

Sexuality Rights

CASE STUDY

Discrimination in federal pensions

Edward Young's partner of 38 years, Larry Cains, was a World War Two veteran. After Larry died, the Federal Government refused Edward the bereavement payment and pension, normally paid to a surviving spouse. Under Australian law, only heterosexual spouses or de facto partners of war veterans are entitled to these payments.

After taking his discrimination claim to the Veterans Review Board and the Human Rights and Equal Opportunity Commission, Edward took his claim to the United Nations. In August 2003 the United Nations Human Rights Committee found that the Federal Government had discriminated against Edward. In response, the Senate asked the Federal Government to introduce legislation to recognise same-sex relationships. The Federal Government is considering its response. Edward has still not received a bereavement payment or pension, five years after Larry's death.¹

The international conventions listed do not specifically refer to sexual orientation and transgender identity. However, these grounds are included in the requirement of governments to ensure respect for everyone's human rights "without discrimination of any kind" and to treat them equally before the law.

After an individual complaint made by Australian Nick Toonan, the United Nations Human Rights Committee found in 1994 that a Tasmanian law making gay sex a crime violated the privacy rights of gay people.² The Federal Government passed legislation to ensure that no state or territory could discriminate in this way.³ The Tasmanian Government was therefore forced to change its law.

The ILO *Convention 111* does not prohibit discrimination based on sexual orientation. However, Australia has decided to include sexual preference as a ground for discrimination for the purposes of this Convention.

➡ For more information about the ILO see fact sheet N° 14:
Womens Right's

Current Australian policy on sexuality

Responsibility for legal issues that affect everyone's lives is shared by federal, state and territory governments. This includes legal issues that affect gay, lesbian, bisexual and transgender people.

Over the past 10 years, states and territories have made many improvements to protecting the equal rights of gay, lesbian, bisexual and transgender people.

All states and territories now have legislation prohibiting unfair treatment on the basis of sexual orientation. However, there are some significant exemptions and no consistency in what they protect and in what situations.

Sexuality rights in international conventions

The *International Covenant on Civil and Political Rights*, the *International Covenant on Economic, Social and Cultural Rights*, and the International Labour Organisation's (ILO) *Discrimination (Employment and Occupation) Convention 111*, require Australia to prohibit all forms of discrimination and to provide effective penalties for discrimination.



CASE STUDY

Discrimination in parenting rights

Bridget and Amanda have been living together in Sydney for nine years. Five years ago they decided to start a family. Bridget was the birth mother. When their son Joseph was born, Bridget was registered as the mother, but there was no place to register Amanda as Joseph's co-parent. They thought nothing of it at the time. Recently they went to register Joseph at his new school, but discovered that the school would not recognise Amanda as Joseph's parent because she was not on his birth certificate.⁴

The right of gay and lesbian people to adopt the children of their partners, so they can be formally recognised as guardians, has only recently become available in Tasmania, Western Australia, the Northern Territory, and the Australian Capital Territory.

CASE STUDY

Discrimination in superannuation

Robert Corvo died in 1993, leaving behind his partner of 10 years, Greg Brown. Robert worked for the Commonwealth Department of Defence and was a member of the Commonwealth Superannuation Scheme. Even though Robert had bequeathed his estate to Greg, the law does not require super funds to follow the deceased's will, and the fund refused to pay Greg the "spouse benefit". After an appeal to the Administrative Appeals Tribunal⁵ and the Human Rights and Equal Opportunity Commission, Greg still did not succeed, because he was not recognised as Robert's spouse.

Sexuality rights not protected in Australia

There are significant areas under federal law that do not recognise the de facto relationships of gay, lesbian, bisexual and transgender people. These include:

- access to pensions and superannuation
- taxation and social security; and
- the right to marriage.

There is no overriding federal legislation specifically prohibiting unfair treatment or harassment based on sexuality. Federal legislation would ensure better protection and more consistency across all states and territories.

The case studies show examples of discrimination against gay and lesbian partners and parents. Although discrimination on the basis of homosexuality is prohibited in all states and territories, discrimination against bisexuals and transgender people is not prohibited in all areas.

Vilification based on sexual preference or gender identity is not unlawful in all states and territories. For example, in Western Australia and Queensland it is not an offence to make public statements that incite or provoke hatred against people who are gay, lesbian, bisexual or transgender.

The anti-discrimination legislation of each state and territory contains certain exemptions. In many states there is an exemption for religious organisations, which effectively means that anyone working for a religious organisation can lawfully be discriminated against based on their sexuality.

The age of consent is the age at which someone can legally agree to have sex. While the age of consent is now consistent for homosexual sex and heterosexual sex in all states and territories, it is not consistent between states and territories. For example, in New South Wales and the Northern Territory, the age of consent is now 16 for both homosexual sex and heterosexual sex; in Tasmania it is 17.

Improving the rights of gay, lesbian, bisexual and transgender people in Australia

While Australia has slowly improved protection for sexuality rights, the protections that do exist are not consistent for all people, across all states and territories. In addition, our Constitution does not prevent a government from repealing equality laws that protect people regardless of their sexuality. For example, the Federal Government is currently attempting to amend the *Sex Discrimination Act 1984* (Cth) to allow states to discriminate against single women, including lesbian women, in providing reproductive technology services.

➡ For more information about access to reproductive technology services see fact sheet N^o 14: **Women's Rights**

Protection for the rights of gay, lesbian, bisexual and transgender people in line with international standards is required to ensure that all people are treated equally regardless of their sexual or gender preferences.

"What form should the protection of human rights take?"

➡ For options about protecting human rights through a Charter or Bill of Rights see fact sheet N^o 1: **Background to Human Rights**

REFERENCES

¹ Patricia Karvelas, "UN backs gay man's war pension bid", *The Australian*, 5/9/2003, p 3.

² UN Human Rights Committee, Communication No. 488/1992, Australia, 4/4/1994, UN Doc CCPR/C/50/D/488/1992 (Jurisprudence).

³ *Human Rights (Sexual Conduct) Act 1994* (Cth).

⁴ Case study provided by the Gay and Lesbian Rights Lobby, NSW.

⁵ *Gregory Brown v Commissioner for Superannuation* (1995) 21 AAR 378.