005, s94ZN

²⁷ *Social Security Act* 1991, s315

²⁸ *Social Security Act* 1991, s362, 408BA

disadvantage in gaining government financial assistance when studying, undertaking an apprenticeship or seeking employment.

My relationship wasn't recognised when Centrelink assessed me for the independent rate of youth allowance while I was studying. – male, Regional NSW

Means testing under the Social Security Act

Eligibility for a number of benefits and pensions under the *Social Security Act* is subject to means testing. Where a person is a 'member of a couple', the income and assets of their partner may also be taken into account in determining whether applicant can receive payment under the Act. As people in same-sex relationships do not fit within the definition of a 'member of a couple', they are advantaged by this exclusion. Removing this discrimination would have a detrimental impact on the financial situation of many low-income GLBT people. As a recent survey of PLWHA has shown that more than half of the respondents were receiving some form of social security, reform would particularly impact on the health and wellbeing of PLWHA²⁹.

It should be noted that the examples listed above are not exhaustive. The complexity of the social security system, and the fundamental impact that any changes would have on the lives of those who are part of the social security systems warrants further investigation incorporating economic modelling on which sections of society would be impacted and in what way.

Given that changes to social security would bring significant obligations as well as rights to people in same-sex relationships, reform in this area should not take place before rights are given in legislative areas. Further a "phase in" period should take place to allow for people who will be negatively impacted to adjust their financial situation.

²⁹ Above n8, at p63

8. NSW LEGISLATION

In 1999 NSW became the first state to introduce comprehensive recognition of same-sex relationships when it passed the *Property (Relationships) Legislation Amendment Act*, recognising same-sex couples within the definition of 'de facto'³⁰. This provided same-sex couples with a wide range of rights under state legislation including property division, inheritance and decision making during illness. Consequential amendments took place in 2002 and 2003, which meant that same-sex de facto relationships were treated equally with married and heterosexual de facto couples under NSW law, with the important exception of parenting legislation.

The lack of legal recognition for same-sex parents under state legislation has a significant impact on the health and wellbeing of both partners in a same-sex relationship, as well as the children they are raising.

My partner and I are trying to get pregnant. We live in Sydney but we're thinking about flying to Perth to have the baby so we can both be on the birth certificate. It would be very nice to stay here in Sydney... perhaps NSW will get their act together and catch up to the rest of the country in this regard- female Sydney

Adoption

The *Adoption Act 2000* currently excludes same-sex couples from adopting children in NSW. A 'couple' is defined in the act as meaning 'a man and a woman', who are either married or in a de facto relationship³¹. This impacts on same-sex couples and same-sex parent families in two ways. First, the option for a same-sex partner to adopt their partner's children as a step-parent is not available. Second, same-sex couples are not able to apply to jointly adopt a child through the process of unknown adoption. As women in same-sex relationships are more likely to become parents through other means such as Artificial Insemination (AI), this primarily effects men in same-sex relationships.

³⁰ *Property (Relationships) Act 1984* (NSW), s4

³¹ *Adoption Act 2000* (NSW), Dictionary

Status of Children Act

An increasing number of lesbians are having children using fertilisation procedures. When pregnancy is achieved through AI, there is a presumption that the male partner of the woman giving birth is the legal parent³². The same recognition is not given to the female partner of a woman who has given birth through AI. As the law does not recognise the sperm donor as a legal parent, there is only one legally recognised parent, being the birth mother. Therefore, despite raising the child from birth as their parent, the non-biological mother is not legally recognised as a parent under NSW law, causing uncertainty and stress for both parents and child.

Workplace entitlements

Because same-sex couples are not recognised under either the *Adoption Act* or the *Status of Children Act*, the non-biological parent (in the case of AI) or non-adopting parent (in the case of adoption) is not entitled to parental leave under the *Industrial Relations Act 1996* (NSW). There is no provision under s55 of the Act for the female partner of a woman who has given to birth to take paternity or maternity leave in order to support their partner and child during the initial stages of the child's life. In most circumstances they are faced with the choice of either foregoing the opportunity to act as primary care-giver for the child or leaving their job in order to do so.

Provision is also made under the Act for people who are adopting a child under a certain age to take leave to ensure that the child's transition into their new family is done properly³³. As the law does not recognise the right of two people in a same-sex relationship to jointly adopt, where one partner is adopting a child the other partner is not able to take leave, even if they intend to both act as parents to the child. This would impact on the transition process for both child and parent.

³² *Status of Children Act 1996* (NSW) s14

³³ *Industrial Relations Act 1996* (NSW), s55(4)

9. RECOMMENDATIONS

Based on our submission outlined above, ACON makes the following recommendations to the inquiry:

1. All discriminatory references and distinctions made on the basis of sexual orientation under federal legislation should be removed.
Legislation that should be amended includes, but is not limited to:
 - *Health Insurance Act 1973*
 - *National Health Act 1973*
 - *Workplace Relations Amendment (Work Choices) Act 2005*
 - *Workplace Relations Act 1996*
 - *Income Tax Assessment Act 1936*
 - *Income Tax Assessment Act 1997*
 - *Superannuation Industry Supervision Regulations*
 - *Aged Care Act 1997*
 - *Social Security 1991*

2. All discriminatory references and distinctions made on the basis of sexual orientation under NSW legislation should be removed.
Legislation that should be amended includes, but is not limited to:
 - *Adoption Act 2000*
 - *Status of Children Act 1996*
 - *Industrial Relations Act 2000*

3. A federal Anti-Discrimination Act that covers discrimination on the basis of sexuality should be introduced to ensure that there is greater coverage under anti-discrimination law for both GLBT individuals and couples. Such legislation is a necessary step in challenging some of the social discrimination that exists against GLBT Australians.