



Submission to the
Senate Inquiry into the Marriage Legislation
Amendment Bill 2004

30th July, 2004

All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

International Covenant on Civil and Political Rights

WHO WE ARE

ACON (AIDS Council of NSW Inc.) is a health promotion organisation based in the gay, lesbian, bisexual and transgender communities with a central focus on HIV/AIDS. We provide HIV prevention, health promotion, advocacy, care and support services to members of those communities including Indigenous people, people who inject drugs, to sex workers and to all people living with HIV/AIDS. ACON has offices in Sydney, Western 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).

WHAT WE SEEK – OUR VISION

- A strong, healthy and resilient gay, lesbian, bisexual and transgender community.
- The health needs of our communities to be effectively addressed through all life stages.
- An end to the HIV/AIDS epidemic.
- A society that respects the basic link between health and social justice.

WHAT WE DO – OUR MISSION

- Drawing our strength from a dynamic relationship with our communities, ACON plays a leading role in promoting health.
- We do this through education, advocacy, and service provision and in partnership with researchers, health care providers, governments, our community members and others.
- HIV/AIDS is a key priority for our organisation.

WHAT WE BELIEVE IN – OUR VALUES

We believe the following are intrinsic to ACON and everything we do;

- Social Justice
- Partnership
- Equity and access
- The centrality to any health response of those affected
- Professionalism, accountability and quality
- Creativity and innovation
- Inclusiveness, respect and self-determination
- Community based
- Sustainability

Background

ACON opposes the enactment of this *Bill* without reservation. We believe this *Bill* will have a range of far reaching discriminatory effects upon same sex couples, which have not been taken into consideration in the drafting of this amendment. This submission addresses the legality of the *Bill* in relation to Australia's international obligations, the adverse health and discrimination impacts upon same sex attracted people and the lack of need for such a *Bill*.

The Hague Convention

Obligations for signatories to this convention to recognise lawful marriages contracted under foreign law are incontrovertible. In order for Australia to comply with its obligations under this convention recognition of same sex marriages which have occurred in jurisdictions such as Belgium, Canada and the Netherlands must be upheld. The types of marriage not recognised¹ in the Convention and the exceptions to the general rule of recognition² are clearly laid out. Recognition of foreign marriages may be refuted under Article 14, which recognises signatories' rights to refuse recognition on the basis of 'public policy' ("ordre public"). However this barrier to recognition of foreign marriage in Australia is inconsistent with the recognition of same sex relationships in other areas of Australian law.

International Covenant on Civil and Political Rights

The International Covenant on Civil and Political Rights (ICCPR)—to which Australia is a signatory--bans discrimination based on sex.^{1 3}In the 1994 case of *Nicholas Toonen v Australia*, the UN Human Rights Committee, which monitors compliance with and adjudicates violations under the

¹ Article 8 This Chapter shall not apply to –(1) marriages celebrated by military authorities; (2) marriages celebrated aboard ships or aircraft; (3) proxy marriages; (4) posthumous marriages; (5) informal marriages.

² Article 11 A Contracting State may refuse to recognize the validity of a marriage only where, at the time of the marriage, under the law of that State – (1) one of the spouses was already married; or (2) the spouses were related to one another, by blood or by adoption, in the direct line or as brother and sister; or (3) one of the spouses had not attained the minimum age required for marriage, nor had obtained the necessary dispensation; or (4) one of the spouses did not have the mental capacity to consent; or (5) one of the spouses did not freely consent to the marriage.

However, recognition may not be refused where, in the case mentioned in sub-paragraph 1 of the preceding paragraph, the marriage has subsequently become valid by reason of the dissolution or annulment of the prior marriage.

³ 1 International Covenant on Civil and Political Rights (ICCPR), G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, entered into force Mar. 23, 1976. Article 26 of the ICCPR states:

All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

² It also held that they violate protections for privacy in Article 17 of the ICCPR, which reads: "No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation."

³ *Nicholas Toonen v Australia*, Human Rights Committee, Case no. 488/1992, UN Doc. CCPR/c/50/D/488/1992, at 8.7.

⁴ Prohibitions on same-sex marriage can also be understood as discrimination based on sex, since marriage would be open to those persons but for their sex.

ICCPR, found that laws punishing consensual, adult homosexual conduct violate protections against discrimination in the ICCPR.² Specifically, the Human Rights Committee held that "sexual orientation" was a status protected under the ICCPR from discrimination, finding that the reference to "sex" in articles 2 and 26 was to be taken to include sexual orientation.³ The same reasoning applies to civil marriage: excluding gay and lesbian people from the status of civil marriage is a form of discrimination based on sexual orientation.⁴

Alternative options

ACON recognises the difficulties in conferring the benefits of marriage on same sex couples. However, we fail to see why precluding gay men and lesbians from marriage without equal legal recognition of same sex relationships is the preferred option of the government. Investigating other mechanisms to provide full legal equality for same sex couples would be far more beneficial in the long term than merely devaluing same sex relationships by the passage of this *Bill*.

Adoption Reform

The provisions of this Bill which aim to prevent same sex couples from being eligible to apply for overseas adoptions have no practical purpose as few same sex couples are currently able to do so. Adoption in Australia has usually been a matter for the States and Territories. Eligibility criteria for adoption vary from State to State with only legislation in the ACT, Tasmania and Western Australia allowing for adoption by same sex couples. Other States and Territories allow for adoption by a single person which enable a gay man or lesbian to adopt.

The Hague Convention on Protection of Children and Cooperation in Respect of Inter-country Adoption came into force in May 1995. Australia ratified the Convention in 1998. The intent of this Convention is:

- to ensure that established safeguards for inter-country adoption take place in the interests of the child with respect to his or her fundamental rights;
- to establish a co-operative system so that contracting States respect and safe guard the rights of children and so that the abduction, sale and trafficking of children is prevented; and
- to ensure that contracting States recognise adoptions made in accordance with the Convention.

The Convention does not deal with the eligibility of prospective parents leaving this as a matter for contracting States. Instead the Convention limits itself to the issue of spouses vested in committed relationships. Therefore by attempting to prevent adoption by same sex parents the government is asserting that gay men and lesbians make poor parents even in the absence of data to support this⁴. This amendment is a poorly veiled attempt at vilification.

⁴ American Psychological Association, *Lesbian And Gay Parenting: A Resource For Psychologists* (1995).

This proposed amendment by the Government on the grounds of meeting Australia's international obligations in relation to inter-country adoption is another attempt to stigmatise gay and lesbian parents in the eyes of the Australian public by asserting they are poor parents.

Health and well-being consequences of this Bill

ACON believes that, by denying equality and legislating in favour of discrimination, this *Bill* will have a direct effect upon the quality of life and general safety of gay men and lesbians.

The message conveyed to the community by the passage of this *Bill* is that same sex couples' relationships are not valid, nor worthy of recognition under the law. We are concerned that this amendment sends a clear message to the Australian public that same sex attraction is an inferior state of being. Consequently, this *Bill* has the potential to increase community and individual discrimination and violence toward same sex couples and individuals. Further, the impact on self-esteem, especially on young people struggling to come to terms with their sexuality, is likely to have consequences on the mental health and wellbeing of same sex attracted people.

Discrimination and violence against gay men and lesbians remain all too commonplace in Australian society today. In a La Trobe University report on the sexuality, health and wellbeing of same-sex attracted young people "Writing Themselves In"⁵, nearly one-third of participants believed they had been unfairly treated or discriminated against, because of their sexuality. Young men were more likely to be targeted for verbal abuse, and 46% of participants overall stated they had been verbally abused 13% of participants had been physically abused.

Of particular concern were the 16% of young people who indicated they felt mostly negative or were really not coping with sexuality issues. For the most part, being treated badly combined with a sense of overwhelming isolation had led to these feelings.

Young same sex attracted people have been shown to have high rates of suicidal ideation, and commit suicide at higher rates than their peers⁶.

⁵ Lynne Hillier, Deborah Dempsey, Lyn Harrison, Lisa Beale, Lesley Matthews, Doreen Rosenthal National Centre in HIV Social Research, Australian Research Centre in Sex, Health and Society, Melbourne

⁶ Rogers, G. (October 2000) "Gay men, depression and dysthymia". Paper presented at the Australian Society for HIV Medicine Conference, Melbourne.

Barbeler, V. (1992) *The young lesbian report: A study of attitudes and behaviours of adolescent lesbians today*. Twenty Ten Association, Sydney.

Welch, S., Collings, S. and Howden-Chapman, P. (2000) "Lesbians in New Zealand: Their mental health and satisfaction with mental health services". *Australian and New Zealand Journal of Psychiatry* 34: 256-263.

D'Augelli, A.R. and Hershberger, S.L. (1993) "Lesbian, gay, and bisexual youth in community settings: Personal challenges and mental health problems". *American Journal of Community Psychology* 4: 421-447 and Garofalo, R., Wolf, R.C. et al (1999) "Sexual orientation and risk of suicide attempts among a representative sample of youth". *Archives of Paediatric and Adolescent Medicine* 153(5): 487-493.

Victorian Department of Human Services (1998) *Victorian Youth Suicide Task force Report*. Victorian Government, Melbourne.

Plummer, D. (1996) "Homophobia and health."

An Australian study of 403 gay men reported that 27 per cent of respondents were suffering major depression. 27 in a study of 200 lesbians, 60% of respondents reported feelings of depression related to their sexual orientation, while 63% had contemplated suicide and 30% had attempted suicide. These findings are consistent with the results of a New Zealand study of lesbians' mental health: 21% of respondents had been diagnosed with depression while 53% had contemplated and 20% had attempted suicide. Studies suggest that the suicide rate among homosexuals is 2–7 times higher than among heterosexuals. Estimates of the percentage of same-sex attracted people who have contemplated or attempted suicide range from 31% to 63%, while same-sex attracted people living in rural areas are at particular risk.

Given the role played in suicide by depression and self-esteem, we remain concerned that the strong message of disapproval this legislation sends could further undermine the fragile self-esteem of vulnerable young people, placing them further at risk of depression and self-harm.

Experiences and concerns relating to homophobic abuse and violence have far reaching effects on the way lesbians and gay men live. Among survey respondents in the report 'You shouldn't have to hide to feel safe'⁷, approximately three-quarters reported that concerns about abuse led them to modify their behaviour in various ways. Many gay men and lesbians are – realistically – concerned about the prospect of abuse, harassment or violence, and this can affect their decision making in numerous ways, from choice of clothing, to decisions about careers and where to live.

Many gay men and lesbians report greater levels of verbal abuse during periods of high media coverage of gay and lesbian issues, such as the recent spate of news reports of gay marriage around the world.

Increased levels of violence are perpetrated against gay men and lesbians in NSW during the annual Gay and Lesbian Mardi Gras Festival, with reports of physical abuse at twice the average rate.

Participants in all aforementioned studies also reported feeling helpless based on a sense of inevitability and expectation of violence related to their sexual identity. Younger participants also reported a preference not to report incidents of violence assuming that police or other authorities would not or could not act on their behalf.

This sense of inevitability by victims of personal abuse and violence coupled with the beliefs of perpetrators of homophobic violence that their actions are supported and condoned by the public, further exacerbates the levels of violence experienced by gay men and lesbians in their day to day lives.

⁷ A report on homophobic hostilities and violence against gay men and lesbians in NSW, Dec 2003, AGNSW

Levels of public support for homophobic attacks can be found in the naïve boasting or frankness about involvement, and initial sense of puzzlement at the investigation of attacks and sometimes killings of gay men⁸ and lesbians among arrested perpetrators. This Bill and its implications offer comfort to and confer confidence upon these perpetrators, enforcing the view in the public domain that gay and lesbian people are not equal or worthy of the same levels of legal protection as the wider population.

While there have been significant improvements in legal equality for de facto same sex couples⁹, the passage of this *Bill* sends a confusing message, due to a general lack of awareness of the rights of de facto couples in this State. This has implications for employment, general safety and wellbeing, accommodation and the provision of services whereby people will refuse service and may indeed accept inequitable service in the belief that gay and lesbian people do not have the legal right to equality.

Concern with the trammelling through of this *Bill*

ACON has concerns about the unnecessary haste with which this *Bill* is being forced through the Parliament. Committee members are asked to examine the government's insistence that this bill be introduced as a matter of urgency when there has been no demonstrated reason for its urgent introduction and no community consultation on the provisions of the *Bill*. It is unclear why this *Bill* would be given consideration without the due process of public consultation. This *Bill* has the potential to create a wedge against a minority group which has achieved increased levels of acceptance in recent years. Indeed this apparent attempt to place gay and lesbian couples as 'other' and to deny equal rights is out of step with current community thinking. In 10 years time this *Bill* will be viewed as outdated, divisive, repugnant and discriminatory by people committed to the Australian principles of social justice and equality for all.

⁸ A study by the NSW Institute of Criminology shows that between 1980 and 2000 there were at least 70 homicides of homosexual men attributed in some way to their sexuality – the majority of these the result of "gay bashings".

⁹ Under NSW state law de facto couple provisions confer equal rights to same sex couples in areas of property ownership, death and inheritance, illness, incapacity and compensation with inequalities still existing in the areas of immigration, ADF issues, parenting, superannuation, taxation and social security.