



Supplementary 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

July 2006

The following supplementary submission contains responses to questions received from HREOC.

1. Examples of the amount of medical costs that would otherwise be reimbursed if PLWHA in same-sex relationships were eligible for the Medicare Safety Net.

Response

Heterosexual couples only need to reach one threshold, so they can combine their out of pocket expenses from GP treatment together. Same-sex couples cannot do this.

Example 1 (hypothetical)

John and Sally are both commonwealth concession card holders. Once they expend more than \$306.90 in out of pocket expenses from GP visits in one year, Medicare will cover 80% of all additional out of pocket expenses.

Mark and Greg are both positive and are both commonwealth concession card holders. As they are not considered a couple under the *Health Insurance Act*, they cannot combine their expenses to reach the one threshold of \$306.90, and so must reach two individual thresholds. Essentially they must expend twice as much as John and Sally, being \$713.80, in order to both qualify for the safety net.

The amount that Mark and Greg would save would be 80% of the second individual safety net threshold, being the amount that they would have been reimbursed through the medicare safety net, if they did not have to reach the second safety net.

This amounts to \$245.52

Example 2 (hypothetical)

Mary is a concessional card holder, and can combine her medical expenses with her partner Andrew to reach the one concessional threshold of \$306.90.

Dave is positive and a concessional card holder, but as the act does not recognise same-sex relationships, he cannot combine his medical expenses with his partner Scott to reach the one concessional threshold of \$306.90. As such, Scott must reach the non-concessional threshold of \$716.10 before he is covered by the safety net.

The amount that Dave and Scott would save would be 80% of the second individual safety net threshold, being the amount that they would have been reimbursed through the Medicare safety net, if they did not have to reach the second safety net.

This amounts to \$572.88.

These basic figures provide a general amount of medical costs that would be saved by same-sex couples. They do not take into account variables such as the amount of PLWHA who seek treatment with doctors who bulk-bill, or the fact that some GP's charge additional fees at varying levels above the Medicare Schedule fee. These factors will obviously influence the amount of medical costs each year, and the extent of the detriment caused by the discriminatory Medicare Safety Net.

If it is possible, further research incorporating economic modelling may be useful in determining what the impact of discrimination under the *Health Insurance Act* has on PLWHA. Such modelling would need to analyse the costs per treatment

and the number of visits per year of a sample of PLWHA to get a more accurate understanding.

Reference in submission

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 medication. (ACON submission p.9).

2. Examples of where people in same-sex relationships have had difficulty proving that they live in the same household as their partner for the purposes of carer's leave.

Response

As same-sex partners are not considered to be 'immediate family' for the purpose of carer's leave under the *Workplace Relations Act*, there may be a need to prove that they live in the same household as their partner. Whereas a heterosexual partner would simply need to lodge an application for leave on the basis that they are caring for their spouse, a same-sex partner may be required to show documentation such as utility bills in order to satisfy management that they will be caring for a member of their household. This raises the issue of privacy in the workplace, given that a same-sex employer may need to provide personal information that would otherwise not be required.

There was no anecdotal evidence gathered from the ACON survey of staff, volunteers, friends and board members of difficulty in proving that a same-sex

couple live in the same household. However, given that there is evidence to suggest that gay and lesbian workers are subject to high levels of discrimination in the workplace, it is highly likely that in many circumstances they will face difficulty in gaining leave.

The Pink Ceiling is Too Low¹, the 2002 report into GLT experiences of discrimination in the workplace is demonstrative of the levels of discrimination in relation to workplace entitlements. Of those surveyed 20% had been rejected from workplace entitlements. According to the report:

“Many participants commented that they did not complete this section of the survey because they did not apply for entitlements knowing they would be refused. In other words many of the participants in the survey (in some instances up to 44%) saw themselves as ineligible to apply for these because the message was clear that these benefits were not available to them”. (The Pink Ceiling is too Low)

Reference in submission

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 family². Same-sex 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.

3. Proportion of superannuation funds where PLWHA are ineligible or must satisfy a waiting period before qualifying for death or disability benefit.

Response

To clarify ACON's submission, the references to restrictions placed on PLWHA relate to death and disability insurance cover associated with superannuation, as well as other types of disability/death/income protection insurance. PLWHA are eligible for base level insurance from all super funds, however they cannot acquire further insurance, which requires disclosure of medical history.

It should also be noted that HESTA Super fund will not provide benefits on death insurance and income protection where the claim arises from AIDS, or suicide where HIV is present in the body, if the employee is employed by a scheduled employer (scheduled employers include ACON, AFAO and other HIV and PLWHA organisations)

² *Workplace Relations Amendment (Work Choices) Act 2005, s93D; Workplace Relations Act 1996, s250*

Reference in submission

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 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. (ACON Submission, 12-13)

4. Examples of the detriment to people in same-sex relationships of their lack of recognition under the Aged Care Act 1997 (Cth).

Response

ACON sought advice from Jo Harrison, an expert in GLBT Ageing issues from the University of South Australia, regarding evidence of discrimination faced by same-sex couples under the *Aged Care Act*. Based on her research, Harrison is aware of many *confidential* anecdotal instances of discrimination where people are accessing aged care services and at the point of assessment for fees etc and are seriously discriminated against by the guidelines which cover family home and payment of fees, bonds etc. She believes the fact that so few people are prepared to come forward to make formal complaints speaks volumes about the level of discrimination faced by older GLBT people in accessing such facilities.

ACON has received an example of the operation of discrimination from an older lesbian as outlined in the following case study.

“My partner was assessed as needing high-level care after a series of strokes in late 2003. The Aged Care Assessment Team (ACAT) assessment form, and every other govt agency's forms including 'notifying person' to Registrar of B.D.& M., do not recognise same-sex partners as a category. All govt forms need updating (spouse, sibling, blood-relative are the only people they recognise). Discrimination against same-sex partners is legally okay in aged care facilities. Of the 19 applications I submitted, only one was not church-run. I contacted them all equally and often in the months we were waiting for a place, and the only one which acknowledged our right to a place was the privately owned facility. After 2 years in Aged Care, Centrelink deems the resident to be a non house-owner. Assets are re-assessed to work out the daily care amount payable to the facility. OK so far. But - Same-sex couples are not home-owners, they are house-owners, so the family home becomes an asset, not our home, and if the resident's assets exceed the amount set by Centrelink (was around \$290k, but has probably changed since), the daily care rate increases by something like \$30 per day, on top of the 85% of full age pension which is the basic minimum. Applies only to us, not straight couples, married or de facto. Their family homes are sacrosanct.”

Reference in submission

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'³. 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. (ACON Submission, p14)

5. Details of operation of any 'phase in' period addressing disadvantage caused by including same-sex couples in Social Security Act means testing.

Response

It should be noted at the outset that there are some in our communities who are opposed to any changes to Social Security legislation to recognise same-sex relationships because of the financial disadvantage that they will suffer. In arguing this position they point to how difficult it is for two people in a couple to survive on two single pensions much less the reduced rate paid to a couple.

Those who support recognition argue that we must take the responsibilities with the rights and so this downside is just something to be borne alongside the benefits that will flow from the rights. It is worth note of course, that the people who will get the benefits are not necessarily the same as those who will experience the disadvantage. They also say that the inadequate rate of pension or benefit paid to couples is something we should join with heterosexual couples to argue against rather than expecting special and advantageous treatment.

³ Aged Care Act 1997, s44-11

All of that said, there are people on pensions and benefits, in same-sex relationships, who are now used to a certain standard of living and rate of income, and to simply reduce that would be both unfair and probably cause detriment to their health.

The purpose of a 'phase-in' is to minimise the negative impact that changing the rules in regards to means testing of same-sex couples will have on many people on benefits, by giving them sufficient time to adjust their financial situation by either seeking other forms of income, or changing their levels of expenditure.

Of course, ACON is not in a position to provide a detailed model of how a 'phase-in period' would work. However, we would like to make a couple of suggestions:

1. That people on social security payments other than people living with HIV/AIDS on disability support pensions be given a phase-in period of at least a year to re-arrange their finances before any reassessment.
2. That people living with HIV/AIDS (plwha) currently on disability support pensions, be excluded from any changes. We say this because we are talking about a very small group of very sick people. People in this category will either have a miraculous recovery and move to another benefit or return to work, or to put it bluntly, they will die. As few people newly diagnosed with HIV today will become this unwell, it is a naturally shrinking category and not one that creates a huge drain on the public coffers anyway. In addition to this, few who are in relationships will openly admit this to Centrelink when they know it will cause them a disadvantage, so to apply the changed law would require Centrelink staff to investigate and review people with a terminal illness. This is unlikely to be a scenario that anyone wants to see.

Reference in submission

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 PLWHA.

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. (ACON Submission, p.17)

6. ACON's position on 'interdependency'

ACON recognises that the incorporation of the category of 'interdependency' into legislation is a politically expedient means by which same-sex couples would have access to legislative rights that were previously not available. However, 'interdependency' is not the most ideal or appropriate model in which same-sex relationships should be recognised under the law. This is for two reasons:

1. Same-sex relationships are equal in every way to heterosexual relationships and so should be defined in the same manner. Therefore, where a law recognises a heterosexual relationship as a spousal or de facto relationship, that same recognition should be extended to same-sex relationships.
2. The test of having to prove an 'interdependent' relationship is more onerous than the recognition that comes with de facto or spousal status. If the category of 'interdependency' used in superannuation legislation was adopted across other areas of Commonwealth legislation, same-sex relationships would be subject to a much higher test in proving the existence of their relationship than a heterosexual couple would in the same situation. This amounts to continued unequal treatment of same-sex couples before the law.
3. The interdependency category creates a situation where the existence of a relationship, rather than being a fact, becomes a matter for subjective judgement. There are still many in our society who believe that homosexuals cannot and should not be permitted by law to have legally recognisable relationships. They will apply this belief in the exercise of a judgment about whether an interdependent relationship

exists. This will allow discrimination to flourish and for same-sex relationships to be recognised or not on a whim.

4. The evidence required by many to prove that an interdependent relationship exists will on many occasions require the disclosure the disclosure of personal confidential information to which you may not want that person to have access.

For these reasons, ACON does not believe that the wide introduction of the category of 'interdependency' across Commonwealth legislation will be problematic for many. That said, if there is no other acceptable option it would be better than nothing.