



Human Rights and Equal
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Same-Sex: Same Entitlements

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





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

May 2007



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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...

Article 26, International Covenant on Civil and Political Rights

**Human Rights and
Equal Opportunity Commission**



The Hon Philip Ruddock MP
Attorney-General
Parliament House
Canberra ACT 2600

May 2007

Dear Attorney,

We are pleased to present *Same-Sex: Same Entitlements*, the Human Rights and Equal Opportunity Commission's report of the National Inquiry into Discrimination Against People in Same-Sex Relationships: Financial and Work-Related Entitlements and Benefits.

The report is furnished to you in accordance with the Commission's functions contained in sections 11(1)(e), 11(1)(g), 11(1)(j), 11(1)(k), 31(a), 31(c), 31(e) and 31(f) of the *Human Rights and Equal Opportunity Commission Act 1986* (Cth). As such, it is subject to the tabling requirements in section 46 of that Act.

Yours sincerely

A handwritten signature in black ink, appearing to read 'John von Doussa'.

The Hon John von Doussa QC
President

A handwritten signature in black ink, appearing to read 'Graeme Innes'.

Graeme Innes AM
Human Rights Commissioner

Human Rights and Equal Opportunity Commission

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Executive Summary

At least 20 000 couples in Australia experience systematic discrimination on a daily basis.

Same-sex couples and families are denied basic financial and work-related entitlements which opposite-sex couples and their families take for granted.

Same-sex couples are not guaranteed the right to take carer's leave to look after a sick partner.

Same-sex couples have to spend more money on medical expenses than opposite-sex couples to enjoy the Medicare and PBS Safety Nets.

Same-sex couples are denied a wide range of tax concessions available to opposite-sex couples.

The same-sex partner of a federal government employee is denied access to certain superannuation and workers' compensation death benefits available to an opposite-sex partner.

The same-sex partner of a defence force veteran is denied a range of pensions and concessions available to an opposite-sex partner.

Older same-sex couples will generally pay more than opposite-sex couples when entering aged care facilities.

This is just a small sample of the discrimination caused by the many federal financial and work-related laws which exclude same-sex couples and their children.

It is not just Australia's same-sex couples who suffer discrimination; it is their children too. Approximately 20% of lesbian couples and 5% of gay couples in Australia are raising children. The financial disadvantages imposed on same-sex parents will inevitably have an impact on their children.

This discrimination breaches human rights. And it can be stopped. All it takes is a few changes to the definitions in some federal laws.

Same-sex families; second-class citizens

The *Same-Sex: Same Entitlements* Inquiry spent more than three months travelling around Australia holding public hearings and community forums to hear, first hand, about the impact of discriminatory laws on gay and lesbian couples. Those public consultations, and some of the 680 written submissions received by the Inquiry, clearly

describe the financial and emotional strain placed on gay and lesbian couples who are trying to enjoy their lives like everybody else in the community.

A same-sex couple from Adelaide said the following:

We are an average suburban family. We are working hard and contributing to our community. We don't want special treatment – just what others can expect from their legal and social community. Our rights are denied simply because of who we love. We just want equality.

A lesbian parent in Sydney made a similar plea:

I am not a second class citizen and resent my family and I being treated as such. All I ask is to be treated equally, no more and no less than any other Australian. Just equal.

A gay doctor put it like this:

I am a first-class taxpayer but a second-class citizen.

Federal laws breach human rights

The *Same-Sex: Same Entitlements* Inquiry conducted an audit of federal laws relating to financial and work-related entitlements in order to identify those which discriminate against same-sex couples and their children.

The Inquiry has identified 58 federal laws (listed in Appendix 1) which breach the rights of same-sex couples and in some cases the rights of their children.

The *Same-Sex: Same Entitlements* Inquiry finds that:

1. *The 58 federal laws in Appendix 1 discriminate against same-sex couples in the area of financial and work-related entitlements. Those laws breach the International Covenant on Civil and Political Rights.*
2. *Many of the federal laws in Appendix 1 discriminate against the children of same-sex couples and fail to protect the best interests of the child in the area of financial and work-related entitlements. Those laws breach the International Covenant on Civil and Political Rights and the Convention on the Rights of the Child.*

Simple amendments will remove discrimination

It is simple to remove discrimination against same-sex couples in federal financial and work-related entitlements: change the definitions in the 58 laws listed in Appendix 1 to this report.

There is no need to rewrite federal tax legislation, superannuation legislation, workers' compensation legislation, employment legislation, veterans' entitlements legislation or any other major area of federal financial entitlements. There just needs to be some changes to a few definitions at the front of each relevant piece of legislation.

The *Same-Sex: Same Entitlements* Inquiry recommends that:

1. *The federal government should amend the discriminatory laws identified by this Inquiry to ensure that same-sex and opposite-sex couples enjoy the same financial and work-related entitlements.*
2. *The federal government should amend the discriminatory laws identified by this Inquiry to ensure that the best interests of children in same-sex and opposite-sex families are equally protected in the area of financial and work-related entitlements.*

***Same-Sex: Same Entitlements* report overview**

The *Same-Sex: Same Entitlements* report covers the following issues:

- A short background to the Inquiry (Chapter 1).
- The strategies used by the Inquiry to gather information (Chapter 2).
- Human rights protections for same-sex couples and their children (Chapter 3).
- How federal law currently defines a couple; what states and territories have done to remove discrimination; how formal relationship recognition schemes may impact on access to financial entitlements; and a new definition of 'de facto relationship' for all federal laws, which would remove ongoing discrimination against same-sex couples (Chapter 4).
- How family law defines a parent-child relationship when a child is born to a same-sex couple; how family law impacts on access to financial and work-related entitlements; and what should change to remove ongoing discrimination against children in same-sex families (Chapter 5).
- The impact of discrimination against same-sex couples and their children in federal financial and work-related entitlements. The table of contents in each topic-specific chapter includes a summary of the entitlements which are, or are not, available to same-sex couples and families. The chapters describe how the relevant legislation applies to same-sex couples and families. Each chapter concludes with a list of legislation setting out what definitions need to change to remove discrimination in the following areas:
 - Employment (Chapter 6)
 - Workers' Compensation (Chapter 7)
 - Tax (Chapter 8)
 - Social Security (Chapter 9)
 - Veterans' Entitlements (Chapter 10)
 - Health Care Costs (Chapter 11)
 - Family Law (Chapter 12)
 - Superannuation (Chapter 13)
 - Aged Care (Chapter 14)
 - Migration (Chapter 15)

● Same-Sex: Same Entitlements

- A miscellaneous list of additional legislation which may discriminate against same-sex couples and families in the area of financial and work-related entitlements (Chapter 16).
- A brief discussion of homophobia in the community and discrimination on the grounds of gender identity (Chapter 17).
- A summary of the Inquiry's findings and recommendations (Chapter 18).
- A list of 58 federal laws which discriminate against same-sex couples and their children, including guidance on how to amend the laws (Appendix 1).
- Selected stories about the impact of discrimination on same-sex couples and families (Appendix 2).
- A list of written submissions (Appendix 3), witnesses at public hearings (Appendix 4) and community forums (Appendix 5).



Glossary of Terms

TERM	EXPLANATION
adoptive parent	A person who has legally adopted a child.
ART	assisted reproductive technology
ART child	A child conceived through ART.
assisted reproductive technology	Conception other than through intercourse, including in-vitro fertilisation, clinically-assisted donor insemination and self-insemination.
birth father	A father listed on a child's birth certificate.
birth mother	A woman who gives birth to a child.
CRC	<i>Convention on the Rights of the Child</i>
de facto couple	Two people in a de facto relationship.
de facto relationship	A relationship between two people living together as a couple on a genuine domestic basis, irrespective of gender.
gay co-father	A person in a gay couple intending to raise a child from birth, who is not a birth father.
HREOC	Human Rights and Equal Opportunity Commission
ICCPR	<i>International Covenant on Civil and Political Rights</i>
ICESCR	<i>International Covenant on Economic, Social and Cultural Rights</i>
ILO 111	International Labour Organisation, <i>Discrimination (Employment and Occupation) Convention 1958</i>
Inquiry	HREOC's National Inquiry into Discrimination against People in Same-Sex Relationships: Financial and Work-Related Entitlements and Benefits
legal parent	A person noted as a parent on a child's birth certificate or an adoptive parent.
lesbian co-mother	The female partner of the birth mother at the time a child is conceived and born.
opposite-sex couple	A de facto couple where one member is the opposite sex to the other.

● Same-Sex: Same Entitlements

TERM	EXPLANATION
opposite-sex family	An opposite-sex couple with one or more children.
opposite-sex partner	One member of an opposite-sex couple.
parenting order	A parenting order issued by the Family Court of Australia under the <i>Family Law Act 1975</i> (Cth).
same-sex couple	A de facto couple where one member is the same sex as the other.
same-sex family	A same-sex couple with one or more children.
same-sex partner	One member of a same-sex couple.
social parent	Any person (often a subsequent partner) significant to the care and welfare of a child who is not a birth mother, birth father, lesbian co-mother or gay co-father.



CHAPTER 1:

Introduction

CHAPTER CONTENTS

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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...

International Covenant on Civil and Political Rights, article 26

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.

Convention on the Rights of the Child, article 3(1)

1.1 Is there really discrimination against same-sex couples and their children?

The right to non-discrimination, equality before the law and the protection of the best interests of the child are among the most fundamental of all human rights principles. Yet there are a raft of laws on Australia's books which deny basic financial and work-related entitlements to gay and lesbian couples and their children.

Appendix 1 to this report sets out a long list of federal laws which clearly discriminate against same-sex couples in the most ordinary areas of every day life. All these laws breach the *International Covenant on Civil and Political Rights* (ICCPR) and some of them breach the *Convention on the Rights of the Child* (CRC).

Same-sex couples and families get fewer leave entitlements, less workers' compensation, fewer tax concessions, fewer veterans' entitlements, fewer health care subsidies, less superannuation and pay more for residential aged care than opposite-sex couples in the same circumstances.

Same-sex couples are denied these basic financial and work-related entitlements because they are excluded from the definitions describing a couple in all the federal laws in Appendix 1. Federal law after federal law defines a 'partner' or a 'member of a couple' or a 'spouse' or a 'de facto spouse' as a person of the opposite sex.

Further, children in same-sex families may suffer because one or both of their parents are denied the financial and work-related entitlements which are intended to help families live better.

1.2 How many people does the discrimination affect?

The 2001 Australian census suggests that there are approximately 20 000 same-sex couples living together in the same home.¹ Of those 20 000 couples, approximately 20% of lesbian couples, and 5% of gay male couples are living with children.²

However, the Australian Bureau of Statistics suggests that the figure of 20 000 underestimates the true number of same-sex couples.³ And several surveys suggest that there are many more gay male couples with children than the 5% suggested in the census – some suggest the figure is closer to 10%.⁴

Whatever the precise figures, it is quite clear that discrimination against same-sex couples and their children affects many people in the Australian community.

1.3 How do same-sex couples feel about discrimination in the area of financial entitlements?

The Inquiry spent more than three months travelling around Australia holding public hearings and community forums to hear, first hand, about the impact of discriminatory laws on gay and lesbian couples.

Those public consultations, and some of the 680 written submissions received by the Inquiry, clearly describe the financial and emotional strain placed on gay and lesbian couples who are trying to live their lives like everybody else in the community.

One Victorian expressed his frustration as follows:

The inequalities embedded in current legislation are obvious and are inexcusable. 'Understanding, tolerance and inclusion' are said to be values of the Australian community. Current legislation tells another story.⁵

A lesbian couple from Adelaide said the following:

We are an average suburban family. We are working hard and contributing to our community. We don't want special treatment - just what others can expect from their legal and social community. Our rights are denied simply because of who we love. We just want equality.⁶

A lesbian parent in Sydney made a similar plea:

I am not a second class citizen and [I] resent my family and I being treated as such. All I ask is to be treated equally, no more and no less than any other Australian. Just equal.⁷

A gay doctor put it like this:

I am a first-class taxpayer but a second-class citizen.⁸

1.4 How easy is it to fix the discrimination?

It is simple to remove discrimination against same-sex couples in the area of financial and work-related entitlements: change the definitions in the laws listed in Appendix 1.

There is no need to rewrite federal tax legislation, superannuation legislation, workers' compensation legislation, employment legislation or any other major area of federal financial entitlements.

There just needs to be some minor changes to a few definitions at the front of each relevant piece of legislation.

The definitions describing a de facto couple should include opposite-sex and same-sex couples alike. And the terms describing the relationship between a child and his or her parents should include same-sex and opposite-sex parents alike.

Chapter 18 on Findings and Recommendations and Appendix 1 to this report provide further guidance on how this can be done.

1.5 Do you need same-sex marriage to remove discrimination in financial and work-related entitlements?

Many submissions to the Inquiry discuss the importance of formal recognition of same-sex relationships through registration schemes, civil unions or marriage. Other submissions to the Inquiry express opposition to same-sex marriage.

The Inquiry understands that for some people in same-sex relationships, formal recognition is not only a path to legal rights and equality, but an important symbolic expression of love between two people.

However, the focus of this Inquiry has been to make sure that *all* couples in Australia have the same access to basic entitlements like tax concessions, superannuation death benefits, carer's leave, workers' compensation, veterans' entitlements and aged care.

An opposite-sex couple does not have to marry to get those entitlements; nor should a same-sex couple have to marry.

So, while same-sex marriage or civil unions could assist those couples who choose to formalise their relationship in that way, this Inquiry has focussed on ensuring that *all couples have all the same rights whether or not they are married*.

1.6 What is the structure of this report?

This report starts by setting out the Inquiry's methodology in Chapter 2 and the human rights of people in same-sex couples, and their children, in Chapter 3.

Chapter 4 on Recognising Relationships summarises how federal laws regarding financial and work-related entitlements define a person in a couple. It describes how state and territories have reformed their laws to remove discrimination. It then briefly discusses the potential impact of formal relationship recognition schemes in the area of financial entitlements. Finally, Chapter 4 proposes a new definition of 'de facto relationship' for all federal laws, which would remove discrimination against same-sex couples.

Chapter 5 on Recognising Children explains how family law defines a parent-child relationship when a child is born to a same-sex couple. It explains how those legal relationships impact on who is a 'child' in laws regarding financial and work-related entitlements. It then sets out what should change to remove the discrimination.

Chapters 6 – 15 describe the impact of discriminatory definitions in the following areas of financial and work-related entitlements:

Chapter 6	Employment
Chapter 7	Workers' Compensation
Chapter 8	Tax
Chapter 9	Social Security
Chapter 10	Veterans' Entitlements
Chapter 11	Health Care
Chapter 12	Family Law
Chapter 13	Superannuation
Chapter 14	Aged Care
Chapter 15	Migration

The table of contents to each chapter summarises which entitlements are, or are not, available to a same-sex couple or family. Each chapter also has a list of legislation at the end which sets out the definitions that need to change to remove the discrimination identified throughout the chapter.

Chapter 16 sets out a miscellaneous list of additional legislation which may discriminate against same-sex couples and families.

Chapter 17 briefly discusses general homophobia in the community and discrimination on the basis of gender identity. Those issues did not fall directly within the Inquiry's Terms of Reference, but they were of substantial concern to several people making submissions and speaking at community forums.

Chapter 18 summarises the Inquiry's findings and recommendations.

Appendix 1 sets out a comprehensive list of legislation which must be amended to remove discrimination against same-sex couples and their children in federal law. This is an accumulation of the lists at the end of each of Chapters 6–16.

Appendix 2 sets out a small selection of stories describing the impact of discrimination on same-sex couples and families.

Appendices 3–5 provide details on who made submissions, the Inquiry's public hearings and the Inquiry's community forums.

Endnotes

- 1 Australian Bureau of Statistics, *Year Book Australia*, 'Same-Sex Couple Families', p142 (2005).
- 2 Australian Bureau of Statistics, *Year Book Australia*, 'Same-Sex Couple Families', p142 (2005).
- 3 Australian Bureau of Statistics, *Year Book Australia*, 'Same-Sex Couple Families', p142 (2005).
- 4 J Millbank, 'Recognition of Lesbian and Gay Families in Australian Law – Part Two: Children', *Federal Law Review*, vol 34, no 2, 2006, pp205-206 citing several surveys in footnote 4.
- 5 James Duncan, Submission 288.
- 6 Sue McNamara and Leanne Nearmy, Submission 298.
- 7 Lynne Martin, Submission 38.
- 8 Dr Jeremy Field, Submission 295.



CHAPTER 2: *Methodology*

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2.1 What is this chapter about?

This chapter describes how the Inquiry gathered information and community views about discrimination against same-sex couples and their children. In particular, the chapter addresses the following questions:

- What are the Inquiry's Terms of Reference?
- What discussion and research papers did the Inquiry release?
- How did the Inquiry gather written submissions?
- How else did the Inquiry hear community views?
- What information did the federal government provide to the Inquiry?
- What are the Inquiry's next steps?

2.2 What are the Inquiry's Terms of Reference?

On 3 April 2006, the Inquiry was launched with the following Terms of Reference:

1. The President, Mr John William von Doussa QC, and the Human Rights Commissioner, Mr Graeme Gordon Innes AM, will conduct an inquiry (the Inquiry), on behalf of the Human Rights and Equal Opportunity Commission, into laws regarding financial and employment-related entitlements and benefits to consider the impact of those laws on:
 - a. the equal enjoyment of human rights by people who are, or have been, a member of a same-sex couple and any children of a same-sex couple; and
 - b. equality of opportunity and treatment in employment or occupation for people who are, or have been, a member of a same-sex couple.
2. The Inquiry's goals are to:
 - a. ascertain whether relevant Commonwealth laws may be or are inconsistent with or contrary to any human right of people who are, or have been, a member of a same-sex couple and any children of a same-sex couple;
 - b. ascertain whether relevant Commonwealth laws may have the effect of nullifying or impairing equality of opportunity and treatment in employment or occupation of people who are, or have been, a member of a same-sex couple;
 - c. consider what effect relevant State and Territory laws have on the human rights of people who are, or have been, a member of a same-sex couple and any children of a same-sex couple;
 - d. consider what effect relevant State and Territory laws have on the equality of opportunity and treatment in employment or occupation of people who are, or have been, a member of a same-sex couple.
3. The President and the Human Rights Commissioner will report, on behalf of the Commission, to the Minister the results of the Inquiry. That report may include recommendations as to action that should be taken by the Commonwealth and/or laws that should be made by the Parliament, in order to:

- a. protect and promote the equal enjoyment of human rights;
 - b. protect and promote equality of opportunity and treatment in employment; and
 - c. ensure that Australia is in compliance with the provisions of the *International Covenant on Civil and Political Rights*, the *Convention on the Rights of the Child* and the *Discrimination (Employment and Occupation) Convention 1958*.
4. For the purposes of the Inquiry, ‘laws regarding financial and employment-related entitlements and benefits’ shall be taken to include, but not be limited to, laws relating to taxation, social security, Medicare, concessions available under the Pharmaceutical Benefits Scheme, conditions of employment such as leave entitlements, compensation for workplace injuries, pensions, retirement benefits, superannuation, benefits payable to veterans of the Australian armed forces and intestacy.

2.3 What discussion and research papers did the Inquiry release?

The Inquiry released several discussion papers as a way to encourage community responses and elicit further information from experts in the field.

2.3.1 Discussion Paper I

When the Inquiry was launched, the Human Rights and Equal Opportunity Commission (HREOC) released Discussion Paper I. The paper presented the Inquiry’s initial research into the area of discrimination against same-sex couples. It set the background for the Inquiry’s ongoing research.

Discussion Paper I was designed to focus attention on possible areas of financial and work-related discrimination in Commonwealth, and some state and territory, laws.

The paper provided some background information on the Inquiry. It outlined the human rights protections that are relevant to people in same-sex relationships and their children under the *International Covenant on Civil and Political Rights* (ICCPR), the *Convention on the Rights of the Child* (CRC) and the *Discrimination (Employment and Occupation) Convention* (ILO 111).

The paper covered the following issues:

- workplace leave and other entitlements
- social security benefits
- tax concessions
- health concessions
- superannuation entitlements
- workers’ compensation under Comcare
- pensions and compensation for veterans
- travel entitlements for parliamentarians
- judicial pensions.

It also included the Terms of Reference for the Inquiry and a Guide for Submissions.

Discussion Paper I is available on the Inquiry website at <http://www.humanrights.gov.au/samesex/>.

2.3.2 Preliminary List of Legislation

The Inquiry commissioned independent research to identify a Preliminary List of Commonwealth laws that discriminate against same-sex couples. The research was conducted by Professor Jenni Millbank from the University of Sydney.

The Preliminary List identified more than 60 federal laws which currently discriminate against same-sex couples and their children.

The Inquiry published the Preliminary List in September 2006 in order to prompt further consideration and discussion of discrimination in federal legislation. It also requested comments, additions or amendments to the list.

The Preliminary List is available on the Inquiry website at <http://www.humanrights.gov.au/samesex/>.

2.3.3 Detailed Research Paper

In addition to a list of legislation, the Inquiry commissioned Professor Millbank to conduct more detailed research on federal laws that discriminate against same-sex couples and their children.

The Inquiry published the results as a Research Paper on 28 September 2006. The Research Paper, called *Areas of Federal Law that Exclude Same-Sex Couples and their Children*, examined a wide range of federal statutes and regulations.

The views expressed in the Research Paper were those of Professor Millbank and not those of the Inquiry. However, the Inquiry has used the research to develop its own findings and recommendations.

The Research Paper is available on the Inquiry website at <http://www.humanrights.gov.au/samesex/>.

2.3.4 Discussion Paper II

Discussion Paper II aimed to provide a short summary of the areas of discrimination in federal law, according to the Inquiry's updated research.

The Discussion Paper is structured in a similar way to the Research Paper by Professor Millbank, so readers can cross-reference between them.

The Inquiry used Discussion Paper II to seek further input from community groups, government and individuals.

Discussion Paper II is available on the Inquiry website at <http://www.humanrights.gov.au/samesex/>.

2.4 How did the Inquiry gather written submissions?

The Inquiry made a substantial effort to ensure that all interested individuals and organisations were able to contribute their views.

The Inquiry invited submissions through the media, the internet and through a broad range of email lists. Submissions could be made in any format, including email, floppy disk, hard copy, audio tape, video tape, CD or DVD.

In total, the Inquiry received submissions from 680 organisations and individuals. A full list of submissions can be found in Appendix 3 to this report. Copies of many of the submissions can be found on the Inquiry website at: <http://www.humanrights.gov.au/samesex/submissions.html>.

The Inquiry is extremely grateful to all those who made submissions. Members of the public as well as organisations devoted considerable time, energy and expertise to this task. We are especially thankful to those individuals who were willing to share their personal experiences of discrimination under current federal, state and territory laws.

There were two phases to the submission process, as described below.

2.4.1 First Round of Submissions

The Inquiry called for public submissions on 3 April 2006, with a deadline of 2 June 2006. That date was extended to 16 June 2006 in response to a number of requests for further time. The Inquiry accepted submissions after that date at its discretion.

The Inquiry received submissions from 389 individuals and organisations as a result of this call for submissions.

Submissions were numbered as they were received.

Copies of the submissions are available on the Inquiry website at: <http://www.humanrights.gov.au/samesex/submissions.html>.

2.4.2 Second Round of Submissions

The deadline for submissions in response to the Discussion Paper II and the Research Paper was 3 November 2006. The Inquiry accepted submissions after this date at its discretion.

The Inquiry received submissions from an additional 291 individuals and organisations in this second round of submissions.

Due to resource constraints in this second round of submissions, only those from organisations were placed on the Inquiry website. However, a list of the names of individuals who made submissions is available at: <http://www.humanrights.gov.au/samesex/submissions.html>.

2.4.3 Who wrote the submissions received by the Inquiry?

Submissions came from a wide range of organisations and individuals including:

- employment bodies
- gay, lesbian, bisexual, transgender and intersex individuals and couples
- human rights, advocacy and legal bodies
- members of the public
- non-government organisations
- organisations representing gay, lesbian, bisexual, transgender and/or intersex people
- parents, friends or family members of same-sex couples
- peak bodies
- religious organisations
- state and territory government agencies
- state equal opportunity commissions
- unions
- universities and academics

2.4.4 How did the Inquiry use the submissions?

The submissions have been a vital resource to the Inquiry.

They have helped to highlight the impact of discriminatory laws on same-sex couples, their children and their families. They identify a number of laws and issues which were previously unknown to the Inquiry. They provide substance to the text of this report and guidance to the recommendations made by the Inquiry.

A large number of submissions made arguments for and against changing the law to allow marriage or civil union for same-sex couples. The debate about the most appropriate form of relationship recognition for same-sex couples is not strictly within the Inquiry's Terms of Reference. However, the Inquiry has considered the role that relationship recognition plays in accessing financial and work-related benefits in Chapter 4 on Recognising Relationships.

Some of the submissions and consultations raised other issues which were not part of the Inquiry's Terms of Reference. Where possible, these issues are discussed at the end of each relevant chapter. Chapter 17 discusses general issues of homophobia and gender identity. However, the Inquiry has not made findings or recommendations about issues outside the Inquiry's Terms of Reference.

2.5 How else did the Inquiry hear community views?

The Inquiry held seven formal public hearings and 18 community forums around Australia between 26 July 2006 and 16 November 2006.

The Inquiry also held a number of meetings with specific groups and individuals, including gay parent groups, parliamentarians and retirement groups.

The Inquiry contacted key groups and individuals in Sydney, Darwin and Townsville to try and hold specific meetings with gay and lesbian Aboriginal and Torres Strait Islander people however, unfortunately no meetings could be arranged. One person explained that this was due to cultural taboos and discrimination faced by same-sex attracted Aboriginal people both within their own community and from the wider community. This made it difficult for gay and lesbian Aboriginal people to potentially 'out' themselves by meeting with representatives from the Inquiry.

The Inquiry also made a number of attempts to meet with gay and lesbian people from Culturally and Linguistically Diverse (CALD) backgrounds. A broadcast email to CALD groups in Melbourne resulted in only one reply from one CALD group. A specific CALD forum was also arranged in Sydney. Unfortunately the forum had to be cancelled due to a lack of response. However a number of submissions were received from gay and lesbian CALD groups and individuals.

2.5.1 How did the Inquiry run the public hearings?

The primary purpose of the public hearings was to allow the Inquiry to further explore information contained in written submissions. They also provided an opportunity to:

- clarify issues raised in submissions and Inquiry research
- compare legislation relating to same-sex entitlements
- hear real life examples of the impact of same-sex discrimination
- learn about further research useful to the Inquiry.

The Inquiry is grateful to all those who contributed their time, expertise and experiences to the hearing process.

A great deal of media interest was generated by the public hearings. Many of the stories and experiences explained during the hearings were recorded in the print media, on radio and on television. This provided the general community with an opportunity to hear about the impact of discrimination on people's lives first hand. Thus making the hearings a useful community education and public awareness-raising tool.

(a) When and where did the public hearings take place?

Public hearings were held in:

Sydney	26 July 2006
Perth	9 August 2006

Adelaide	28 August 2006
Hobart	25 September 2006
Melbourne	26-27 September 2006
Brisbane	11 October 2006
Canberra	20 October 2006

The formal hearings were conducted either by the President of HREOC or the Human Rights Commissioner, assisted by Inquiry staff.

(b) *Who appeared at the public hearings?*

Overall, 32 organisations and 44 individuals appeared at the public hearings.

Organisations that attended the hearings included the state and territory based equal opportunity commissions, gay and lesbian lobby groups, legal and human rights groups, non-government organisations, universities, employer bodies and unions.

Individuals with a diverse range of experiences appeared at the hearings. They included people presenting their own independent or university research, parliamentarians and ex-parliamentarians and parent groups.

A list of witnesses who appeared at the hearings can be found in Appendix 4 to this report.

(c) *Where can you find records of the public hearings?*

Audio and written notes from the hearings are available on the Inquiry website at <http://www.humanrights.gov.au/samesex/hearings.html>.

2.5.2 How did the Inquiry run the community forums?

The main purpose of the community forums was to listen to and gather people's stories of discrimination.

The Inquiry has used the information gathered in the community forums to show how same-sex couples experience discrimination and how this impacts on their family.

(a) *When and where did the community forums take place?*

A concerted effort was made to engage with the rural and regional same-sex attracted community. People living in rural and regional areas often have different issues or experiences to those people living in metropolitan areas.

Overall 488 participants attended the community forums. Their ages ranged from the late teens to the late seventies.

Appendix 5 to this report provides details on where and when the various forums took place and how many people attended each of them.

(b) *How did the Inquiry conduct the community forums?*

The community forums were facilitated by either the President of HREOC, the Human Rights Commissioner or Inquiry staff.

Prior to each community forum participants were sent a background briefing document that summarised the purpose of the Inquiry.

Whenever possible the community forum was opened by a number of arranged speakers to 'break the ice'. These speakers discussed their submission to the Inquiry and spoke about their personal experiences of the impact of discrimination on their lives. The forum was then opened to the floor. Many people spoke about the impact of financial and work-related discrimination on their lives and the lives of their partners, families and children. Participants also asked questions of Inquiry staff about specific aspects of the Inquiry.

(c) *What were some of the themes covered in the community forums?*

Issues covered at the forums included ageing, Medicare and health issues, social security, superannuation, tax, medical consent, powers of attorney, adoption and parental recognition, veterans' affairs, employment and access to leave from work, and general issues of discrimination.

As with the written submissions, marriage or relationship recognition was a key issue for same-sex couples at these forums. The Commissioner, President or Inquiry staff stated at the start of each forum that the goal of the Inquiry was to focus public attention on financial and work-related discrimination over formal relationship recognition. However, the Inquiry acknowledges the importance of relationship recognition to same-sex couples.

The Inquiry appreciates the frankness of the participants and their willingness to share personal aspects of their lives. At times the stories were deeply emotional.

(d) *What did participants think about the community forums?*

Participants were provided with an evaluation form at the end of the forum.

Overall 161 evaluation forms were completed and returned to the Inquiry. However, not all people who completed the forms answered all the questions.

86% of respondents rated the forums as 'good' or 'excellent'.

The aspects of the community forums which people liked included hearing about other people's stories and listening to the wide variety of issues that people raised. Participants also liked the openness of the discussions and the respect given to the speakers. Respondents also indicated that being able to have their say and the inclusive manner of the forum was important. The facilitation skills of the Inquiry staff were also highly appreciated.

The aspect that people least liked about the forums was the focus on legal and financial issues over marriage and civil union. Other things that people did not like about the forums included: starting late, relevance of some of the stories, seating and time given to speak.

(e) Where can you find records of the community forums?

Audio (for some forums) and written notes from the community forums are available on the Inquiry website at <http://www.humanrights.gov.au/samesex/hearings.html>.

2.6 What information did the federal government provide to the Inquiry?

In June 2006, the federal Cabinet issued a direction that no federal department or agency should provide a written submission to the Inquiry. However, in July 2006 the Attorney-General indicated that the Attorney-General's Department would be open to accepting any requests for factual information.

In response to that offer, the President of HREOC wrote to the Secretary of the Attorney-General's Department, on 23 August 2006. The letter requested that the Attorney-General's Department provide copies of relevant internal policies, guidelines, instructions, directives, circulars, departmental or ministerial instructions and departmental, ministerial or tribunal decisions from 28 Commonwealth departments and agencies. The letter also requested assistance from the Attorney-General's Department to collect information from other relevant agencies.

On 18 October 2006, the Secretary of the Attorney-General's Department sent out a letter to the agencies listed in the President's letter, requesting that a response be sent directly to HREOC by 3 November 2006.

The following agencies and departments provided information to the Inquiry:

- Attorney-General's Department
- AusAID
- Australian Public Service Commission
- Defence Housing Authority
- Department of Defence
- Department of Families, Community Services and Indigenous Affairs
- Department of Finance and Administration
- Department of Foreign Affairs and Trade
- Department of Health and Ageing
- Department of Human Services
- Department of Treasury
- Department of Veterans' Affairs
- Migration Review Tribunal
- Remuneration Tribunal
- Superannuation Complaints Tribunal.

The information has been incorporated throughout this report, where relevant.

2.7 What are the Inquiry's next steps?

The publication and national launch of this final report marks the completion of the *Same-Sex: Same Entitlements Inquiry*.

However, HREOC will continue to advocate that the government implement the recommendations made in this report. HREOC is also interested to hear about additional issues facing gay and lesbian members of the community for the purposes of future projects.



CHAPTER 3:

Human Rights Protections for Same-Sex Couples and their Children

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3.1 What is this chapter about?

This chapter explains how the provisions of international human rights treaties protect same-sex couples and their children, in the context of accessing financial and work-related entitlements.

In particular, this chapter focuses on the right to non-discrimination on the grounds of sexual orientation. It also describes how the breach of that right can interfere with a range of other basic human rights, for example, the right to social security.

The chapter also explains how discrimination against parents on the grounds of sexual orientation can impact on the rights of their children. In particular, discrimination against same-sex parents can compromise the protection of the best interests of the child. It can also result in a breach of Australia's obligation to assist both parents in the performance of their common responsibilities.

More specifically, this chapter addresses the following questions:

- Which human rights treaties are relevant to this Inquiry?
- Does the right to non-discrimination protect same-sex couples?
- Can discrimination against same-sex parents interfere with the right to protection of family?
- Can discrimination against same-sex parents interfere with the rights of the child?
- Can discrimination against same-sex parents interfere with the right to social security?
- Can discrimination against same-sex couples interfere with the right to health?
- How are these human rights principles applied in this report?

3.2 Which human rights treaties are relevant to this Inquiry?

Australia is a party to the following major international human rights treaties relevant to this Inquiry:

- *International Covenant on Civil and Political Rights* (ICCPR)
- *Convention on the Rights of the Child* (CRC)
- *International Covenant on Economic, Social and Cultural Rights* (ICESCR)
- International Labour Organisation *Discrimination (Employment and Occupation) Convention 1958* (ILO 111)

Australia has voluntarily agreed to comply with the provisions of all of these treaties. However, a treaty only becomes legally binding in Australia when it is directly incorporated by domestic legislation. A range of Australian laws have sought to incorporate aspects of the ICCPR, CRC, ILO 111 and ICESCR, but none of the treaties have been incorporated in their entirety.

However, the Commonwealth Parliament has enacted the *Human Rights and Equal Opportunity Commission Act 1986* (Cth) (HREOC Act), which empowers the Human Rights and Equal Opportunity Commission (HREOC) to examine whether Australia is complying with its obligations under the ICCPR, the CRC and ILO 111. HREOC also has a statutory responsibility to promote public understanding and acceptance of human rights in Australia.

This Inquiry examines whether Australia's laws relating to financial and work-related entitlements comply with the ICCPR, the CRC and ILO 111 when applied to same-sex couples and their children. The Inquiry also considers the impact of discriminatory laws on the ability of same-sex couples and their children to realise their rights under the ICESCR.

3.2.1 International Covenant on Civil and Political Rights

The ICCPR protects the fundamental civil and political rights of all people. The provisions of the ICCPR which are relevant to this Inquiry are:

- right to non-discrimination (article 2(1))
- right to an effective remedy for a breach of human rights (article 2(3))
- right to the protection of the law without discrimination (article 26)
- right to privacy (article 17)
- right to family (article 23)
- rights of the child (article 24).

The United Nations Human Rights Committee (the Human Rights Committee), is responsible for monitoring compliance with the ICCPR and providing guidance about how to interpret ICCPR rights. HREOC also monitors Australia's compliance with the ICCPR.¹

3.2.2 Convention on the Rights of the Child

The CRC adapts the rights set out in the ICCPR and the ICESCR to the needs of children. It also creates specific rights that recognise children's unique needs. The provisions of the CRC which are relevant to this Inquiry are:

- right to non-discrimination (article 2)
- best interests of the child must be a primary consideration in all decisions about children (article 3)
- right to know and be cared for by parents (article 7)
- right to identity (article 8)
- right to privacy (article 16)
- recognition of parents' joint responsibilities (to be assisted by the state) (article 18)
- best interests of child must be the paramount consideration in adoption (article 21)
- right to the highest attainable standard of health (article 24)

- right to benefit from social security (article 26)
- right to an adequate standard of living (article 27).

The United Nations Committee on the Rights of the Child (the Children's Rights Committee), is responsible for monitoring compliance with the CRC and providing guidance on the interpretation of the CRC. HREOC also monitors Australia's compliance with the CRC.²

The CRC also recognises the special competence of the United Nations Children's Fund (UNICEF) to provide expert advice about the implementation of the CRC.³ The UNICEF *Implementation Handbook for the Convention on the Rights of the Child* (UNICEF Implementation Handbook) helps explain how the CRC's provisions should be interpreted.

3.2.3 International Covenant on Economic, Social and Cultural Rights

The ICESCR is the main treaty dealing with the economic, social and cultural rights of all people. Article 2(1) of the ICESCR requires State Parties to take steps, especially legislative measures, to achieve the progressive realisation of ICESCR rights.

While the ICESCR acknowledges that the obligations of State Parties are subject to 'progressive realisation' and available resources, the obligation of State Parties to undertake to guarantee ICESCR rights without discrimination (article 2(2)) is of immediate effect.⁴

The rights in ICESCR which are relevant to this Inquiry include:

- right to non-discrimination (article 2(2))
- right to just and favourable conditions of work (article 7)
- right to social security (article 9)
- right to protection and assistance for the family (article 10)
- right to an adequate standard of living (article 11)
- the right to health (article 12).

The United Nations Committee on Economic Social and Cultural Rights (the ESCR Committee) monitors compliance with the ICESCR and provides guidance on how countries should interpret the ICESCR.

3.2.4 Discrimination (Employment and Occupation) Convention (ILO 111)

The ILO 111 requires Australia to take all appropriate steps to eliminate discrimination on a range of grounds and ensure equality of opportunity and treatment in employment.

The ILO 111 provides that countries can add to the list of grounds on which discrimination is prohibited. In 1989, Australia added discrimination on the grounds of sexual preference to that list.⁵

Part II, Division 4 of the HREOC Act provides for a range of functions to be exercised by HREOC in relation to ILO 111 discrimination. Those functions include inquiring into acts

or practices that may constitute discrimination in the workplace on the grounds of sexual orientation.⁶

However, while HREOC is empowered to make recommendations to remedy discrimination, including for payment of compensation, these recommendations are not enforceable.⁷

3.3 Does the right to non-discrimination protect same-sex couples?

The right to non-discrimination and the right to equality before the law are fundamental principles of international human rights law.

Laws which have the purpose or effect of denying same-sex couples financial benefits and entitlements available to opposite-sex couples will be discriminatory, unless they serve a legitimate purpose and can be justified on reasonable and objective grounds.

Many of Australia's laws exclude same-sex couples from financial and work-related entitlements and benefits that are enjoyed by opposite-sex couples, for no readily apparent reason.

For example, same-sex couples are not eligible for a range of rebates and tax concessions that are available to opposite-sex couples. There is no justifiable reason for this discrimination.

Discriminatory laws not only interfere with the rights of same-sex couples to enjoy equal protection of the law, they can interfere with the ability of same-sex couples to enjoy many other rights set out in international human rights treaties. These 'flow-on' effects are discussed throughout this chapter.

3.3.1 The umbrella non-discrimination rights in human rights treaties

All of the major human rights treaties begin by stating that all people should enjoy all the rights set out in the treaty without discrimination of any kind. For example, article 2(1) of the ICCPR states that:

Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, *sex*, language, religion, political or other opinion, national or social origin, property, birth or *other status*. (emphasis added)

Similarly, article 2(2) of ICESCR says that all people should enjoy the rights set out in ICESCR without discrimination.

Article 2(1) of the CRC says that all children should enjoy the rights in the CRC without discrimination of any kind, irrespective of the child's or his or her parent's or legal guardian's race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status.

These articles are described as 'umbrella clauses' because they apply to all of the other rights set out in the relevant treaty.⁸ In other words, they require Australia to guarantee all the 'stand alone' rights within a treaty without discrimination.

Where there is discrimination in relation to the recognition or enjoyment of a ‘stand alone’ right, there will be a breach of that stand alone right *in conjunction with* the right to non-discrimination.

For example, if a law denies protection to a same-sex family which is available to an opposite-sex family, this will be a breach of the right to the protection of the family (article 23(1), ICCPR) in conjunction with the right to non-discrimination (article 2(1), ICCPR).

3.3.2 The right to equal protection of the law without any discrimination

In addition to article 2(1) in the ICCPR, article 26 of the ICCPR protects the right to equality before the law and the right to the equal protection of the law without any discrimination.

The right to equality before the law guarantees equality with regard to the enforcement of the law. The right to the equal protection of the law without discrimination is directed at the legislature and requires State Parties to prohibit discrimination.⁹

Article 26 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*. (emphasis added)

Article 26 is broader than article 2(1) because it is a stand alone right which forbids discrimination in *any law* and in *any field regulated by public authorities*, even if those laws do not relate to a right specifically mentioned in the ICCPR.¹⁰

For example, if social security legislation discriminates against same-sex couples it will breach Australia’s obligations under article 26 of the ICCPR even though the legislation relates to social security (which is a right otherwise protected by ICESCR).

3.3.3 Non-discrimination protections for children

Article 2(1) of the CRC provides that Australia must ensure children can enjoy their CRC rights without discrimination. Article 2(2) of the CRC goes a step further and requires Australia to ensure that a child is protected against ‘all forms of discrimination’ based on the status or activities of their parents.

In other words, article 2(2) of the CRC creates a stand alone right which protects children from suffering any discrimination on the basis of the status of their parents – including the sexual orientation of their parents. This is discussed further below in section 3.5.

3.3.4 Non-discrimination protections in the workplace

(a) *Protection from discrimination under ILO 111*

The protection provided by ILO 111 against discrimination is different to the protections in the ICCPR, CRC and ICESCR. This is because ILO 111 focuses purely on non-discrimination in employment and occupation.

Article 1(a) of ILO 111 defines discrimination as:

...any distinction, exclusion or preference made on the basis of race, colour, sex, religion, political opinion, national extraction or social origin, which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation...

Australia has specifically added 'sexual preference' to the grounds of discrimination prohibited under ILO 111.

Article 2 of ILO 111 requires Australia to:

...declare and pursue a national policy designed to promote, by methods appropriate to national conditions and practice, equality of opportunity and treatment in respect of employment and occupation, with a view to eliminating discrimination in respect thereof.

Article 3(b) of ILO 111 requires Australia to enact legislation which reflects this policy of non-discrimination and equal opportunity, while article 3(c) requires Australia to repeal any statutory provisions which are inconsistent with the policy.

(b) Protection from discrimination under ICESCR

Article 7 of ICESCR also specifically protects against non-discrimination in the workplace, by setting out 'the right to fair wages and equal remuneration for work of equal value without distinction of any kind' and providing for 'equal opportunity for everyone to be promoted in employment, subject to no considerations other than those of seniority and competence'.

3.3.5 Protection against discrimination on the grounds of sexual orientation

None of the non-discrimination articles in any of the ICCPR, CRC or ICESCR treaties specifically mention 'sexual orientation' or 'sexuality' in the prohibited grounds of discrimination. However, all of those articles forbid discrimination on the basis of 'sex' or 'other status'. And it appears that the UN treaty bodies interpreting those provisions agree that the right to non-discrimination includes protection from discrimination on the grounds of sexual orientation.

The Human Rights Committee has considered two cases from Australia (*Toonen v Australia* and *Young v Australia*) which make it clear that one or the other of these categories ('sex' or 'other status') protects people from discrimination on the basis of sexual orientation under the ICCPR. These cases are discussed further below.

The *Young* case is particularly relevant to this Inquiry because it is authority for the proposition that a law differentiating between same-sex and opposite-sex de facto couples in accessing financial entitlements will generally be discrimination for the purposes of article 26 of the ICCPR.¹¹

The Human Rights Committee has also emphasised the obligation of all parties to the ICCPR to provide 'effective protection' against discrimination based on sexual orientation.¹²

Further, the ESCR Committee has explicitly stated that discrimination on the grounds of sexual orientation is prohibited under article 2(2) of the ICESCR.¹³ The Committee on the Rights of the Child has also indicated that the CRC prohibits discrimination on the grounds of sexual orientation.¹⁴

3.3.6 ‘Sex’ discrimination vs discrimination on the grounds of an ‘other status’

The cases of *Toonen* and *Young* are authority for the statement that the ICCPR prohibits discrimination on the grounds of sexual orientation. However, neither case clarifies whether the prohibited discrimination is on the basis of ‘sex’ or an ‘other status’.

(a) *Toonen v Australia*

In 1991 Mr Toonen challenged Tasmanian laws which criminalised consensual homosexual acts, even when they occurred in a private home.¹⁵ The Human Rights Committee found that the laws breached the right to privacy (article 17(1) of the ICCPR) and the right to non-discrimination (article 2(1)) of the ICCPR.

The Committee did not make a finding about whether the Tasmanian laws breached the right to equal protection under the law (article 26), since it had already found that there was discrimination in the application of the right to privacy (articles 2(1), 17(1) of the ICCPR).

The Committee found that the reference to ‘sex’ in articles 2(1) and 26 of the ICCPR, includes sexual orientation.¹⁶ However, the Committee did not address whether discrimination on the grounds of sexual orientation might also fall under the ‘other status’ category – despite a specific request by Australia to do so.¹⁷

The Human Rights Committee’s recommendation that the Tasmanian laws be repealed was implemented through the introduction of the *Human Rights (Sexual Conduct) Act 1994* (Cth). This Act was introduced after a constitutional legal battle between Mr Toonen’s partner, Mr Rodney Croome, and the then Tasmanian government.¹⁸

(b) *Young v Australia*

In 1999, Mr Young challenged Commonwealth laws that denied him the right to receive a veterans’ pension because he was gay.¹⁹

Mr Young was in a 38 year relationship with his partner, Mr C, who was a war veteran. When Mr C died, Mr Young applied for a veterans’ pension under the *Veterans’ Entitlements Act 1986* (Cth) (Veterans’ Entitlements Act). The Department of Veterans’ Affairs denied his pension application because a same-sex partner does not qualify as a veteran’s ‘dependant’, even though an opposite-sex de facto partner does qualify.

The Human Rights Committee found no reasonable or objective reasons for denying Mr Young the pension. It concluded that the distinction between the treatment of opposite-sex couples and same-sex couples under the Veterans’ Entitlement Act was discrimination in breach of article 26 of the ICCPR.²⁰

As in the *Toonen* case, the Human Rights Committee did not clarify whether the discrimination in Mr Young’s case was on the basis of ‘sex’ or ‘other status’. The Committee said the following in this regard:

The Committee recalls its earlier jurisprudence that *the prohibition against discrimination under article 26 comprises also discrimination based on sexual orientation...* the Committee finds that [Australia] has violated article 26 of the Covenant by denying [Mr Young] a pension on the basis of his *sex or sexual orientation*.²¹ (emphasis added)

One way of reading this passage is that the Human Rights Committee is suggesting that 'sexual orientation' is a subset of 'sex' discrimination. Another way of reading the passage is that 'sexual orientation' is *either* a subset of 'sex' *or* it is something in addition to 'sex' discrimination, namely discrimination on the grounds of any 'other status'. It is unclear which interpretation was intended by the Committee.

To date, the Committee's recommendation that the Australian government amend the veterans' entitlements law to give Mr Young access to a pension has not been adopted.

(c) 'Other status' is the better approach

Some academics suggest that sexual orientation 'seems more properly classified as an 'other status', rather than as an aspect of one's gender.'²²

In practice it may not matter whether discrimination on the grounds of sexual orientation is included in the 'sex' category or the 'other status' category.

However, in the Inquiry's view, it is preferable to distinguish discrimination on the grounds of sexual orientation from discrimination on the grounds of 'sex'. This is because 'sex' discrimination is more about a person's gender than a person's sexuality.

Confusing discrimination on the basis of 'sexual orientation' with discrimination on the grounds of 'sex' minimises the importance of two very different motivations for discrimination.

For example, if a law provides that gay men can access a veterans' pension but lesbian women cannot, then that law would discriminate against lesbian women because they are *women* in a same-sex relationship, not because they are in a same-sex relationship. This would amount to discrimination on the grounds of their 'sex' not their 'sexual orientation'.

On the other hand, if a law provides that a man in an opposite-sex couple can access the veterans' pension but a man in a same-sex couple cannot, then the discrimination is based on the 'sexual orientation' of the men, not their 'sex'.

Distinguishing between 'sex' discrimination and discrimination on the grounds of 'sexuality' is consistent with the treatment of 'sex' discrimination under Australia's *Sex Discrimination Act 1984* (Cth) (Sex Discrimination Act). The Sex Discrimination Act separates the concept of 'sex' discrimination from the concept of 'marital status' discrimination.²³ However, it must be noted that discrimination on the grounds of 'marital status' under the Sex Discrimination Act does not include discrimination against same-sex couples.

3.3.7 Different treatment is not always discriminatory treatment

Different treatment does not always amount to discriminatory treatment.

The Human Rights Committee's General Comment 18 states that for the purposes of interpreting the scope of both article 2(1) and article 26 of the ICCPR, the term 'discrimination':

...should be understood to imply any distinction, exclusion, restriction or preference which is based on any ground such as race, colour, sex, language, religion, political or other opinion,

national or social origin, property, birth or other status, and which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise by all persons, on an equal footing, of all rights and freedoms.²⁴ (emphasis added)

This means that different treatment will only be discrimination if its purpose or effect is to harm or deny a person's rights and freedoms.

The Human Rights Committee has also stated if the grounds for treating one group of people differently to another group are:

- reasonable and objective, and
- the aim is to achieve a purpose which is legitimate under the ICCPR

then there may not be any discrimination.²⁵ This reasoning also applies to the CRC, ICESCR and ILO 111.

Therefore, where there is a difference in treatment between same-sex and opposite-sex couples, it is relevant to consider whether:

- the purpose of the different treatment is legitimate under the relevant treaty
- the differentiation is a reasonable and objective way of achieving that purpose
- the differentiation has, or intends, a negative consequence, namely impairing or nullifying a person's rights and freedoms.

(a) *Different treatment of same-sex and opposite-sex de facto couples is discrimination*

The Inquiry has not been presented with any arguments which suggest that the sexual orientation of a couple is a reasonable and objective justification for differential treatment in the area of financial and work-related entitlements.

The Human Rights Committee, the ESCR Committee, the Children's Rights Committee and the European Court of Human Rights have consistently found that discrimination between people on the grounds of sexuality breaches the relevant human rights treaties.²⁶

Thus, the Inquiry has concluded that Australia's obligations under the ICCPR require Australia to remove all distinctions between same-sex couples and opposite-sex couples in the area of accessing financial and work-related entitlements.

(b) *Different treatment of same-sex and married couples may be discrimination*

The Human Rights Committee has considered the issue of same-sex marriage only once.

In the case of *Joslin v New Zealand* the Committee found that 'a mere refusal to provide for marriage between homosexual couples' does not violate the State Party's obligations under the ICCPR.²⁷

However, if denying the right to marry results in discrimination in the area of financial and work-related entitlements then there may still be a breach of international law.²⁸

Discrimination could occur if financial entitlements and benefits are only available to married couples (and not to de facto opposite-sex couples or same-sex couples). This is

because same-sex couples are unable to meet the threshold requirement (marriage) of accessing the benefits, if same-sex couples cannot marry.

For example, if financial entitlements are only available to a married couple, an opposite-sex couple has the option to marry and therefore obtain those benefits. But a same-sex couple can never obtain those entitlements because they can not meet the 'marriage' requirement.²⁹ This is a form of 'indirect discrimination'.³⁰

In practice, most Australian laws treat married and de facto couples in the same way. Thus this form of discrimination does not frequently arise. However, in those areas where married and de facto couples do have different access to financial entitlements, there will be discrimination against same-sex couples.

3.3.8 The right to a remedy when there is discrimination

Article 2(3) of the ICCPR requires Australia to ensure that same-sex couples can access 'effective remedies' to address human rights violations.³¹

An 'effective remedy' must be enforceable and requires 'reparation to individuals whose Covenant rights have been violated'.³² A failure to investigate allegations of violations can in itself give rise to a separate breach of the ICCPR.³³

A number of submissions to the Inquiry observed there are no effective federal remedies available to people who experience discrimination on the grounds of sexual orientation.³⁴

In particular, discrimination on the grounds of sexual orientation is not unlawful discrimination under federal discrimination law.³⁵

The *Workplace Relations Act 1996* (Cth) makes it unlawful to dismiss someone because of their sexual preference, or for reasons which include their sexual preference.³⁶ While this provides effective remedy for a person who is dismissed on the grounds of their sexual orientation, the remedy is limited to discrimination in the context of dismissal from employment.³⁷

HREOC can investigate discrimination on the grounds of sexual orientation under its statutory powers to:

- investigate complaints of breaches of 'human rights'³⁸ or ILO 111 discrimination³⁹
- determine if laws are inconsistent with human rights⁴⁰ or equal opportunity and treatment in employment⁴¹
- report to the Minister about any action needed to comply with human rights obligations⁴² or ensure equal treatment and opportunity in employment.⁴³

However, HREOC cannot enforce any recommended remedies. The Human Rights Committee has confirmed that this means complaints to HREOC can not be characterised as effective remedies as defined by article 2(3) of the ICCPR.⁴⁴

Where a same-sex couple experiences discrimination and there is no effective remedy for that discrimination, there will be a breach of article 2(3) of the ICCPR.

3.4 Can discrimination against same-sex parents interfere with the right to protection of family?

Some of the laws examined by this Inquiry reflect a narrow view about what constitutes a legitimate family. The failure to include same-sex couples and their children within the definitions of ‘spouse’, ‘member of a couple’, ‘child’, ‘dependant’ and so on, means that that same-sex families miss out on tax, social security, superannuation, Medicare, aged care and other federal financial benefits which are designed to assist members of the legally defined ‘family’, and are available to opposite-sex parents and their children.

The failure to recognise the lesbian co-mother or gay co-father is particularly problematic for same-sex couples who face confusion and uncertainty when attempting to access the financial entitlements available to parents in an opposite-sex couple.

3.4.1 Same-sex families are protected by human rights law

The ICCPR, the CRC and the ICESCR all place a positive obligation on Australia to protect the rights of the family.

The concept of family means different things to different people. But the Human Rights Committee takes the view that the term ‘family’ is not confined by the concept of marriage⁴⁵ and should be interpreted broadly to include a wide variety of living arrangements.⁴⁶

The Human Rights Committee has also stated that when a group of persons is regarded as a family under the legislation and practises of a particular country, that family must be protected under the ICCPR.⁴⁷ A country’s laws cannot:

- Limit the definition of ‘family’ by applying structures or values which breach international human rights standards; nor
- Prescribe a narrower definition of ‘family’ than that adopted within that country’s society.⁴⁸

The Human Rights Committee has set out some minimal requirements for the existence of family including ‘life together, economic ties, [and] a regular and intense relationship’ however it has not sought to impose any strict definitional criteria on the concept of family.⁴⁹

The Committee on the Rights of the Child has also emphasised that the definition of ‘family’ is flexible, stating:

When considering the family environment, the Convention reflects different family structures arising from various cultural patterns and emerging familial relationships. In this regard, the Convention refers to the extended family and the community and applies in situations of nuclear family, separated parents, single-parent family, common-law family and adoptive family.⁵⁰

While none of these statements explicitly include same-sex families, this Inquiry takes the view that same-sex couples and their children are families in the same way as opposite-sex couples and their children are families. This view reflects both the social reality of Australian society (around 20% of lesbians and 5% of gay men in Australia have children)⁵¹ and the broad and flexible definition of family adopted by United Nations treaty bodies.

The Inquiry has received submissions suggesting that same-sex couples and their children should not be recognised as families. The Inquiry rejects this view as contrary both to human rights principles and the reality of modern Australian society.

3.4.2 Discrimination against same-sex couples and parents can interfere with the right to protection of family

Where there is discrimination against same-sex couples or same-sex parents, this may impact on the right to protection of the family as a whole.

Failing to provide protection to a family on the basis of the sexual orientation of one or both parents may result in a breach of article 23(1) of the ICCPR in conjunction with article 2(1).

Further, the ICESCR requires Australia to provide ‘the widest possible protection and assistance’ to the family, ‘particularly for its establishment and while it is responsible for the care and education of dependent children’ (ICESCR, article 10). This includes taking ‘special measures of protection and assistance on behalf of all children and young persons without any discrimination for reasons of parentage or other conditions’.

Denying protection and assistance to same-sex families which is available to opposite-sex families, will breach article 10 in conjunction with article 2(2).

3.4.3 Discrimination against same-sex couples and parents can interfere with the right to privacy, family and home

Laws which interfere with the privacy, family life or home life of same-sex couples or their children, on the basis of the sexual orientation of one or both of the parents, may give rise to a breach of the ICCPR (articles 2(1) and 17) or the CRC (articles 2 and 16).

The ICCPR protects against certain types of interference with a person’s privacy, family and home. Specifically, article 17(1) of the ICCPR states that:

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. (emphasis added)

Article 16(1) of the CRC uses the same language to protect children from arbitrary or unlawful interference with their privacy, family and home.

As noted earlier, the term ‘family’ has been interpreted broadly to ‘include all those comprising the family as understood in the society of the State party concerned.’⁵²

Further, the concept of ‘arbitrary’ interference protects against situations where ‘lawful’ interference contravenes the provisions of the ICCPR.⁵³ In other words, it contemplates a situation where the law itself is the problem.

(a) Examples of the breach of the right to privacy

As noted in section 3.3.6, in the *Toonen* case the Human Rights Committee found that Tasmanian laws criminalising consensual homosexual activity breached the right to privacy

under article 17(1) of the ICCPR. The Committee rejected the argument that the laws were justified on the grounds of public health and morals.⁵⁴

The European Court of Human Rights has also held that laws setting a different age of sexual consent for homosexual activity than heterosexual activity violate the right to privacy (article 8) and the non-discrimination provision of the *European Convention on Human Rights* (ECHR) (article 14).⁵⁵ Article 8 and article 14 of the ECHR substantially reflect articles 2 and 17 of the ICCPR.

(b) Example of the breach of the right to family life

In 1999 the European Court of Human Rights held that a court's decision to deny a gay man custody of his child on the basis of his sexual orientation constituted an interference with the man's family life contrary to article 8 of the ECHR in conjunction with the non-discrimination provision of the ECHR (article 14).⁵⁶

(c) Example of the breach of the right to home life

In 2003 the European Court of Human Rights held the decision to deny a gay man the right to continue occupying his deceased partner's flat (a right available to opposite-sex de facto partners) violated article 8 (respect for home life) and article 14 (non-discrimination) of the ECHR.⁵⁷

3.5 Can discrimination against same-sex parents interfere with the rights of the child?

The lives of children are inextricably bound up with the lives of their parents. The Committee on the Rights of the Child has recognised that 'the human rights of children cannot be realized independently from the human rights of their parents, or in isolation from society at large'.⁵⁸

The exclusion of certain same-sex parents from financial benefits and entitlements may have a negative impact on that family's capacity to protect the best interests of the child.

For example, a child born to a lesbian couple through assisted reproductive technology will not be recognised as the child of the lesbian co-mother under income tax law. This may mean that the lesbian parents will miss out on tax benefits intended to help families support their children.

3.5.1 Discrimination against same-sex parents can amount to discrimination against a child

The CRC requires Australia to ensure that all children can enjoy their rights without discrimination. In particular, Australian children should not suffer any discrimination on the basis of the 'status' of their parents or legal guardians. Article 2(2) of the CRC reads as follows:

States Parties shall take all appropriate measures to ensure that the child is protected against all forms of discrimination or punishment on the basis of the status, activities, expressed opinions, or beliefs of the child's parents, legal guardians, or family members.

The scope of article 2(2) is very broad and requires State Parties to protect the child from discrimination *regardless* of whether such discrimination is related to a right under the CRC.⁵⁹

The Committee on the Rights of the Child has expressly stated that:

- Discrimination on the basis of sexual orientation is discrimination for the purpose of article 2.⁶⁰
- Direct and indirect discrimination against children, their parents, or legal guardians will breach article 2 of the CRC.⁶¹

The Committee on the Rights of the Child has expressed concern that:

[Y]oung children may...suffer the consequences of discrimination against their parents, for example if children have been born out of wedlock or in other circumstances that deviate from traditional values, or if their parents are refugees or asylum seekers.⁶²

In evidence to the Inquiry, Mr Philip Lynch, Director and Principal Solicitor of the Human Rights Resource Law Centre argued:

...discrimination against the same-sex parents or guardians of a child which has an adverse impact on the child (eg, parents unable to access a particular financial entitlement which would have been of benefit to the parents and, by extension, the child) directly engages and violates art 2(2) of the CRC.⁶³

In this Inquiry's view, when laws relating to financial and work-related entitlements of same-sex couples disadvantage the children of those couples, when compared with children of opposite-sex couples, those laws may breach article 2(2) of the CRC.

3.5.2 Discrimination against same-sex parents can interfere with the best interests of the child

The best interests principle set out in article 3(1) is one of the core principles of the CRC.⁶⁴ It provides 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.* (emphasis added)

The best interests principle requires parliament, the executive (including private institutions acting on their behalf) and the judiciary to ensure that the best interests of the child are a primary consideration in all actions concerning children.

Laws which discriminate against same-sex parents may have a negative impact on that couple's child. If such a negative impact is a reasonably foreseeable outcome of a particular law it suggests that the best interests of the child were not a primary consideration in the decision to enact such legislation.

For example, minimum workplace entitlements for Australian employees include parental leave. However, parental leave is only guaranteed to the male partner of a woman who has just given birth. This means that there is no guarantee that a lesbian co-mother can take leave to help her partner through the birth of her child and the first weeks of the child's life.

Given that the purpose of parental leave is to enable a parent to care for a newly born child, and to assist his or her partner in this task, the decision to deny leave to a parent in a same-sex couple does not appear to take into account the best interests of the child as a primary consideration. Such laws are in breach of article 3(1) in conjunction with article 2 of the CRC.

3.5.3 Discrimination against same-sex parents can interfere with the performance of their common responsibilities

Under the CRC Australia is obliged to respect and assist the role of a child's parents in protecting the best interests of the child.

Article 18(1) of the CRC expands on the concept of the responsibilities of parents and requires State Parties to:

...use their best efforts to ensure recognition of the principle that both parents have common responsibilities for the upbringing and development of the child. Parents or, as the case may be, legal guardians, have the primary responsibility for the upbringing and development of the child. The best interests of the child will be their basic concern. (emphasis added)

Article 18(2) goes a step further and imposes an obligation on State Parties to provide appropriate assistance to parents and legal guardians in the performance of their child-rearing responsibilities. The purpose of this assistance is to guarantee and promote all the rights set out in the CRC. Relevantly, article 18(2) states:

For the purpose of guaranteeing and promoting the rights set forth in the present Convention, States Parties shall render appropriate assistance to parents and legal guardians in the performance of their child-rearing responsibilities and shall ensure the development of institutions, facilities and services for the care of children. (emphasis added)

While the UNICEF Implementation Handbook does not specifically refer to the responsibilities and rights of parents in a same-sex couple, it states:

Under the terms of article 18, the law must recognise the principle that **both** parents have **common** responsibility... Government measures should be directed at supporting and promoting the viability of joint parenting. (emphasis in original)⁶⁵

Laws denying benefits and entitlements to a same-sex parent, which are otherwise available to an opposite-sex parent, will breach article 18, in conjunction with article 2 of the CRC.

Further, laws which fail to recognise the lesbian co-mother or gay co-father of a child may breach the obligation to recognise the 'common responsibilities' of 'both parents' under article 18(1).

3.5.4 Discrimination against same-sex parents can interfere with a child's right to identity

The CRC recognises the importance of family relations in forming and preserving the identity of the child.

(a) *A child's right to know and be cared for by his parents*

Under article 7(1) of the CRC a child has a right to be:

...registered immediately after birth and shall have the right from birth to a name, the right to acquire a nationality and, *as far as possible, the right to know and be cared for by his or her parents.* (emphasis added)

Article 7(1) of the CRC reflects the text of article 24(2) of the ICCPR which provides that 'every child shall be registered immediately after birth and shall have a name'. The Human Rights Committee has stated article 24(2) 'is designed to promote the child's legal personality'.⁶⁶

Part of the registration process is to note the parents of the child. This ensures that parents take responsibility for the child and recognises the importance of parents in the development, well-being and maintenance of the child.⁶⁷

There are some Australian states which allow the registration of a lesbian couple on a child's birth certificate and other states which do not. Those states which do not recognise both same-sex parents of a child, in circumstances where both of the heterosexual parents would be recognised, may be in breach of article 7 of the CRC, either independently or in conjunction with article 2. This is discussed further in Chapter 5 on Recognising Children.

(b) *A child's right to preserve his or her identity*

Article 8(1) of the CRC reads as follows:

States Parties undertake to respect the right of the child to preserve his or her identity, including nationality, name and family relations as recognized by law without unlawful interference.

While the UNICEF Implementation Handbook observes the legal meaning of the phrase 'family relations recognised by law' is unclear, it recognises that a child's sense of identity depends on more than just knowing his or her biological parents.⁶⁸

In terms of a child's right to know his or her parents under article 7 and the child's right to preserve his or her identity under article 8, the definition of 'parents' has been interpreted broadly to include, genetic parents, birth parents and psychological parents.⁶⁹

The UNICEF Implementation Handbook states that:

...psychological parents – those who cared for the child for significant periods during infancy and childhood – should also logically be included [in the definition of parents] since these persons too are intimately bound up in children's identity and thus their rights under article 8.⁷⁰

Thus, in the Inquiry's view, the lesbian co-mother or gay co-father of a child should be included under the CRC definition of 'parents'. If an Australian law fails to recognise the

potential significance of such a person it may deny the child's right to know his or her 'psychological parent' or interfere with a child's sense of identity.

For example, the lesbian co-mother of a child born through assisted reproductive technology is not automatically recognised as a parent under the *Family Law Act 1975* (Cth). If the parents separate, the legal rights of the lesbian co-mother may not be recognised. To the extent that this failure to recognise parental status may lead to interference with a child's sense of identity, article 8 may be breached in conjunction with article 2 of the CRC.

3.5.5 Discrimination against same-sex couples in adoption can interfere with the best interests of the child

Article 21 of the CRC requires countries which permit adoption to make sure that the best interests of the child are 'the paramount consideration' in the adoption process. This requirement is even stronger than the principle in article 3(1) of the CRC which requires a child's best interests to be 'a primary consideration'.

The UNICEF Handbook states that article 21 of the CRC establishes that 'no other interests, whether economic, political, state security or those of the adopters, should take precedence over, or be considered equal to, the child's'. This means that 'any regulation [that] fetters the principle could lead to a breach of the Convention – for example inflexible rules about the adopters, such as the setting of age limits...'⁷¹

Australian laws restricting adoption rights to heterosexual individuals or couples may breach article 21 of the CRC in conjunction with article 2. This is because a blanket ban on adoption by same-sex couples prevents an objective case-by-case assessment of what is in an individual child's best interests.

As discussed further in Chapter 5 on Recognising Children, discrimination against same-sex couples in adoption may also lead to discrimination in access to financial entitlements for the benefit of the family. This is because some financial benefits are only available to the birth parents or adoptive parents.

3.6 Can discrimination against same-sex couples interfere with the right to social security?

Most federal social security laws in Australia do not recognise same-sex couples as a genuine relationship.⁷² In some circumstances, this can result in a financial disadvantage for same-sex couples. In other circumstances same-sex couples may receive a financial advantage.

3.6.1 Social security has a broad definition in human rights law

Article 9 of the ICESCR recognises the 'right of everyone to social security, including social insurance'.

According to the ESCR Committee and the ILO, social security includes:

- medical care
- sickness benefits
- unemployment benefits
- old-age benefits
- employment injury benefits
- family benefits
- maternity benefits
- invalidity benefits
- survivors benefits.⁷³

The ESCR Committee draft General Comment on social security confirms the broad scope of the right to social security, stating:

The right to social security covers the right to access benefits, through a system of social security, in order to secure (i) income security in time of economic or social distress; (ii) access to health care and (iii) family support, particularly for children and adult dependants. Economic and social distress includes the interruption of earnings through sickness, maternity, employment injury, old age, invalidity or disability, death or other factor that is either beyond the person's control or would be otherwise inconsistent with the principle of human dignity.⁷⁴

Consistent with the broad scope right to social security, this Inquiry considers the right to social security without discrimination is relevant to the discussions in the following chapters:

- Chapter 8 on Tax
- Chapter 9 on Social Security
- Chapter 10 on Veterans' Entitlements
- Chapter 12 on Health Care
- Chapter 13 on Superannuation.

3.6.2 Discrimination against same-sex couples can interfere with the right to social security

The ESCR Committee's draft General Comment on the interpretation of the right to social security states that the ICESCR:

...prohibits any discrimination on the grounds of race, colour, sex...*sexual orientation* and civil, political, social or *other status*, which has the intention or effect of nullifying or impairing the equal enjoyment or exercise of the right to social security (emphasis added).⁷⁵

The ESCR Committee has also recognised the importance of social security benefits to families, stating that 'family benefits should be provided to families, without discrimination on prohibited grounds.'⁷⁶

The ESCR Committee has urged State Parties to actively take steps to remove discrimination on prohibited grounds, stating '[r]estrictions on access to social security schemes, particularly benefits, should also be reviewed to ensure that they do not discriminate in law or in fact'.⁷⁷

Therefore, excluding same-sex couples from social security benefits may breach the right to social security in article 9 of the ICESCR in conjunction with article 2(2).

3.6.3 Discrimination against same-sex parents can impact on a child's right to benefit from social security

Article 26(1) of the CRC reads as follows:

States Parties shall recognize for every child the right to benefit from social security, including social insurance, and shall take the necessary measures to achieve the full realization of this right in accordance with their national law.

The right of a child to *benefit from* social security under article 26 can be distinguished from article 9 of ICESCR, which recognises a right *to* social security. This distinction 'reflects the fact that children's economic security is generally bound up with that of their adult caregivers'.⁷⁸

As noted above, Australian social security laws do not generally recognise same-sex couples. Given that a child's right to benefit from social security is often inextricable from the rights of his or her parents, legislation which discriminates against same-sex couples or parents, generally also discriminates against a child of the couple. On this basis, Australia may be in breach of article 26 in conjunction with article 2(1) of the CRC.

3.7 Can discrimination against same-sex couples interfere with the right to health?

Australian laws which provide health care and medicine subsidies currently discriminate against same-sex couples. This can have a negative impact on the ability of same-sex couples and families to access health care and medicines.

3.7.1 Discrimination against same-sex couples can interfere with the right to health

Article 12 of ICESCR 'recognises the right of everyone to the enjoyment of the highest attainable standard of physical and mental health'.

The right to health is 'understood as the right to the enjoyment of a variety of facilities, goods, services and conditions necessary for the highest attainable standard of health'.⁷⁹

Article 2 of ICESCR requires that the enjoyment of the rights set out in the ICESCR, including the right to health, must occur without discrimination. The ECSR Committee has expressly stated that the ICESCR:

Proscribes any discrimination in access to health care and underlying determinants of health, as well as to means and entitlements for their procurement, on the grounds of race, colour, sex...sexual orientation... which has the intention or effect of nullifying or impairing the equal enjoyment or exercise of the right to health.⁸⁰

Australian laws denying equal access to financial entitlements which help cover the cost of health care may act as a financial barrier to same-sex couples accessing health care.

This may contravene the right of people in same-sex families to enjoy 'the highest attainable standard of physical and mental health' without discrimination (article 2).

3.7.2 Discrimination against same-sex parents can interfere with a child's right to health

Like article 12 of ICESCR, article 24(1) of the CRC protects the rights of the child to access the highest attainable standard of health.

The Committee on the Rights of the Child has expressed concern about the impact that discrimination, including discrimination on the grounds of sexual orientation, can have on the physical and mental health of the child.⁸¹

The CRC requires Australia to ensure that no child suffers discrimination in the provision of health care as a result of the sexual orientation of the child's parents or legal guardian, or indeed the sexual orientation of the child.

This means that if a same-sex couple is discriminated against in the provision of health services and this discriminatory treatment has a negative impact on the child's capacity to enjoy the 'highest attainable standard of health', there may be a breach of article 24(1) in conjunction with article 2(1).

3.8 How are these human rights principles applied in this report?

This chapter explains the human rights principles applied in the remainder of this report.

The emphasis of this report is on the right to non-discrimination because, as one commentator observed, 'discrimination is at the root of virtually all human rights abuses.'⁸²

Therefore, each of the following chapters identifies whether and how the specific laws breach the right to protection of the law without discrimination on the grounds of sexual orientation. If such discrimination is identified, the Inquiry then examines the impact of that discrimination on other rights protected by the ICCPR, the CRC and the ICESCR.

The findings in each chapter are summarised in the final Chapter 18.

Endnotes

- 1 Since 1986, HREOC has had the powers to investigate alleged violations of the ICCPR, although it has no power of penalty or enforcement. HREOC also has other powers to monitor Australia's compliance with the ICCPR, including the power to examine where federal legislation complies with Australia's obligations under the ICCPR. See *Human Rights and Equal Opportunity Commission Act 1986* (Cth), s 11(1)(e), s 11(1)(f).
- 2 Since 1986, HREOC has had the powers to investigate alleged violations of the CRC, although it has no power of penalty or enforcement. HREOC also has other powers to monitor Australia's compliance with the CRC, including the power to examine where federal legislation complies with Australia's obligations under the CRC. See *Human Rights and Equal Opportunity Commission Act 1986* (Cth), s 11(1)(e), s 11(1)(f).
- 3 *Convention on the Rights of the Child*, article 45.
- 4 ESCR Committee, General Comment 3, (1990), para 1, in *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, UN Doc HRI/GEN/1/Rev.8 (2006) at 15.
- 5 The Human Rights and Equal Opportunity Regulations specifically state that for the purposes of the *Human Rights and Equal Opportunity Commission Act*, 'discrimination' includes discrimination on the grounds of sexual preference. See Human Rights and Equal Opportunity Commission Regulations 1989 (Cth), No 407 4(a)(ix).
- 6 *Human Rights and Equal Opportunity Commission Act 1986* (Cth), s 31(b), 32(1).
- 7 *Human Rights and Equal Opportunity Commission Act 1986* (Cth), s 35(2).
- 8 Manfred Nowak, *UN Covenant on Civil and Political Rights: CCPR Commentary*, N.P. Engel, Strasbourg, 1993, p28.
- 9 Manfred Nowak, *UN Covenant on Civil and Political Rights: CCPR Commentary*, N.P. Engel, Strasbourg, 1993, p473; See also S Joseph, M Castan and J Schultz, *The International Covenant on Civil and Political Rights: Cases, Materials and Commentary*, 2nd ed, Oxford University Press, 2004, p686, para [23.11].
- 10 Human Rights Committee, General Comment 18, (1989), para 12, in *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, UN Doc HRI/GEN/1/Rev.8 (2006) at 185. See also *Broeks v Netherlands*, Communication No 172/1984, UN Doc CCPR/C/OP/2 at 196 (1990).
- 11 See also Human Rights Law Resource Centre, Submission 160.
- 12 Concluding observations of the Human Rights Committee: *El Salvador*, CCPR/CO/78/SLV (2003) at para 16; Concluding observations of the Human Rights Committee: *Philippines*, CCPR/CO/79/PHL (2003) at para 18; Concluding observations of the Human Rights Committee: *United Kingdom of Great Britain and Northern Ireland (Hong Kong)*, CCPR/C/79/Add.57 (1995) at para 13; Concluding observations of the Human Rights Committee: *Poland*, CCPR/C/79/Add.110 (1999) at para 23.
- 13 ESCR Committee, General Comment 18, (2005), para 12(b)(i), in *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, UN Doc HRI/GEN/1/Rev.8 (2006) at 151. See also ESCR Committee, General Comment 14, (2000), para 18, in *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, UN Doc HRI/GEN/1/Rev.8 (2006) at 91.
- 14 Committee on the Rights of the Child, General Comment 3, (2003), para 6, in *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, UN Doc HRI/GEN/1/Rev.8 (2006) at 365.
- 15 *Toonen v Australia*, (488/92) UN Doc. CCPR/C/50/D/488/92, para 2.1.
- 16 *Toonen v Australia*, (488/92) UN Doc. CCPR/C/50/D/488/92, para 8.7.
- 17 *Toonen v Australia*, (488/92) UN Doc. CCPR/C/50/D/488/92, para 8.7.
- 18 *Croome v Tasmania* (1997) 191 CLR 119.
- 19 *Young v Australia*, (941/2000) UN Doc. CCPR/C/78/D/941/2000, para 10.4.
- 20 *Young v Australia*, (941/2000) UN Doc. CCPR/C/78/D/941/2000, para 10.4.
- 21 *Young v Australia*, (941/2000) UN Doc. CCPR/C/78/D/941/2000, para 10.4.

- 22 S Joseph, M Castan and J Schultz, *The International Covenant on Civil and Political Rights: Cases, Materials and Commentary*, 2nd ed, Oxford University Press, 2004, p691, para [23.25]. See also, Castan Centre for Human Rights Law, Submission 126.
- 23 *Sex Discrimination Act 1984* (Cth), ss 5-6.
- 24 Human Rights Committee, General Comment 18, (1989), para 7, in *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, UN Doc. HRI/GEN/1/Rev.8 (2006) at 187.
- 25 Human Rights Committee, General Comment 18, (1989), para 13, in *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, UN Doc. HRI/GEN/1/Rev.8 (2006) at 188. See also *Young v Australia*, (941/2000) UN Doc. CCPR/C/78/D/941/2000, para 10.4.
- 26 The European Court of Human Rights has held that differential treatment based on sexual orientation requires 'particularly serious reasons by way of justification' and must respect the principle of proportionality. See *Karner v Austria* [2003] ECHR 395, 37, 40.
- 27 *Joslin v New Zealand*, (902/1999) UN Doc. CCPR/C/75/D/902/1999.
- 28 In *Joslin*, the separate but concurring opinion of Messrs Lallah and Scheinin noted that 'a denial of certain rights or benefits to same-sex couples that are available to married couples may amount to discrimination prohibited under article 26, unless otherwise justified on reasonable and objective criteria'. See *Joslin v New Zealand*, (902/1999) UN Doc. CCPR/C/75/D/902/1999.
- 29 The Human Rights Committee has held that differential access to benefits available to a married couple and an opposite-sex de facto couple may be reasonable and objective because the opposite-sex de facto couple has the *choice* to marry and access the benefits. See *Young v Australia*, (941/2000) UN Doc. CCPR/C/78/D/941/2000, para 10.4.
- 30 Indirect discrimination occurs when there is a requirement or condition or practice that is the same for everyone but has an unfair effect on a particular group of people. Direct and indirect discrimination are prohibited by the ICCPR.
- 31 Human Rights Committee, General Comment 31, (2004), para 15 in *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, UN Doc HRI/GEN/1/Rev.8 (2006) at 237.
- 32 Human Rights Committee, General Comment 31, (2004), para 16 in *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, UN Doc HRI/GEN/1/Rev.8 (2006) at 237.
- 33 Human Rights Committee, General Comment 31, (2004), para 15 in *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, UN Doc HRI/GEN/1/Rev.8 (2006) at 237.
- 34 See for example Equal Opportunity Commission of Western Australia, Submission 342; Equal Opportunity Commission of Victoria, Submission 327.
- 35 Both the *Charter of Human Rights and Responsibilities Act 2006* (Vic) and the *Human Rights Act 2004* (ACT) prohibit discrimination on the grounds of sexual orientation: see *Charter of Human Rights and Responsibilities Act 2006* (Vic), s 3; *Human Rights Act 2004* (ACT), s 8.
- 36 *Workplace Relations Act 1996* (Cth), s 659.
- 37 The *Workplace Relations Act 1996* (Cth) also directs the Australian Industrial Relations Commission, the Australian Fair Pay Commission and the Office of the Employment Advocate to take into account the need to prevent and eliminate discrimination on a range of grounds, including 'sexual preference': *Workplace Relations Act 1996* (Cth), ss 104(b), 222(1)(e), 151(3)(b), 568(2)(e). The *Workplace Relations Act 1996* (Cth) also provides that awards or award-related orders also must not discriminate on the grounds of 'sexual preference'.
- 38 *Human Rights and Equal Opportunity Commission Act 1986* (Cth), s 11(1)(f).
- 39 *Human Rights and Equal Opportunity Commission Act 1986* (Cth), ss 31(b), 32(1).
- 40 *Human Rights and Equal Opportunity Commission Act 1986* (Cth), s 11(1)(e).
- 41 *Human Rights and Equal Opportunity Commission Act 1986* (Cth), s 31(a).
- 42 *Human Rights and Equal Opportunity Commission Act 1986* (Cth), s 11(1)(j).
- 43 *Human Rights and Equal Opportunity Commission Act 1986* (Cth), s 31(f).

- 44 *C. v Australia*, (900/1999) UN Doc. CCPR/C/76/D/900/1999, para 7.3.
- 45 *Hendriks v Netherlands*, (201/85) UN Doc. CCPR/C/33/D/201/1985, para 10.3. See also S Joseph, J Schultz and M Castan, *The International Covenant on Civil and Political Rights: Cases, Materials and Commentary*, Oxford University Press (2004), p588.
- 46 Human Rights Committee, General Comment 16, (1988), para 5, in *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, UN Doc. HRI/GEN/1/Rev.8 (2006), at 182.
- 47 Human Rights Committee, General Comment 19, (1990), para 2 in *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, UN Doc. HRI/GEN/1/Rev.8 (2006) at 188.
- 48 S Joseph, M Castan and J Schultz, *The International Covenant on Civil and Political Rights: Cases, Materials and Commentary*, 2nd ed, Oxford University Press, 2004, p587, para [20.06].
- 49 *Balaguer Santacana v Spain*, (417/90) UN Doc. CCPR/C/51/D/417/1990, para 10.2.
- 50 Committee on the Rights of the Child, *Report on the fifth session, January 1994*, UN Doc. CRC/C/24/Annex V, p 63. See also discussion in R Hodgkin and P Newell, *Implementation Handbook for the Convention on the Rights of the Child*, UNICEF (2002), p88.
- 51 Australian Bureau of Statistics, *Year Book Australia*, 'Same-Sex Couple Families', p142 (2005).
- 52 Human Rights Committee, General Comment 16, (1988), para 5, in *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, UN Doc. HRI/GEN/1/Rev.8 (2006) at 182.
- 53 Human Rights Committee, General Comment 16, (1988), para 4, in *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, UN Doc. HRI/GEN/1/Rev.8 (2006) at 182.
- 54 *Toonen v Australia*, (488/92) UN Doc. CCPR/C/50/D/488/92, paras 8.4 - 8.6.
- 55 *BB v The United Kingdom* [2004] ECHR 65.
- 56 *Salgueiro da Silva Mouta v Portugal* [1999] ECHR 176
- 57 *Karner v Austria* [2003] ECHR 395.
- 58 Concluding Observations of the Committee on the Rights of the Child: *Uzbekistan*, CRC, CRC/C/111 (2001) 117, para 558.
- 59 R Hodgkin and P Newell, *Implementation Handbook for the Convention on the Rights of the Child*, UNICEF (2002), p35.
- 60 Committee on the Rights of the Child, General Comment 3, (2003), in *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, UN Doc HRI/GEN/1/Rev.8 (2006), at 363; Committee on the Rights of the Child, General Comment 4 (2003), in *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, UN Doc HRI/GEN/1/Rev.8 (2006) at 376.
- 61 Concluding Observations of the Committee on the Rights of the Child: *Libyan Arab Jamahiriya*, CRC, CRC/C/132 (2003) 100 at para 368; Concluding Observations of the Committee on the Rights of the Child: *Morocco*, CRC, CRC/C/132 (2003) 100 at para 479.
- 62 Committee on the Rights of the Child, General Comment 7, (2003), para 12, in *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, UN Doc HRI/GEN/1/Rev.8 (2006), at 437.
- 63 Phillip Lynch, Melbourne Hearing, 27 September 2006.
- 64 R Hodgkin and P Newell, *Implementation Handbook for the Convention on the Rights of the Child*, UNICEF (2002), p39.
- 65 R Hodgkin and P Newell, *Implementation Handbook for the Convention on the Rights of the Child*, UNICEF (2002), p249.
- 66 Human Rights Committee, General Comment 17, (1989), para 7, in *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, UN Doc. HRI/GEN/1/Rev.8 (2006) at 185.
- 67 R Hodgkin and P Newell, *Implementation Handbook for the Convention on the Rights of the Child*, UNICEF (2002), p112.

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- 68 R Hodgkin and P Newell, *Implementation Handbook for the Convention on the Rights of the Child*, UNICEF (2002), p125.
- 69 R Hodgkin and P Newell, *Implementation Handbook for the Convention on the Rights of the Child*, UNICEF (2002), p117.
- 70 R Hodgkin and P Newell, *Implementation Handbook for the Convention on the Rights of the Child*, UNICEF (2002), p117.
- 71 R Hodgkin and P Newell, *Implementation Handbook for the Convention on the Rights of the Child*, UNICEF (2002), p296.
- 72 *Social Security Act 1991* (Cth), s 4(2).
- 73 For the purpose of monitoring State Parties' compliance with article 9 of the ICESCR, the ESCR Committee has adopted the same categories of social security set out in the ILO Social Security (Minimum Standards) Convention 1952 (No.102) (ILO 102).
- 74 ESCR Committee, *Draft General Comment 20*, (2006) UN Doc. E/C.12/GC/20/CRP.1, p1.
- 75 ESCR Committee, *Draft General Comment 20*, (2006) UN Doc. E/C.12/GC/20/CRP.1, p5.
- 76 ESCR Committee, *Draft General Comment 20*, (2006) UN Doc. E/C.12/GC/20/CRP.1, p8.
- 77 ESCR Committee, *Draft General Comment 20*, (2006) UN Doc. E/C.12/GC/20/CRP.1, p5.
- 78 R Hodgkin and P Newell, *Implementation Handbook for the Convention on the Rights of the Child*, UNICEF (2002), p379.
- 79 ESCR Committee, General Comment 14, (2000), para 9, in *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, UN Doc. HRI/GEN/1/Rev.8 (2006) at 88.
- 80 ESCR Committee, General Comment 14, (2000), para 18, in *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, UN Doc. HRI/GEN/1/Rev.8 (2006) at 91.
- 81 Committee on the Rights of the Child, General Comment 4, (2003), para 2, in *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, UN Doc. HRI/GEN/1/Rev.8 (2006) at 377.
- 82 S Joseph, M Castan and J Schultz, *The International Covenant on Civil and Political Rights: Cases, Materials and Commentary*, 2nd ed, Oxford University Press, 2004, p680, para [23.01].



CHAPTER 4:

Recognising Relationships of Same-Sex Couples

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4.1 What is this chapter about?

It is simple to remove discrimination against same-sex couples in laws conferring financial and work-related benefits: amend the definitions describing a couple to include same-sex and opposite-sex couples alike.

The primary source of discrimination against same-sex couples in federal laws conferring financial and work-related entitlements is the way in which terms such as 'spouse', 'de facto spouse', 'partner', 'member of a couple' and other similar terms are defined in legislation. These definitions routinely include an opposite-sex partner and exclude a same-sex partner.

The consequence of these narrow definitions is that same-sex partners are treated differently to opposite-sex partners in a myriad of laws conferring financial and work-related entitlements. This differential treatment is contrary to one of the most fundamental principles of international law: the right to equality.

Some federal legislation has introduced the concept of an 'interdependency relationship' to allow same-sex couples access to selected entitlements which are already available to opposite-sex de facto couples. This new category of relationship has undoubtedly improved access to certain superannuation, employment and visa entitlements for some same-sex couples. But the introduction of a new category of relationship is an unnecessary and overly complicated method of removing discrimination against same-sex couples. It could end up giving financial entitlements to more people than intended. And it suggests that a same-sex relationship is unequal to an opposite-sex de facto relationship. Rather than create a new category of relationship, same-sex couples should be included in the existing category of couple relationships.

Where the definition of 'spouse', 'de facto spouse', 'partner', or 'member of a couple' already includes a person in an opposite-sex couple it should also include a person in a same-sex couple. There is no need to rewrite the entirety of social security, taxation, superannuation, workers' compensation, aged care, migration and other legislation. But there is a need to redefine the way a relationship is recognised under that legislation.

This type of reform has already occurred in all states and territories and it should now occur in the federal jurisdiction.

This chapter discusses how the definitions currently used in federal law exclude same-sex couples. The chapter also considers the new 'interdependency relationship' provisions in federal law and discusses the weaknesses of that approach in addressing discrimination against same-sex couples.

The chapter summarises how all the states and territories have reformed their laws to remove discrimination against same-sex couples. It also considers how the introduction of formal relationship recognition schemes for same-sex couples may assist in accessing financial and work-related entitlements.

Finally, the chapter makes recommendations about how federal law should be amended to remove discrimination against same-sex couples when accessing financial and work-related entitlements.

Specifically, this chapter addresses the following questions:

- Do federal laws giving financial and work-related entitlements currently recognise same-sex relationships?
- Should the 'interdependency' category of relationships be extended to all federal laws?
- How have states and territories removed discrimination against same-sex couples?
- Would formal relationship recognition schemes help same-sex couples access financial and work-related entitlements?
- How should federal law change to ensure same-sex couples can access financial and work-related entitlements?

4.2 Do federal laws giving financial and work-related entitlements currently recognise same-sex relationships?

There is a wide range of federal legislation which uses different definitions of 'spouse', 'de facto spouse', 'marital relationship', 'member of a couple', 'partner' and other terms used to describe a couple. There is also a range of federal legislation which uses terms like 'spouse' and 'de facto spouse' in substantive provisions, but does not define those words.

None of these laws recognise same-sex relationships.

Superannuation and migration legislation and Australian Defence Force instructions have introduced the concept of an 'interdependency relationship'. This new category recognises a relationship where there is an element of interdependency between two people – be it between members of a same-sex couple or any other two people who rely on each other. Legislation including the 'interdependency relationship' category will usually mean that a same-sex couple can access similar entitlements to an opposite-sex couple. But a same-sex couple is sometimes required to meet different criteria to qualify for those entitlements when compared with an opposite-sex couple.

The following sections discuss the different definitions of 'spouse', 'de facto spouse', 'partner', 'member of a couple', 'interdependency relationship' and other such terms, and how they treat a same-sex couple.

The discussion is organised according to the features of the definitions which create the discrimination, rather than the terminology used. The categories are:

- definitions using the words 'opposite sex'
- definitions using the words 'husband or wife'
- definitions using the words 'spouse' or 'de facto spouse'
- definitions using the words 'marriage-like relationship'
- definitions using the words 'interdependency relationship'
- legislation without definitions.

4.2.1 Definitions using 'opposite sex' exclude a same-sex partner

There are some definitions which explicitly use the words 'opposite sex' to identify the second member of a couple. These definitions unambiguously exclude same-sex relationships.

The following are examples of different definitions using these words.

(a) *Definitions of 'spouse' and 'de facto spouse' using 'opposite sex'*

Some definitions of 'spouse', 'de facto spouse' and 'de facto relationship' include a genuine relationship with a person of the 'opposite sex', even though the woman and man are not married.

For example, the *Defence Force (Home Loans Assistance) Act 1990* (Cth) defines a 'spouse' as follows:

a person of the *opposite sex* to the person who lives with the person as his or her *spouse*, on a permanent and bona fide domestic basis, although not legally married to the person.¹ (emphasis added)

The Medicare legislation defines a 'de facto spouse' as:

a person who is living with another person of the *opposite sex* on a bona fide domestic basis although not legally married to that other person.² (emphasis added)

Similarly, the Migration Regulations 1994 (Cth) state that two people will be in a 'de facto relationship' if they are of the opposite sex to each other.³

(b) *Definitions of 'partner' using 'opposite sex'*

The *Military Rehabilitation and Compensation Act 2004* (Cth) relevantly defines a member's 'partner' as follows:

a person of the *opposite sex* to the member in respect of whom at least one of the following applies:

...

(b) the person is legally married to the member;

(c) the person lives with the member as his or her partner on a bona fide domestic basis although not legally married to the member.⁴ (emphasis added)

(c) *Definitions of 'member of a couple' using 'opposite sex'*

Social security legislation, income tax legislation and legislation conferring veterans' entitlements define a 'partner' by reference to a person who is a 'member of a couple'. The definitions of 'member of a couple' specify that the two people are of the 'opposite sex'.

For example, the social security legislation states that a person will be a 'member of a couple' if a person is married, or:

...

(b) all of the following conditions are met:

- (i) the person has a relationship with a person of the *opposite sex* (in this paragraph called the partner);
- (ii) the person is not legally married to the partner;
- (iii) the relationship between the person and the partner is, in the [decision-maker's] opinion (formed as mentioned in subsections (3) and (3A)), a *marriage-like relationship*; ...⁵ (emphasis added)

The legislation goes on to set out criteria of what constitutes a 'marriage-like relationship' (see section 4.2.4 below).

4.2.2 Definitions using 'husband or wife' exclude a same-sex partner

Some definitions of 'spouse', 'de facto spouse' and 'marital relationship' use the words 'husband or wife' to describe the quality of the relationship between an unmarried couple.

In *Gregory Brown v Commissioner of Superannuation*, the Administrative Appeals Tribunal found that the terms 'husband' and 'wife' do not require that a couple be married.⁶ But they do require a woman and man to be involved in the relationship. Specifically, the Tribunal stated:

It is unnecessary for us to determine in these proceedings whether the words 'husband' and 'wife' now include men and women who live together in a de facto relationship without having undergone a formal marriage ceremony. We are inclined to think that they might. If so, the meaning of the words has indeed moved on since the compilation of the Macquarie Dictionary. However, any such movement, if it has occurred, reflects changing social attitudes towards the necessity of undergoing a marriage ceremony in order to have a marital relationship. It does not, in our view, reflect any diminution of the gender connotations in these words.⁷

(a) Definitions of 'spouse' and 'de facto spouse' using 'husband or wife'

Some of the definitions define a 'spouse' or 'de facto spouse' to include a person who is not legally married, but who lives with another person on a genuine domestic basis as '*husband or wife*'.

For example, tax and superannuation legislation uses the following definition of 'spouse':

a person who, although not legally married to the person, lives with the person on a genuine domestic basis as the person's *husband or wife*.⁸ (emphasis added)

Some employment laws use the words 'husband or wife' and 'opposite sex' in the same definition of 'de facto spouse'. For example the *Workplace Relations Act 1996* (Cth) defines a 'de facto spouse' of an employee as:

a person of the *opposite sex* to the employee who lives with the employee as the employee's *husband or wife* on a genuine domestic basis although not legally married to the employee.⁹ (emphasis added)

It is clear that this type of definition excludes a same-sex couple by using the terms 'husband', 'wife' and 'opposite sex' to describe the relationship.

(b) Definitions of 'marital relationship' using 'husband or wife'

Some legislation uses the term 'marital relationship' to describe a genuine relationship between two people, whether or not they are legally married. Those definitions tend to use the words 'husband or wife'.

For example, some superannuation legislation uses the following words to describe a marital relationship:

a person had a *marital relationship* with another person at a particular time if the person ordinarily lived with that other person as that other person's *husband or wife* on a permanent and bona fide domestic basis at that time.¹⁰ (emphasis added)

4.2.3 Definitions using 'spouse' probably exclude a same-sex partner

Some definitions of 'spouse' or 'de facto spouse' include a person who is not legally married, but who lives with another person:

- on a genuine domestic basis as a 'spouse', or
- in a marriage-like relationship.

For example, the *Parliamentary Entitlements Act 1990* (Cth) defines a 'spouse' to include:

a person who is living with the member as the *spouse* of the member on a genuine domestic basis although not legally married to the member.¹¹ (emphasis added)

Although these definitions broaden the coverage of spouse to include a person who is not legally married, they are unlikely to cover a same-sex partner for several reasons.

Firstly, some of the definitions explicitly exclude a same-sex partner by including the words 'opposite sex' as well as 'spouse'.¹²

Secondly, even where the words 'opposite sex' are not used, case law suggests that using the word 'spouse' or 'marriage-like relationship' will exclude a same-sex partner.

In 1998, the Federal Court held in *Commonwealth of Australia v HREOC and Muller* (*Muller's Case*) that living 'as a spouse' meant that a couple, although not married, must be capable of becoming legally married.¹³ Since a same-sex couple cannot marry in Australia, they cannot qualify under a definition using the word 'spouse'.

The reasoning in *Muller's Case* is debatable because heterosexual de facto partners are recognised in numerous federal statutes even if one of them is still in a current legal marriage with another person. Such couples live 'as a spouse' even though they are not able to marry.¹⁴

Further, since 1998, many state laws now define a 'spouse' to include a same-sex partner.¹⁵ So, it could be argued that these developments will change the interpretation of the phrase 'living as a spouse'.

However, based on the law as it stands in *Muller's Case*, using 'spouse' in any part of a definition of a couple in federal law is likely to exclude a same-sex partner.

4.2.4 Definitions using ‘marriage-like relationship’ probably exclude a same-sex partner

The *Aged Care Act 1997* (Cth) uses the words ‘marriage-like relationship’ to define a ‘member of a couple’. A person will be a ‘member of a couple’ if he or she is:

a person who lives with another person in a *marriage-like relationship*, although not legally married to the other person.¹⁶ (emphasis added)

Again, it is arguable that a ‘marriage-like relationship’ could include a genuine same-sex relationship because some state legislation now describes a same-sex and opposite-sex de facto relationship as a ‘marriage-like relationship’.¹⁷ However, the reasoning in *Muller’s Case* suggests that this interpretation is unlikely to be adopted.

The *Social Security Act 1991* (Cth) also uses the words ‘marriage-like relationship’ to help define a ‘member of a couple’.¹⁸ The legislation sets out a range of criteria indicating what amounts to a ‘marriage-like relationship’.¹⁹ While those criteria do not specifically exclude a same-sex relationship, the precursor to considering whether a person is in a ‘marriage-like relationship’ is that he or she is an opposite-sex ‘member of a couple’.²⁰

4.2.5 Laws where there are no definitions probably exclude a same-sex relationship

There is some legislation which uses the term ‘spouse’ without defining the term.²¹ Other legislation uses the term ‘de facto spouse’ without defining that term.²²

While each piece of legislation should be interpreted in the context of its own provisions, it is unlikely that those terms will include same-sex partnerships. This is because the approach taken in *Muller’s Case* to the term ‘spouse’ excludes a same-sex partner. Further, the terms ‘spouse’ and ‘de facto spouse’ are routinely defined in federal legislation in a way that excludes same-sex partners.

4.2.6 An ‘interdependency’ relationship generally includes a same-sex relationship

There are three different areas of federal law which incorporate an ‘interdependency’ category:

- superannuation (and superannuation tax) law
- migration law
- Australian Defence Force instructions relating to certain defence force personnel.

In each of these three areas, the interdependency category was introduced to broaden who would qualify for the relevant entitlements and benefits.²³ These definitions will generally include people in a same-sex relationship. They may also include people in other forms of dependency relationships – for example, two elderly friends or siblings living with, and caring for, each other.

Under migration law and defence force instructions, a same-sex couple seeking to qualify as an interdependency relationship must prove similar relationship characteristics as an

opposite-sex couple.²⁴ However, in superannuation law, the ‘interdependency’ criteria shifts the focus towards a *carer* relationship and away from a couple relationship. This may mean that some same-sex couples will be excluded from superannuation benefits which would be available to an opposite-sex couple in the same circumstances.

The definition of ‘interdependency relationship’ in the *Superannuation Industry (Supervision) Act 1993* (Cth) relevantly reads as follows:

2 persons (whether or not related by family) have an interdependency relationship if:

- (a) they have a close personal relationship; and
- (b) they live together; and
- (c) one or each of them provides the other with financial support; and
- (d) one or each of them provides the other with domestic support and personal care.²⁵

The various interdependency definitions are discussed in more detail in Chapter 6 on Employment, Chapter 13 on Superannuation and Chapter 15 on Migration.

4.3 Should the ‘interdependency’ category of relationships be extended to all federal laws?

As discussed above, the few areas which give equal access to same-sex couples do so through the introduction of an ‘interdependency’ category of relationships.

The introduction of this category has meant that same-sex couples can now access superannuation, migration and certain defence force employment entitlements that were previously denied to them. However, the ‘interdependency’ category has not brought about full equality to same-sex couples.

If the goal of legislative change is to remove discrimination against same-sex couples, then there are several reasons why using an ‘interdependency’ category is inappropriate.

4.3.1 An ‘interdependency’ category will give financial entitlements to people who are not in a couple

Most of the legislation under discussion in this report confines rights to members of a couple. There are very few instances where financial benefits like tax, social security and workers’ compensation are intended to extend to a broader range of non-couple relationships.

Using an ‘interdependency’ relationship as a tool for including same-sex couples could have the unintended consequence of covering non-couple relationships – for example friends or siblings living together and caring for each other in old age.

4.3.2 An 'interdependency' relationship may impose different criteria than a couple relationship

In order to ensure that the 'interdependency' relationship category does not cover too many people, legislation may (and does in the case of superannuation) impose more onerous criteria to qualify for a benefit.

This does not provide equality for same-sex couples because it does not recognise them on the same terms as opposite-sex couples. It may be more difficult for a same-sex couple to qualify for the relevant entitlement than it would be for an opposite-sex couple in the same situation.

4.3.3 An 'interdependency' relationship mischaracterises a same-sex relationship

Some gay and lesbian groups have rejected the use of 'interdependency' to describe their relationships, because it does not characterise same-sex partners as committed and intimate couples.²⁶

The 'interdependency' term suggests that same-sex couples are different to, and lesser than, similarly situated opposite-sex couples. Put another way, it is an *almost* de facto relationship, or a *de facto* de facto relationship.

This is not only insulting to the couple; it imposes an unspoken hurdle in front of a same-sex couple trying to prove the genuineness of the partnership.

James Magel describes his feelings about the term 'interdependency' as follows:

This is a prime example of how federal law discriminates by only allowing the word 'de facto' to apply to heterosexual couples. Furthermore the use of 'interdependent' is a demeaning manner in which to acknowledge a same-sex couple that has been living together for a long time. It is a 'cop out' because the term itself only wishes to acknowledge some interdependency instead of acknowledging that it is a bone fide relationship.²⁷

Miranda Stewart argues that the term 'interdependency' should only be used in relation to non-couples:

While the notion of 'interdependency relationship' in the superannuation law may have a place with respect to non-couple interdependent relationships, it is not an adequate mechanism for recognition of same-sex couples.²⁸

4.3.4 A federal 'interdependency' category creates inconsistencies with state and territory laws

Using an 'interdependency' relationship category instead of a 'de facto' relationship category creates further inconsistencies between federal law and state and territory laws. This can create uncertainty and difficulties for same-sex couples trying to assert their right to financial and work-related entitlements in state, territory and federal jurisdictions.

As discussed in the following section, all states and territories have amended their laws to ensure that same-sex and opposite-sex couples are covered in the same category of relationship – be it 'de facto relationship', 'domestic relationship' or 'significant relationship'.

Some states and territories have also introduced a category of relationship which captures people who are dependent on each other (interdependent) but *not* in a couple.

Creating one category for *people who are in a couple* (irrespective of gender), and another category for *people who are interdependent but not in a couple*, is a more appropriate way to ensure equality for same-sex couples. It is also a better way to contain the scope of entitlements available to people who are not in a couple.

4.4 How have states and territories removed discrimination against same-sex couples?

The way to remove discrimination against same-sex couples is to include same-sex couples in the definitions which already cover opposite-sex couples. This is what occurred in state and territory laws as a result of law reforms taking place between 1999 and 2006.

As described in more detail below, each state and territory enacted legislation which simultaneously amended a wide range of existing legislation (omnibus legislation). In each case, the amending legislation identified and amended (or replaced) definitions relating to *de facto* couples, which otherwise failed to include same-sex couples.

The effect of these reforms is that, in almost all circumstances, same-sex and opposite-sex couples can access the same state and territory financial and work-related entitlements. Where differences still exist they have been noted elsewhere in this report.

There is also a far higher degree of consistency in the definitions used within and between states and territories. ‘*De facto relationship*’ and ‘*de facto partner*’ are the most commonly used terms in state and territory law. The meaning of these terms is well understood and the courts have developed case law around borderline determinations which dates back to the 1980s.²⁹

The state and territory reform process provides a useful model for federal law reform. In particular, it is worth noting that the states and territories did not add a category of ‘interdependency’ to cover same-sex couples. Rather, they made sure that the definitions of ‘*de facto*’, ‘*domestic*’ or ‘*significant*’ relationships include same-sex couples and opposite-sex couples alike.

4.4.1 NSW reforms (1999)

In NSW, the *Property (Relationships) Legislation Amendment Act 1999* (NSW) inserted a new definition of ‘*de facto relationship*’ into what was the *De Facto Relationships Act 1984* (NSW) (now the *Property (Relationships) Act 1984* (NSW)) and amended around 20 other pieces of legislation.

These amendments introduced the terms ‘*de facto relationship*’ and ‘*de facto partner*’. A ‘*de facto relationship*’ is now defined in NSW as:

a relationship between two adult persons:

- (a) who live together as a couple, and
- (b) who are not married to one another or related by family.³⁰

There are also criteria setting out what will constitute a ‘de facto relationship’.³¹

As a result of these amendments, in some NSW legislation, ‘spouse’ is now defined to include a party to a ‘de facto relationship’. Thus, in some circumstances, a same-sex partner will be accessing benefits available to a ‘spouse’ even though the couple are not married and have no possibility of marrying under federal law.³²

In 2000, the NSW Parliament amended its superannuation legislation to ensure equal access for same-sex couples.³³ In 2002, the *Miscellaneous Acts Amendment (Relationships) Act 2002* (NSW) amended around 25 additional laws to include same-sex couples.³⁴

The NSW Law Reform Commission and NSW Anti-Discrimination Board have both identified further areas for reform.³⁵

4.4.2 Victorian reforms (2001)

In 2001, the Victorian Parliament introduced two pieces of amending legislation – the *Statute Law Amendment (Relationships) Act 2001* (Vic) and the *Statute Law Further Amendment (Relationships) Act 2001* (Vic). Together they amended around 60 enactments, introducing the term ‘domestic partner’ and replacing definitions of ‘de facto spouse’ and in some instances ‘spouse’.³⁶ In some legislation, the term ‘domestic partner’ has been inserted as an additional definition of a relationship.

A ‘domestic partner’ of a person is now defined in Victorian law as:

a person with whom the person is or has been in a domestic relationship.³⁷

A ‘domestic relationship’ means:

the relationship between two people who, although not married to each other, are living or have lived together as a couple on a genuine domestic basis (irrespective of gender).³⁸

There are also criteria setting out what will constitute a ‘domestic relationship’.³⁹

The *Statute Law Amendment (Relationships) Act 2001* (Vic) also adds a new category of relationship to certain laws for couples who do not live with each other. This category is also called ‘domestic partner’:

‘domestic partner’ of a person means an adult person to whom the person is not married but with whom the person is in a relationship as a couple where one or each of them provides personal or financial commitment and support of a domestic nature for the material benefit of the other, irrespective of their genders and whether or not they are living under the same roof, but does not include a person who provides domestic support and personal care to the person—

(a) for fee or reward; or

(b) on behalf of another person or an organisation (including a government or government agency, a body corporate or a charitable or benevolent organisation).⁴⁰

This definition applies to health-related legislation, legislation dealing with criminal law and consumer and business legislation.

The submission from the Equal Opportunity Commission of Victoria identifies further areas for reform in the future.⁴¹

4.4.3 Queensland reforms (2002)

In 2002, the *Discrimination Law Amendment Act 2002* (Qld) amended a wide range of existing Acts to introduce the term ‘de facto partner’ as a category of ‘spouse’ or to replace the term ‘de facto spouse’ with ‘de facto partner.’⁴² The new definition of ‘de facto partner’ (which is very similar to the NSW definition) is as follows:

either 1 of 2 persons who are living together as a couple on a genuine domestic basis but who are not married to each other or related by family.⁴³

There are also criteria setting out what will constitute a ‘de facto partner.’⁴⁴

Importantly, these amendments also made changes to the *Acts Interpretation Act 1954* (Qld). This Act now says that any reference to a ‘spouse’ in other legislation includes a ‘de facto partner’ unless the particular legislation expressly states the contrary.⁴⁵ Thus, a same-sex partner in Queensland now has access to entitlements available to a ‘spouse’.

The submission from the Anti-Discrimination Commission Queensland identifies further potential areas for reform.⁴⁶

4.4.4 Western Australian reforms (2002–2003)

In 2002 and 2003, the Western Australian Parliament passed the *Acts Amendment (Lesbian and Gay Reform) Act 2002* (WA) and the *Acts Amendment (Equality of Status) Act 2003* (WA). These Acts removed discriminatory definitions from many pieces of Western Australian legislation. This was largely done through introducing the terms ‘de facto partner’ and ‘de facto relationship’, for example by replacing the words ‘de facto spouse’ with ‘de facto partner.’⁴⁷

Unlike other states, the definition of ‘de facto relationship’ under the *Interpretation Act 1984* (WA) refers to a ‘marriage-like relationship’ as follows:

a relationship (other than legal marriage) between 2 persons who live together in a marriage-like relationship.⁴⁸

A later subsection clarifies that the two persons can be of the same sex.⁴⁹

There are also criteria setting out what will constitute a ‘de facto relationship.’⁵⁰

In some cases, these amendments gave same-sex couples the same entitlements as a ‘spouse’, by including a ‘de facto partner’ in the definition of ‘spouse’ or inserting a reference to a ‘de facto partner’ directly after a reference to ‘spouse.’⁵¹

A number of people spoke to the Inquiry about the positive impact of de facto laws in Western Australia.⁵²

4.4.5 Northern Territory reforms (2003)

In 2003, the Northern Territory Parliament enacted the *Law Reform (Gender, Sexuality and De Facto Relationships) Act 2003* (NT). That legislation amended Northern Territory legislation by redefining the term ‘de facto partner’ to include same-sex couples.

Northern Territory law had already established a distinction between the definition of 'spouse' (people who are married) and the definition of a de facto 'partner' (people who are not married) so the legislative terminology did not need to change, just the scope of the definition of de facto 'partner'.⁵³

The new definition of de facto partner is similar to the definition used in WA, in that it refers to a 'marriage-like relationship':

2 persons are in a de facto relationship if they are not married but have a marriage-like relationship.⁵⁴

A later subsection clarifies that the two persons can be of the same sex.⁵⁵

There are also criteria setting out what will constitute a 'de facto relationship'.⁵⁶

4.4.6 Tasmanian reforms (2003)

In 2003, the Tasmanian Parliament amended around 70 laws through the *Relationships Act 2003* (Tas) and the *Relationships (Consequential Amendments) Act 2003* (Tas).⁵⁷

There are three main differences between the Tasmanian reforms and the reforms in other states and territories.

Firstly, the Tasmanian legislation is the only one that uses the term 'significant relationship' to describe an unmarried couple.⁵⁸

Secondly, the Tasmanian reforms introduce a relationship register alongside the introduction of the term 'significant relationship'.⁵⁹ A couple (same-sex or opposite-sex) who registers their relationship as a significant relationship will have prima facie proof of the existence of that relationship.⁶⁰

Thirdly, Tasmanian law does *not* require the couple to live together in order to prove a significant relationship. This is probably because of the registration scheme. A registered couple has prima facie proof of the existence of their relationship, so cohabitation need not be a fundamental element of proving a 'significant relationship'.

The definition of 'significant relationship' is:

a relationship between two adult persons –

- (a) who have a relationship as a couple; and
- (b) who are not married to one another or related by family.⁶¹

There are also criteria setting out when a 'significant relationship' exists even if the relationship has not been registered.⁶²

4.4.7 Australian Capital Territory reforms (2003–2004)

Although the ACT Parliament had already made some legislative amendments in 1994, more sweeping reforms occurred in 2003 and 2004.⁶³

The *Legislation (Gay, Lesbian and Transgender) Amendment Act 2003* (ACT) and the *Sexuality Discrimination Legislation Amendment Act 2004* (ACT) together amended a wide range of ACT legislation. Among the amendments was the replacement of the term 'spouse' with 'domestic partner'.⁶⁴

The definition of 'domestic partnership' is very similar to the definition of 'de facto partnership' in other states except that it explicitly includes people of the same sex. The definition reads as follows:

the relationship between 2 people, whether of a different or the same sex, living together as a couple on a genuine domestic basis.⁶⁵

An earlier subsection provides that 'domestic partner' refers to a person who lives with another person in a 'domestic partnership' and also a spouse.⁶⁶ There are also criteria setting out what will constitute a 'domestic relationship'.⁶⁷

4.4.8 South Australian reforms (2006)

South Australia was the last state to enact reforms in the area of de facto relationships. The *Statutes Amendment (Domestic Partners) Act 2006* (SA) was assented to on 14 December 2006. However, the Act had not come into force as at 10 April 2007.

The legislation will amend around 90 South Australian enactments by introducing the concept of a 'domestic partner', which is defined as follows:

A person is, on a certain date, the domestic partner of another person if he or she is, on that date, living with that person in a close personal relationship and—

(a) he or she—

(i) has so lived with that other person continuously for the period of 3 years immediately preceding that date; or

(ii) has during the period of 4 years immediately preceding that date so lived with that other person for periods aggregating not less than 3 years; or

(b) a child, of whom he or she and the other person are the parents, has been born (whether or not the child is still living at that date).⁶⁸

The Act also allows for two people to apply to the Court for a declaration of domestic partnership.⁶⁹ However, this declaration has limited impact as:

[i]t must not be inferred from the fact that the Court has declared that 2 persons were domestic partners 1 of the other, on a certain date, that they were domestic partners at any prior or subsequent date.⁷⁰

There are also criteria setting out what will constitute a 'domestic partnership'.⁷¹

4.5 Would formal relationship recognition schemes help same-sex couples access financial and work-related entitlements?

Many submissions to the Inquiry discuss the importance of formal recognition of same-sex relationships through registration schemes, civil unions or marriage.⁷² They also discuss some of the advantages and disadvantages of the different recognition models.

Recent consultations and surveys by a variety of gay and lesbian lobby groups note general support for formal relationship recognition schemes. However, there does not appear to be consensus about the most appropriate way to recognise same-sex relationships when given the choice between registration schemes, civil unions, or same-sex marriage.⁷³

On the other hand, there is absolute consensus that gay and lesbian couples should have the same rights to financial and work-related entitlements as their opposite-sex counterparts. This is the primary goal of this Inquiry.

The following discussion focuses on whether formal systems of relationship recognition of same-sex couples could assist those couples in accessing financial and work-related entitlements. In particular, the discussion highlights how formal relationship recognition may assist a same-sex couple to prove the existence of their relationship for the purposes of accessing financial and work-related entitlements.

The Inquiry recognises that formal relationship recognition is an important issue to many people for reasons other than access to financial entitlements. The recent report of the Gay and Lesbian Rights Lobby (NSW), *All Love is Equal*, highlights that for some people, formal relationship recognition is seen not only as a path to legal rights and equality, but as an important symbolic expression of love between two people.⁷⁴ Several written submissions and many of the people who attended the Inquiry's forums and hearings expressed a similar view.⁷⁵

Further, while only some people in same-sex relationships wish to formalise their relationships through marriage, civil union or registration, many wish to have the option to do so, just like an opposite-sex couple.⁷⁶

These are all valid and important arguments. However, the focus of this Inquiry is on how formal relationship recognition might help or hinder access to financial and work-related entitlements.

4.5.1 Three possible models of relationship recognition

Submissions to the Inquiry discuss three models of formal relationship recognition for same-sex couples:

- relationship registration schemes
- civil unions
- same-sex marriage.

Of these models, only relationship registration currently exists as an option for some same-sex couples in Australia.

(a) *Relationship registration for same-sex couples*

Registration of a relationship does not confer legal rights in itself but it may assist in demonstrating the existence of a de facto relationship.

Tasmania introduced registration for 'significant relationships' under the *Relationships Act 2003* (Tas). Both same-sex and opposite-sex couples can register their relationship.⁷⁷ Some city councils have also introduced relationship registration schemes.⁷⁸

However, it seems that few couples have registered under these schemes.⁷⁹

(b) *Civil union for same-sex couples*

Civil unions may provide greater ceremony and symbolism than relationship registration. However, there is currently no civil union scheme in Australia.

The ACT government introduced legislation for civil unions in early 2006. Shortly after the *Civil Unions Act 2006* (ACT) passed through the ACT Legislative Assembly, it was disallowed by the federal government pursuant to the *Australian Capital Territory (Self-Government) Act 1988* (Cth).⁸⁰

In disallowing the legislation, the federal Attorney-General stated that the civil union scheme proposed by the ACT government was 'deliberately intended to make the ACT arrangements as close as possible to marriage; when the marriage power is clearly vested in the Commonwealth.'⁸¹

On 12 December 2006, the ACT Attorney-General presented the *Civil Partnerships Bill 2006* (ACT) to the ACT Legislative Assembly. The new Bill is similar to the disallowed *Civil Unions Act 2006* (ACT) but with modifications designed to address the concerns expressed by the federal Attorney-General. The Bill uses the term 'civil partnership' to avoid using the language of marriage.⁸² However, the federal Attorney-General has indicated that the new Bill still does not address the federal government's concerns.⁸³

There are various models of civil unions in other countries.⁸⁴

(c) *Marriage for same-sex couples*

In 2004, the federal government amended the *Marriage Act 1961* (Cth) to clarify that 'marriage' is 'the union of a man and a woman to the exclusion of all others.'⁸⁵

Same-sex marriage is permitted in a range of other countries.⁸⁶ However, the *Marriage Amendment Act 2004* (Cth) clarified that same-sex marriages taking place overseas will not be recognised under Australian law.⁸⁷

Marriage is clearly the most politically contentious of the three models. Many of the submissions to the Inquiry emphasised the utmost importance of giving same-sex couples and opposite-sex couples the same right to affirm their relationship in marriage.⁸⁸ Other submissions argued that same-sex marriage: 'promotes different models, values and behaviours' compared to opposite-sex marriage,⁸⁹ is 'highly unstable',⁹⁰ and is not in the best interests of children.⁹¹

4.5.2 Formal recognition can provide evidence of a relationship

While there are many persuasive and valid reasons for introducing formal relationship recognition for same-sex couples, the focus of this Inquiry is on how formal relationship recognition could help a same-sex couple prove the right to financial entitlements.

Sometimes it is difficult for a couple to provide the evidence necessary to prove the criteria for a genuine domestic relationship. This may be particularly difficult for a same-sex couple who has not yet declared their sexuality to friends, family or workplaces for fear of the public reaction. Further, some same-sex couples have told stories of decision-makers who are resistant to the possibility that a same-sex couple can be a genuine couple.

Several people told the Inquiry that a formal 'piece of paper' could assist same-sex couples in proving the genuineness of their relationship and in asserting the rights that flow from such a relationship.

The NSW Law Reform Commission believes that the advantages of registration schemes include greater certainty and recognition. They comment:

Registration has the benefit of certainty. That certainty removes the need for legislative preconditions such as requiring cohabitation. The parties to a relationship can be readily identified, and have demonstrated that they know about, and agree to be bound by, the legislation and its provisions. It would give people who do not wish or are legally unable to marry, such as gay and lesbian couples, the opportunity to have their relationship registered and formally recognised by the State. It also provides a system of recognition for people who do not wish to live together, but want to acknowledge their relationship of mutual support.⁹²

A woman from PFLAG Brisbane told the Inquiry about how civil unions could help her gay son assert his rights under law:

I want the government to relent on the issue of civil unions. It would give my son and his partner instant recognition and give them the rights that the rest of us take for granted.⁹³

Doug Pollard told the Inquiry of the advantages that marriage might have brought him in proving his relationship for visa purposes:

You are accepted as someone's heterosexual partner if you can provide ONE piece of paper – a marriage certificate. To prove our interdependency took a blizzard of paper – bank statements, phone bills, rent receipts, credit card statements, letters, airline tickets, hotel and restaurant bills etc. etc. - and a major intrusion into our private life.⁹⁴

As this example suggests, if a same-sex couple were entitled to marry, those who did in fact marry could by-pass the 'de facto relationship' or 'interdependency relationship' definitions and qualify automatically as a 'spouse'.

4.5.3 Formal relationship recognition is helpful but not necessary to access financial entitlements

Almost all of the financial entitlements discussed throughout this report are available to opposite-sex couples, whether or not they are married. The goal of this Inquiry is to ensure that same-sex couples also have access to all financial entitlements, whether or not they are married.

Even if there were formal relationship recognition schemes for same-sex couples, only some same-sex couples will choose to formalise their relationships. This is no different to opposite-sex couples, only some of whom choose to formalise their relationships.

So, while marriage, civil unions or relationship registration might help some same-sex couples prove a genuine relationship, formal recognition is not, and should not be a necessary prerequisite.

Thus, the following recommendations focus on ensuring that same-sex couples can access the same financial entitlements available to opposite-sex couples – irrespective of formal recognition schemes.

4.6 How should federal law change to ensure same-sex couples can access financial and work-related entitlements?

The primary source of discrimination against same-sex couples is the way in which federal law describes who constitutes a legitimate couple.

Same-sex couples are excluded from all definitions describing a couple-like relationship, except where the ‘interdependency’ category has been introduced. While that category has brought improvements, it still treats same-sex couples differently to opposite-sex de facto couples.

Discrimination will continue for as long as the definitions continue to limit their scope to opposite-sex couples. Discrimination will disappear as soon as the definitions include same-sex couples.

All of the states and territories have enacted broad-based law reform to achieve this goal. They have done this by inserting new definitions of ‘de facto’, ‘domestic’ or ‘significant’ relationship into the relevant state and territory laws. Federal Parliament should also amend the definitions in federal laws to remove discrimination against same-sex couples.

4.6.1 Introduce omnibus legislation replacing discriminatory definitions in federal law

The Inquiry recommends that the federal Parliament enact legislation which ensures that all discriminatory definitions are amended to include same-sex couples. Such legislation should be ‘omnibus’ legislation that simultaneously amends all discriminatory federal laws – including those laws set out in Appendix 1 to this report.

The following sets out two possible ways that this omnibus legislation could amend the laws to remove discrimination. However, the Inquiry prefers the first approach.

(a) *Preferred approach: retain current terminology and introduce the concept of a ‘de facto relationship’*

This first option for amendment is to:

● Same-Sex: Same Entitlements

- retain the current terminology used in federal legislation
- redefine the terminology in the legislation to include same-sex couples
- insert new definitions of 'de facto relationship' and 'de facto partner' which include same-sex couples (as set out in section 4.6.2(b) below).

For example, the *Income Tax Assessment Act 1997* (Cth) currently defines a 'spouse' as follows:

'spouse' of a person includes a person who, although not legally married to the person, lives with the person on a genuine domestic basis *as the person's husband or wife*.⁹⁵ (emphasis added)

This definition has been interpreted to exclude same-sex couples because of the reference to a 'husband or wife'.

There is no need to change the term 'spouse', but it must be redefined to include a same-sex couple. A new definition of 'spouse' could read:

'spouse' of a person includes a person who is in a de facto relationship.

But 'de facto relationship' must also be defined in the legislation to include a same-sex relationship.

The main advantage of this strategy is that minimal changes are required to the existing legislation. For the most part, the only amendments necessary would be in the 'interpretation' or 'definitions' sections in the relevant legislation.

For example, if this approach is adopted, the substantive provisions of the tax legislation which confer rights on a 'spouse' need not be amended, because 'spouse' will remain the term to describe married and unmarried couples. But the term will now also incorporate same-sex couples (and opposite-sex couples) in a 'de facto relationship'.

Appendix 1 to this report sets out the relevant sections which would need to be amended if this approach were taken.

(b) *Alternative approach: change current terminology describing married and unmarried couples*

This alternative approach makes a clearer distinction between the way a married couple is described and an unmarried couple is described, because it amends both the terminology and the substantive provisions. This approach is in line with that taken in several states and territories.

This approach involves:

- narrowing the scope of marriage-related terms to apply only to people who are (or were) legally married (for example 'spouse' only includes a person who is married)
- introducing the terms 'de facto partner' and 'de facto relationship' to apply to unmarried opposite-sex and same-sex couples
- amending all sections conferring substantive entitlements to ensure that they include both the marriage-related terms and de facto-related terms.

There will need to be many more amendments to the existing legislation if this approach is taken, because the substantive provisions relying on current terminology must be amended to recognise the new terminology.

For example, some of the changes which may need to occur pursuant to this approach include:

- Legislation will need to add a new definition of ‘de facto relationship’.
- Where there is currently a definition of ‘spouse’, that term should only describe a person who is legally married; a definition of ‘de facto partner’ should be inserted to cover a person who is unmarried but in a genuine relationship, irrespective of gender.
- Wherever there is a reference to a ‘spouse’ in the substantive provisions of legislation, there should also be a reference to a ‘de facto partner’.
- Wherever there is a reference to a ‘de facto spouse’ that term should be replaced with the term ‘de facto partner’.
- Wherever there is a definition of ‘member of a couple’ that definition should include a person in a ‘de facto relationship’.
- Wherever there is a reference to a ‘marital relationship’ or ‘marriage-like relationship’, ‘de facto relationship’ should either replace that term or be added to that term.
- Wherever there is a reference to a person who lives with another person ‘on a bona fide (or genuine) domestic basis, although not legally married to the employee’, that phrase can be replaced with the phrase ‘in a de facto relationship’.

These are broad guidelines only. There needs to be special care in ensuring that the amendments do not alter the nature of the entitlements described by these terms, other than to put opposite-sex and same-sex de facto relationships on the same footing.

4.6.2 Introduce an inclusive definition of ‘de facto relationship’ into federal law

In developing the following definition of ‘de facto relationship’ the Inquiry has considered definitions and criteria used in state and territory laws; criteria used in federal law definitions of ‘interdependency’; and the criteria for a ‘marriage-like relationship’ in social security law.

(a) *Important features of the model definition*

The Inquiry has used the term ‘de facto’ because it is the most common of the terms used in state and territory law. However, the Inquiry has no strong preference for the term ‘de facto relationship’ above terms such as ‘domestic relationship’ or ‘significant relationship’.

The Inquiry is concerned to ensure that a new definition has the following features:

- **Inclusiveness.** The focus of the definition is on the genuineness of the relationship between two people rather than their gender.
- **Flexibility.** The definition considers a range of factors relevant to a relationship with no one determinative factor. Further, the definition starts with the assumption

that the couple must live together, but allows for the possibility that they may be temporarily separated.

- **Consistency.** The federal definition should be consistent with definitions in state and territory jurisdictions to reduce the uncertainty currently facing same-sex couples.
- **Evidentiary guidelines.** The definition should indicate the type of evidence that can assist a couple in proving the genuineness of the relationship, including statutory declarations and other formal recognition schemes if available.

(b) A model definition of 'de facto relationship' and 'de facto partner'

The following is the definition of 'de facto relationship' which the Inquiry recommends be introduced into federal laws conferring financial and work-related entitlements.

(1) 'De facto relationship' means the relationship between two people living together as a couple on a genuine domestic basis.

(2) In determining whether two people are in a de facto relationship, all the circumstances of the relationship must be taken into account, including any of the following:

- (a) the length of their relationship*
- (b) how long and under what circumstances they have lived together*
- (c) whether there is a sexual relationship between them*
- (d) their degree of financial dependence or interdependence, and any arrangements for financial support, between or by them*
- (e) the ownership, use and acquisition of their property, including any property that they own individually*
- (f) their degree of mutual commitment to a shared life*
- (g) whether they mutually care for and support children*
- (h) the performance of household duties*
- (i) the reputation, and public aspects, of the relationship between them*
- (j) the existence of a statutory declaration signed by both persons stating that they regard themselves to be in a de facto relationship with the other person.*

(3) No one factor, or any combination of factors, under (2) is necessary to establish a de facto relationship.

(4) A de facto relationship may be between two people, irrespective of gender.

(5) Two people may still be in a de facto relationship if they are living apart from each other on a temporary basis.

If the various states and territories adopt a relationship registration scheme (like that which exists in Tasmania), subsection (6) could be added to the definition of 'de facto relationship' along the following lines:

(6) If a relationship is registered under a state or territory law allowing for the registration of relationships, registration is proof of the relationship from that date.

If the various states and territories adopt a civil union scheme, subsection (7) could be added along the following lines:

(7) If two people enter into a civil union under a state or territory law, evidence of that civil union is proof of the relationship from that date.

If relationship registration or civil unions become relevant to the definition, subsection (3) should change to read:

(3) No one factor, or any combination of factors, under (2), (6) or (7) is necessary to establish a de facto relationship.

The Inquiry further recommends the following definition of ‘de facto partner’:

‘de facto partner’ means one of two people in a de facto relationship.

4.6.3 Summary of recommendations

The Inquiry recommends that the federal Parliament amend federal law to ensure equal access to financial entitlements and benefits for all couples – be they married or unmarried, opposite-sex or same-sex.

The federal Parliament should introduce ‘omnibus’ legislation to simultaneously eliminate discrimination against same-sex couples in all federal laws identified in Appendix 1 to this report.

The Inquiry’s preferred approach to amendments is that the omnibus legislation:

- retain the current terminology used in federal legislation
- redefine the current terminology to include same-sex couples
- insert a new definition of ‘de facto relationship’ and ‘de facto partner’ following the model definition in section 4.6.2(b) above.

Endnotes

- 1 *Defence Force (Home Loans Assistance) Act 1990* (Cth), s 3. Examples of legislation using minor semantic variations on this definition: *Corporations Act 2001* (Cth), s 9; *Bankruptcy Act 1966* (Cth), s 5(1); *Pooled Development Funds Act 1992* (Cth), s 4(1).
- 2 *National Health Act 1953* (Cth), s 4.
- 3 Migration Regulations 1994 (Cth), reg 1.15A(2). Note, however, that the Migration Regulations include same-sex couples within the definition of an ‘interdependency relationship’.
- 4 *Military Rehabilitation and Compensation Act 2004* (Cth), s 5.
- 5 *Social Security Act 1991* (Cth), s 4(2); *A New Tax System (Family Assistance) Act 1999* (Cth), s 3(1); *Income Tax Assessment Act 1997* (Cth), s 61.490(1)(b); *Veterans’ Entitlements Act 1986* (Cth), s 5E(2).
- 6 *Gregory Brown v Commissioner of Superannuation* (1995) 21 AAR 378. See also *Re: The Roll-over Relief Claimant and Commissioner of Taxation* [2006] AATA 728.
- 7 See *Gregory Brown v Commissioner of Superannuation* (1995) 21 AAR 378 at [33].
- 8 *Income Tax Assessment Act 1936* (Cth), s 6(1); *Income Tax Assessment Act 1997* (Cth), s 995.1(1); *Fringe Benefits Tax Assessment Act 1986* (Cth), s 136(1). Minor semantic variations: *Passenger Movement Charge Collection Act 1978* (Cth), s 3; *Superannuation Industry (Supervision) Act 1993* (Cth), s 10; *Retirement Savings Accounts Act 1997* (Cth), s 20(2); *Life Insurance Act 1995* (Cth), sch 1, s 8; Foreign Acquisition and Takeovers Regulations 1989 (Cth), reg 2; *Superannuation Act 1990* (Cth), sch 1, r 1.1.1. Definition used as a subset of ‘relative’ in: *Financial Sector (Shareholdings) Act 1998* (Cth), sch 1, s 2; *Insurance Acquisitions and Takeovers Act 1991* (Cth), s 4. Other context: *Income Tax Assessment Act 1936* (Cth), s 251R(2).
- 9 *Workplace Relations Act 1996* (Cth), ss 240, 263. Minor semantic variations: *Sex Discrimination Act 1984* (Cth), s 4(1); *Military Superannuation and Benefits Act 1991* (Cth), sch 1, r 7(4); *Evidence Act 1995* (Cth), Dictionary, pt 1.
- 10 *Superannuation Act 1976* (Cth), s 8A(1); *Defence Force Retirement and Death Benefits Act 1973* (Cth), s 6A(1); *Governor-General Act 1974* (Cth), s 2B(2); *Judges’ Pensions Act 1968* (Cth), s 4AB(1); *Parliamentary Contributory Superannuation Act 1948* (Cth), s 4B(1).
- 11 *Parliamentary Entitlements Act 1990* (Cth), s 3. Minor semantic variations: *Aboriginal Land Grant (Jervis Bay Territory) Act 1986* (Cth), s 37(1); *Aboriginal Councils and Associations Act 1976* (Cth), s 3; *Commonwealth Electoral Act 1918* (Cth), s 4(1); *Safety, Rehabilitation and Compensation Act 1988* (Cth), s 4(1).
- 12 *Defence Force (Home Loans Assistance) Act 1990* (Cth), s 3; *Corporations Act 2001* (Cth), s 9; *Bankruptcy Act 1966* (Cth), s 5(1); *Pooled Development Funds Act 1992* (Cth), s 4(1).
- 13 *Commonwealth of Australia v Human Rights and Equal Opportunity Commission and Anor* [1998] 138 FCA (27 February 1998).
- 14 A number of federal acts discussed in this paper make specific provision for exactly this situation (i.e. where there is both a *de jure* and a *de facto* spouse): see, for example, *Superannuation Act 1976* (Cth), s 110; *Military Superannuation and Benefits Act 1991* (Cth), sch 1, r 47; *Defence Force Retirement and Death Benefits Act 1973* (Cth), s 41; *Parliamentary Contributory Superannuation Act 1948* (Cth), s 21AA.
- 15 For a full discussion of the changes to state and territory laws needed to recognise same-sex couples, see J Millbank, ‘Recognition of Lesbian and Gay Families in Australian Law – Part One: Couples’, *Federal Law Review*, vol 34, no 1, 2006, pp1-35.
- 16 *Aged Care Act 1997* (Cth), s 44.11(b).
- 17 See *Interpretation Act 1984* (WA), s 13A(1); *Commonwealth Powers (De facto Relationships) Act 2003* (NSW), s 3(1); *Commonwealth Powers (De facto Relationships) Act 2003* (Qld), s 3(1); *De facto Relationships (Northern Territory Request) Act 2003* (NT), s 3A(1).
- 18 *Social Security Act 1991* (Cth), s 4(2)(b)(iii).
- 19 *Social Security Act 1991* (Cth), s 4(3)-(3A).
- 20 *Social Security Act 1991* (Cth), s 4(2)(b)(i).

- 21 *Disability Discrimination Act 1992* (Cth); *Financial Transactions Reports Act 1988* (Cth); *Australian Citizenship Act 1948* (Cth); *Foreign States Immunities Act 1985* (Cth); *International Organisations (Privileges and Immunities) Act 1963* (Cth); *Proceeds of Crime Act 2002* (Cth); *Higher Education Funding Act 1988* (Cth); *Higher Education Support Act 2003* (Cth).
- 22 *Age Discrimination Act 2004* (Cth); *Health Insurance Act 1973* (Cth); *Education Services for Overseas Students Act 2000* (Cth); *Broadcasting Services Act 1992* (Cth); *Australian Meat and Live-Stock Industry Act 1997* (Cth); *Financial Transactions Reports Act 1988* (Cth); *Civil Aviation (Carriers Liability) Act 1959* (Cth).
- 23 See Minister for Revenue and the Assistant Treasurer, *Fairer Treatment for Interdependent Relationships*, Media Release, 27 May 2004, concerning superannuation legislation.
- 24 *Migration Act 1958* (Cth), s 238; *Migration Regulations 1994* (Cth), regs 1.09A(2), 1.09A(5)-(6); Australian Government Department of Defence, *Defence Instructions (General) Personnel 53-1* (1 December 2005), issued pursuant to s 9A of the *Defence Act 1903* (Cth), amended the *Defence Instruction (General) Manual* and the *ADF Pay and Conditions Manual*; *Defence Act 1903* (Cth). In order to be recognised, a person *must* first complete a statutory declaration and attach documentary evidence from a prescribed list: see Item 9 and Annex A and B of the Instructions.
- 25 *Superannuation Industry (Supervision) Act 1993* (Cth), s 10A(1). The *Superannuation Industry (Supervision) Regulations 1994* (Cth), reg 1.04AAAA(1), sets out the criteria for satisfying this definition which, although onerous, do not specify the sex of the two people involved in the relationship.
- 26 See ACON, Sydney Hearing, 26 July 2006; Brian Greig, Perth Hearing, 9 August 2006; Law Institute of Victoria, Melbourne Hearing, 26 September 2006; Good Process, Submission 284; Miranda Stewart, Submission 266; Tasmanian Gay and Lesbian Rights Group, Submission 233; Victorian Gay and Lesbian Rights Lobby, Submission 256; Women's Health Victoria, Submission 318.
- 27 James Magel, Submission 245.
- 28 Miranda Stewart, Submission 266.
- 29 See for example, *Roy v Sturgeon* (1986) 11 NSWLR 454; *Weston v Public Trustee* (1986) 4 NSWLR 407. See also Australian De Facto Relationships Cases (looseleaf) (2005) 9-695.
- 30 *Property Relationships Act 1984* (NSW), s 4(1). See also Anti-Discrimination Board of NSW, Submission 317.
- 31 *Property Relationships Act 1984* (NSW), s 4(2).
- 32 See for example *Anatomy Act 1977* (NSW), s 4(2)(d); *Coroners Act 1980* (NSW), s 4(1); *Guardianship Act 1987* (NSW), s 3(1). See also J Millbank, 'Lesbian and Gay Families in Australian Law – Part One: Couples', *Federal Law Review*, vol 34, no 1, 2006, p11.
- 33 The *Superannuation Legislation Amendment (Same Sex Partners) Act 2000* (NSW) amended the *Parliamentary Contributory Superannuation Act 1971* (NSW); *Police Association Employees (Superannuation) Act 1969* (NSW); *Police Regulation (Superannuation) Act 1906* (NSW); *State Authorities Non-contributory Superannuation Act 1987* (NSW); *State Authorities Superannuation Act 1987* (NSW); *Superannuation Act 1916* (NSW). See J Millbank, 'Lesbian and Gay Families in Australian Law – Part One: Couples', *Federal Law Review*, vol 34, no 1, 2006, p13.
- 34 *Miscellaneous Acts Amendment (Relationships) Act 2002* (NSW). See J Millbank, 'Lesbian and Gay Families in Australian Law – Part One: Couples', *Federal Law Review*, vol 34, no 1, 2006, p13. See also Anti-Discrimination Board of NSW, Submission 317.
- 35 NSW Law Reform Commission, *Discussion Paper 44 (2002) - Review of the Property (Relationships) Act 1984* (NSW), <http://www.lawlink.nsw.gov.au/lrc.nsf/pages/dp44chp3#H8>, viewed 1 March 2007; Anti-Discrimination Board of NSW, Submission 317.
- 36 J Millbank, 'Lesbian and Gay Families in Australian Law – Part One: Couples', *Federal Law Review*, vol 34, no 1, 2006, p15. See also Attorney-General of Victoria, Submission 343; Equal Opportunity Commission of Victoria, Submission 327; Law Institute of Victoria, Submission 331; Victorian Gay and Lesbian Rights Lobby, Submission 256.
- 37 *Property Law Act 1958* (Vic), s 275(1).
- 38 *Property Law Act 1958* (Vic), s 275(1).
- 39 *Property Law Act 1958* (Vic), s 275(2).
- 40 See *Statute Law Amendment (Relationships) Act 2001* (Vic), schs 4-6.

- 41 Equal Opportunity Commission of Victoria, Submission 327.
- 42 A large number of amendments also removed references to 'husband' and 'wife' and replaced them with 'spouse'. See, for example, *Discrimination Law Amendment Act 2002* (Qld), ss 53-57, 59. J Millbank, 'Lesbian and Gay Families in Australian Law – Part One: Couples', *Federal Law Review*, vol 34, no 1, 2006, p19. See also Action Reform Change Queensland and Queensland AIDS Council, Submission 270.
- 43 *Acts Interpretation Act 1954* (Qld), s 32DA(1).
- 44 *Acts Interpretation Act 1954* (Qld), s 32DA(2).
- 45 *Acts Interpretation Act 1954* (Qld), s 32DA(6).
- 46 Anti-Discrimination Commission Queensland, Submission 264.
- 47 See for example *Acts Amendment (Equality of Status) Act 2003* (WA), ss 29, 59.
- 48 *Interpretation Act 1984* (WA), s 13A(1).
- 49 *Interpretation Act 1984* (WA), s 13A(3).
- 50 *Interpretation Act 1984* (WA), s 13A(2).
- 51 See, for example, *Acts Amendment (Lesbian and Gay Reform) Act 2002* (WA), ss 69(2), 102; *Acts Amendment (Equality of Status) Act 2003* (WA), ss 40, 48, 63.
- 52 See Rod Swift, Perth Hearing, 9 August 2006; Speaker, Perth Forum, 10 August 2006; Equal Opportunity Commission of Western Australia, Submission 342; Samantha and Kelly Pilgrim-Byrne, Submission 13; The Hon Penny Sharpe MLC, Submission 341; Giz Watson MLC, Submission 262.
- 53 J Millbank, 'Lesbian and Gay Families in Australian Law – Part One: Couples', *Federal Law Review*, vol 34, no 1, 2006, p25.
- 54 *De Facto Relationships Act 1991* (NT), s 3A(1).
- 55 *De Facto Relationships Act 1991* (NT), s 3A(3).
- 56 *De Facto Relationships Act 1991* (NT), s 3A(2).
- 57 J Millbank, 'Lesbian and Gay Families in Australian Law – Part One: Couples', *Federal Law Review*, vol 34, no 1, 2006, p26.
- 58 *Relationships Act 2003* (Tas), s 4(1).
- 59 *Relationships Act 2003* (Tas), pt 2.
- 60 *Relationships Act 2003* (Tas), s 4(2).
- 61 *Relationships Act 2003* (Tas), s 4(1).
- 62 *Relationships Act 2003* (Tas), s 4(3).
- 63 *Domestic Relationships Act 1994* (ACT), s 3(1), introduced the concept of a 'domestic relationship' in the context of property rights. The definition was intended to include same-sex couples. See J Millbank, 'Lesbian and Gay Families in Australian Law – Part One: Couples', *Federal Law Review*, vol 34, no 1, 2006, pp29-30.
- 64 See for example *Legislation (Gay, Lesbian and Transgender) Amendment Act 2003* (ACT), sch 1, amendments 1.23-1.25, 1.32, 1.28, 1.62, 1.55; *Sexuality Discrimination Legislation Amendment Act 2004* (ACT), sch 1, amendments 1.14, 1.55, 1.63.
- 65 *Legislation Act 2001* (ACT), s 169(2).
- 66 *Legislation Act 2001* (ACT), s 169(1).
- 67 *Legislation Act 2001* (ACT), s 169(2).
- 68 *Statutes Amendment (Domestic Partners) Act 2006* (SA), s 5, will insert this definition into the *Family Relationships Act 1975* (SA), s 11A. This Act had not commenced as at 5 April 2007.
- 69 *Statutes Amendment (Domestic Partners) Act 2006* (SA), s 5, will insert this provision into the *Family Relationships Act 1975* (SA), s 11B. This Act had not commenced as at 5 April 2007.
- 70 *Statutes Amendment (Domestic Partners) Act 2006* (SA), s 5, will insert this provision into the *Family Relationships Act 1975* (SA), s 11B(5). This Act had not commenced as at 5 April 2007.
- 71 *Statutes Amendment (Domestic Partners) Act 2006* (SA), s 5, will insert this provision into the *Family Relationships Act 1975* (SA), s 11B(3). This Act had not commenced as at 5 April 2007.

- 72 See Action Reform Change Queensland and Queensland AIDS Council, Submission 270; Associate Professor Jenni Millbank, Submission 27; Australian Coalition for Equality, Submission 228; Australian Marriage Equality, Submissions 238 and 238a; Gay and Lesbian Equality (WA), Submission 251; Gay and Lesbian Rights Lobby (NSW), Submission 333; Lesbian and Gay Solidarity (Melbourne), Submission 89a; Gilbert and Tobin Centre of Public Law, Submission 179; Good Process, Submission 184; Let's Get Equal Campaign (SA), Submission 260; Tasmanian Gay and Lesbian Rights Group, Submission 233a; ALSO Foundation, Submissions 307 and 307f; Victorian Gay and Lesbian Rights Lobby, Submissions 233 and 233a.
- 73 For more discussion on the importance of such schemes to gay and lesbian communities and the advantages and disadvantages of each scheme, see Gay and Lesbian Rights Lobby (NSW), *All Love Is Equal ... Isn't It? The recognition of same-sex relationships under federal law*, Consultation Report, February 2007; R McNair and N Thomacos, *Not Yet Equal*, Report of the Victorian Gay and Lesbian Rights Lobby, Same Sex Relationships Survey 2005, July 2005; Gay and Lesbian Legal Rights Service, *The Bride Wore Pink, Legal Recognition of our Relationships*, Discussion Paper, 2nd ed, February 1994.
- 74 See Gay and Lesbian Rights Lobby (NSW), *All Love Is Equal ... Isn't It? The recognition of same-sex relationships under federal law*, Consultation Report, February 2007; R McNair and N Thomacos, *Not Yet Equal*, Report of the Victorian Gay and Lesbian Rights Lobby, Same Sex Relationships Survey 2005, July 2005; Gay and Lesbian Legal Rights Service, *The Bride Wore Pink, Legal Recognition of our Relationships*, Discussion Paper, 2nd ed, February 1994; K Anthony and T Drabsch, *Legal Recognition of Same-Sex Relationships*, NSW Parliamentary Library Research Service, Briefing Paper No. 9/06, June 2006.
- 75 See Speaker, Adelaide Forum, 28 August 2006; Speaker, Melbourne Forum, 26 September 2006; Speaker, Brisbane Forum, 10 October 2006; Let's Get Equal Campaign (SA), Adelaide Hearing, 28 August 2006; David Bocabella, Submission 4; Ralph Barrand and Douglas Collins, Submission 258.
- 76 See for example, Gay and Lesbian Rights Lobby (NSW), *All Love Is Equal ... Isn't It? The recognition of same-sex relationships under federal law*, Consultation Report, February 2007; R McNair and N Thomacos, *Not Yet Equal*, Report of the Victorian Gay and Lesbian Rights Lobby, Same Sex Relationships Survey 2005, July 2005; Gay and Lesbian Legal Rights Service, *The Bride Wore Pink, Legal Recognition of our Relationships*, Discussion Paper, 2nd ed, February 1994; K Anthony and T Drabsch, *Legal Recognition of Same-Sex Relationships*, NSW Parliamentary Library Research Service, Briefing Paper No. 9/06, June 2006.
- 77 *Relationships Act 2003* (Tas), s 11(1).
- 78 In September 2005, the City of Sydney adopted a Relationships Declaration Program. While making a relationship declaration does not confer legal rights in the way marriage does, it may be used to demonstrate the existence of a de facto relationship within the meaning of the *Property (Relationships) Act 1984* (NSW) and other legislation: City of Sydney, *Relationship Declaration Program Information Pack*, 2005, p2. Melbourne City Council introduced a Relationship Declaration Register on 2 April 2007: City of Melbourne, *Relationship Declaration Register*, <http://www.melbourne.vic.gov.au/info.cfm?top=208&pg=3483>, viewed 20 April 2007.
- 79 As at 1 January 2006, 57 couples had registered a 'significant relationship' in Tasmania. Of these relationships, 45 were same-sex couples (24 gay male and 21 lesbian couples) and 12 were opposite-sex couples: J Millbank, 'Lesbian and Gay Families in Australian Law – Part One: Couples', *Federal Law Review*, vol 34, no 1, 2006, p27. There is evidence of a low take up of registration regimes internationally, 'with a much lower take up by women, and a high urban concentration': K Anthony and T Drabsch, *Legal Recognition of Same-Sex Relationships*, NSW Parliamentary Library Research Service, Briefing Paper No. 9/06, June 2006, pp4-5.
- 80 *Australian Capital Territory (Self-Government) Act 1988* (Cth), s 35(2). See Commonwealth of Australia, Special Gazette No S93, 14 June 2006.
- 81 The Attorney-General, Transcript of Interview, Doorstop Interview, House of Representatives Alcove, Parliament House, Canberra, 13 June 2006, http://www.ag.gov.au/agd/WWW/MinisterRuddockHome.nsf/Page/Interview_Transcripts_2006_Transcripts_13_June_2006_-_Transcript_-_Doorstop_Interview_-_House_of_Representatives_Alcove_-_Parliament_House_-_Canberra, viewed 30 March 2007.

● Same-Sex: Same Entitlements

- 82 Chief Minister, Australian Capital Territory, *Corbell Introduces Civil Partnerships Bill*, Media Release, 12 December 2006, <http://www.chiefminister.act.gov.au/media.asp?media=2031§ion=52&title=Media%20Release&id=52>, viewed 30 March 2007.
- 83 The Attorney-General, *ACT Civil Partnerships Bill does not remove concerns*, Media Release, 6 February 2007. See also The Attorney-General, Transcript, ABC Local Radio Canberra, 7 February 2007, http://www.ag.gov.au/agd/WWW/MinisterRuddockHome.nsf/Page/Interview_Transcripts_2007_Transcripts_7_February_2007_-_Transcript_-_ABC_Local_Radio_Canberra, viewed 30 March 2007.
- 84 Countries with civil unions include Denmark, New Zealand and the UK: K Anthony and T Drabsch, *Legal Recognition of Same-Sex Relationships*, NSW Parliamentary Library Research Service, Briefing Paper No. 9/06, June 2006, pp45-48. See also Public Interest Advocacy Centre (PIAC), Submission 328.
- 85 *Marriage Act 1961* (Cth), s 5(1), amended by the *Marriage Amendment Act 2004* (Cth), sch 1, cl 1.
- 86 Countries with same-sex marriage include Canada, Spain, the Netherlands, and Belgium: K Anthony and T Drabsch, *Legal Recognition of Same-Sex Relationships*, NSW Parliamentary Library Research Service, Briefing Paper No. 9/06, 2006, p41. See also Public Interest Advocacy Centre (PIAC), Submission 328.
- 87 *Marriage Act 1961* (Cth), s 88EA, amended by the *Marriage Amendment Act 2004* (Cth), sch 1, cl 3.
- 88 See Anthony Brien, Submission 64a; Australian Lawyers for Human Rights, Submission 286; Australian Marriage Equality, Submissions 238 and 238a; Castan Centre for Human Rights Law, Monash University, Submission 126; Frank Gomez, Submission 216; Walter Lee, Submission 250a; Russell Pollard, Submission 300; Tasmanian Gay and Lesbian Rights Group, Submission 233a.
- 89 Marriage and Family Office, Catholic Archdiocese of Sydney, Submission 364.
- 90 Festival of Light Australia, Submission 31.
- 91 Festival of Light Australia, Submission 31, Marriage and Family Office, Catholic Archdiocese of Sydney, Submission 364, Lutheran Church of Australia, Submission 494; Australian Family Association, South Australian Branch, Submission 399.
- 92 NSW Law Reform Commission, *Review of the Property (Relationships) Act 1984* (NSW), Discussion Paper 44, 2002, para 2.73, <http://www.lawlink.nsw.gov.au/lrc.nsf/pages/dp44toc>, viewed 30 March 2007. See also K Anthony and T Drabsch, *Legal Recognition of Same-Sex Relationships*, NSW Parliamentary Library Research Service, Briefing Paper No. 9/06, June 2006, p5.
- 93 Person A, Parents and Friends of Lesbians and Gays Brisbane (PFLAG), Brisbane Hearing, 11 October 2006.
- 94 Doug Pollard, Opening Statement, Melbourne Hearing, 27 September 2006.
- 95 *Income Tax Assessment Act 1997* (Cth), s 995-1(1).



CHAPTER 5:

Recognising Children of Same-Sex Couples

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5.1 What is this chapter about?

Protecting the best interests of a child is one of the most important principles of international law and the *Convention on the Rights of the Child* (CRC) in particular. This chapter focuses on whether federal law currently protects the best interests of a child being raised by lesbian or gay parents.

In particular, this chapter examines whether the definitions of ‘child’, ‘dependent child’, ‘dependant’ and other terms describing a family relationship between a parent and child incorporate children being raised in same-sex families.

The way a family is defined by law has enormous impact on the financial and work-related entitlements available to help children and parents. Some entitlements are targeted at parents, to help them financially support their children. Other entitlements are intended to go directly to children themselves – for example when a parent dies. Either way, the primary purpose of these entitlements should be to protect the best interests of the child.

Families headed by same-sex couples already exist in our community. And with the advent of assisted reproductive technology (ART), more and more lesbian and gay couples are having children. While federal laws recognise the relationship between an opposite-sex couple and a child conceived through ART, they do not recognise the relationship between a same-sex couple and a child conceived through ART. In addition, federal laws do not currently contemplate that a lesbian co-mother or gay co-father may well be a child’s primary caregiver despite the absence of biology.

Whether or not same-sex parents or their children can access financial and work-related entitlements under federal law depends on legal presumptions as to who is a person’s child, and their application to legislative definitions of ‘child’, ‘dependent child’, ‘dependant’ and other similar terms.

This chapter gives an overview of the legal presumptions and legislative definitions and considers whether children in same-sex families can enjoy the same financial environment as children in opposite-sex families.

The Inquiry is aware that many people have strong views about whether same-sex couples make appropriate parents. The Inquiry received a number of submissions suggesting that families headed by an opposite-sex couple are the only appropriate form of family.

However, the reality is that same-sex families do exist. And the Inquiry does not accept that one set of parents should have to struggle harder than another set of parents to protect the best interests of their child, purely on the basis of their sexuality. Laws that perpetuate such inequalities are unjust and should be changed. They are also contrary to international human rights law.

This chapter sets out the circumstances under which a same-sex couple may become parents of a child and how federal law currently treats that relationship in the context of financial and work-related entitlements. The chapter then discusses how federal law should be changed to ensure greater protection of the interests of children born to and raised by gay and lesbian couples.

More specifically, this chapter addresses the following questions:

- What is the legal status of child-parent relationships in same-sex families?
- How are same-sex families treated under federal financial laws?
- How are same-sex families treated under state and territory financial laws?
- How should federal law change to protect the best interests of all children?

5.2 What is the legal status of child-parent relationships in same-sex families?

It is important to understand the legal status of parent-child relationships in same-sex families in order to determine how the various federal law definitions of ‘child’, ‘dependent child’ and ‘dependant’ apply to those families.

The most recent Australian census results suggest that approximately 20% of lesbian couples and 5% of gay male couples in Australia are raising children.¹ These child-parent relationships arise in many different ways.

Some children are born to one member of a same-sex couple during an earlier opposite-sex relationship. Many children are born to lesbian couples using donor sperm and ART.² Some children are being born into and raised by gay male couples with the help of a female friend or through a surrogacy arrangement. A few children may be adopted by one or both members of a same-sex couple.

Felicity Martin and Sara Lowe explain how much thought they put into forming a family:

Felicity and I have been in a relationship for 6 years. We have spent 4 years trying to have a family. Two of those years were spent planning and making decisions, for example which clinic, known donor or unknown etc. No children of GLBTI people are born by accident. We go to great lengths and great expense to create these families.³

There are many more ways that a same-sex family may come about. This section does not seek to describe all the family forms in which a particular child may be raised. The following text discusses how family law treats the relationship between a child and his or her same-sex parents.

The Glossary to this report summarises the terms used in this chapter, and in following chapters, to describe the different child-parent relationships.

5.2.1 General family law framework applying to children and their parents

In considering all of the following scenarios, it is important to keep in mind that the *Family Law Act 1975* (Cth) (Family Law Act) makes the best interests of a child a primary consideration in all decisions relating to children.⁴

In assessing the best interests of children, family law looks at the role of ‘both of their parents’ and ‘other people significant to their care, welfare and development.’⁵ In other words, family law operates on the assumption that a child will have one or two legal parents and possibly ‘other people significant to their care.’

(a) Birth parents and adoptive parents are a child's legal parents

Under family law, a child's two legal parents are generally the woman who bears the child (the **birth mother**) and the male partner of the birth mother, if there is one (the **birth father**). These are generally the two people who are recorded on the child's birth certificate as parents, which will be evidence of the legal relationship throughout the child's life.⁶

Alternatively, if a child has been adopted, the child's legal parents will include the parents who adopt him or her.⁷ Adoptive parents can also be added to a birth certificate.⁸

(b) Birth parents and 'other people significant to care' in an opposite-sex family

A child born to an opposite-sex couple will generally have a birth mother and a birth father and both of them will be legal parents.

However, a child being cared for in an opposite-sex family may well have other people significant to their care and welfare.

The 'other people significant to the care' of a child raised by an opposite-sex family are typically the subsequent partners of separated birth parents (**social parents**).⁹ Social parents can formalise their parenting relationship by applying to the Family Court of Australia for a parenting order.¹⁰ However, a social parent with a parenting order will not always have the same financial and work-related entitlements as the birth mother or birth father.

(c) Birth parents and 'other people significant to care' in a same-sex family

A child born to a lesbian couple will generally have a **birth mother** and a **lesbian co-mother**. The birth mother will be a legal parent under the current family law system.

A child born to a gay couple will often have a **birth father** and a **gay co-father**, as well as a birth mother. Alternatively, a child may have **two gay co-fathers** as well as a birth mother. If there is a birth father, he will be a legal parent.

The lesbian co-mother or gay co-father(s) can apply to the Family Court of Australia for a parenting order, as 'other people significant to the care, welfare and development' of the child. But the lesbian co-mother and gay co-father(s) will be treated in the same way as a social parent is treated under the law; they will not be treated in the same way as a birth parent.

In other words, federal law does not currently recognise the distinction between a person who is a *subsequent partner* of a birth mother or birth father, and a person in a same-sex couple who is either the *partner of the birth mother or birth father or an active co-parent at the time a child is born*.

This means the lesbian co-mother or gay co-father(s) may be denied financial and work-related entitlements available to a birth mother and birth father, even though they are the original and intended parents of the child.

The failure to make this distinction can compromise the best interests of a child born into a lesbian or gay family, because that child's parents will not have the same entitlements as the opposite-sex parents of another child.

The failure to recognise both gay or lesbian parents of a child may breach a child's right to identity under the articles 7 and 8 of the CRC. It may also breach Australia's obligation to support and promote the *common responsibilities of both parents* in raising a child (article 18). These rights are discussed in greater detail in Chapter 3 on Human Rights Protections.

The following explains the various parenting scenarios in more detail.

5.2.2 A child born to a same-sex couple will often have only one legal parent

Ever increasingly children are being born to lesbian and gay couples. However, where a child born to a lesbian or gay couple is conceived through ART, federal law only recognises the birth mother of the child as the legal parent. And where a child is conceived through intercourse, federal law only recognises the two people involved in intercourse as legal parents.

This puts the lesbian co-mother and gay co-father(s) at a significant disadvantage when attempting to access financial and work-related benefits intended to help support a family.

(a) *A child born to a lesbian couple usually has a birth mother and lesbian co-mother*

A lesbian couple can bring a child into the world through ART using donated sperm. The woman bearing the child will be the birth mother and her partner at the time of birth will be the lesbian co-mother. A sperm donor is not generally considered a legal parent under the applicable federal, state and territory laws regulating ART.¹¹

(i) *Federal law does not recognise a lesbian co-mother as a legal parent of an ART child*

Under federal law, the child of a lesbian couple conceived through ART will have only one legal parent – the birth mother.

Compare this to the ART child of an opposite-sex couple where both the woman and man consenting to the process of ART are *presumed* to be the child's legal parents, as long as they are in a genuine couple.¹² Federal, state and territory law recognises that the important thing is that the couple intend to have a child together – not the biology or technology involved in conception. However, federal law does not extend this logic to a lesbian couple.

(ii) *WA, ACT and NT law recognises a lesbian co-mother as a legal parent of an ART child*

In Western Australia (WA), Northern Territory (NT) and the Australian Capital Territory (ACT), the birth mother and lesbian co-mother of an ART child are *presumed* to be the legal parents of the child, if they are in a genuine relationship when the child is born.¹³ They are both noted on the child's birth certificate, to the exclusion of the sperm donor.¹⁴

One couple describe how fortunate they feel to be living in the ACT where a same-sex couple can be recognised as a child's legal parents:

I feel fortunate to live in the ACT where at least some of the forms of discrimination levelled against those in same-sex relationships have been legislated against. For example, were I to give birth to a child through assisted conception, my partner's name goes on the birth certificate as that child's parent which is exactly what she would be. This is because in the ACT the term domestic partner includes partners in same-sex relationships and so where that term is used in ACT legislation my partner and I can essentially claim de facto status. This reflects how we

live and who we are and we applaud the Stanhope government for achieving these reforms in relation to same-sex relationships.¹⁵

It is unclear how a birth certificate from WA, NT and the ACT will be regarded under federal laws.

The Family Law Act presumes that a person who is noted as a parent on a birth register is the legal parent of that child.¹⁶ There is therefore a strong argument that a lesbian co-mother noted on a birth certificate from WA, NT and the ACT should be presumed the parent of a child under federal law in the same way as the birth mother is presumed the parent.

However, the Family Law Act has not enacted parenting presumptions in favour of a lesbian co-mother. And the Family Law Act does not appear to recognise the parenting presumptions created by the WA, NT and ACT laws.¹⁷ So it is also possible that federal law will not recognise the birth certificates created pursuant to those laws.

At best it is uncertain whether a birth certificate noting a lesbian couple as parents will be recognised for the purpose of federal financial laws.

(iii) A child conceived through intercourse to a lesbian couple will have a birth mother, birth father and lesbian co-mother

Intercourse is the least likely way a lesbian couple will conceive a child.¹⁸ Nevertheless it does occur.

When a child is conceived through intercourse, the legal parents will usually be the woman (birth mother) and the man (birth father) involved in intercourse.¹⁹

The lesbian co-mother will not be recognised as a legal parent under any state, territory or federal law, unless she adopts the child from the birth father under the 'step-parent adoption' laws (see section 5.2.4 below).

(b) A child born to a gay couple always has a birth mother and may have a birth father and gay co-father or two gay co-fathers

A child born to a gay couple will always have a birth mother (the woman bearing the child). The birth mother will be the legal mother of the child under all federal, state and territory laws, unless she allows the couple to adopt the child. This makes adoption a particularly important mechanism for gay parents to obtain legal parental status.

If the child is conceived through ART, the birth mother will likely be the only legal parent and the gay couple will both be co-fathers.

If the child is conceived through intercourse, the two people involved (the birth mother and the birth father) will generally be the legal parents and the gay partner of the birth father will be the co-father.

(i) A child conceived through ART to a gay couple will have a birth mother and two gay co-fathers

There is no law in any state or territory which makes a parenting presumption in favour of a gay co-father or gay couple conceiving a child with a woman through ART. This is because a

parenting presumption in favour of the gay co-father would mean automatically displacing the legal rights of the birth mother.

However, it is also important to note that existing parenting presumption laws may displace the legal rights of a gay man who donates his sperm to a woman with the intention of raising that child. This is because, under the ART parenting presumptions for opposite-sex and lesbian couples, a male donor to an ART process will only be a legal parent if he is in a genuine domestic relationship with the birth mother.²⁰

Since a man in a gay couple will not be in a genuine domestic relationship with the birth mother, neither he nor his gay partner will be treated as legal parents unless adoption occurs.

(ii) A surrogate mother is the legal mother unless adoption occurs

All states other than NSW and the ACT either prohibit surrogacy agreements or limit access to the ART necessary to fulfil a surrogacy arrangement.²¹ As a consequence, 'the combination of surrogacy and fertility regulation means that surrogacy is an exceptionally unlikely possibility for gay men to have children, at least within Australia.'²² However, even if surrogacy does take place, the mother will be the legal parent, unless she allows the couple to adopt the child.

(iii) A child conceived through intercourse to a gay couple will have a birth mother, birth father and gay co-father

If the child born to a gay couple is conceived through intercourse the law will recognise the birth mother and the birth father (one of the gay couple) as the legal parents.

5.2.3 A lesbian co-mother or gay co-father(s) cannot be a step-parent to a child

A step-parent is sometimes entitled to the same financial and work-related benefits available to a legal (birth) parent. Thus becoming a step-parent could be a useful mechanism for a lesbian co-mother or gay co-father seeking access to the entitlements intended to assist parents raise their children.

However, the federal financial and work-related laws tend not to define who qualifies as a 'step-parent' or 'step-child' (see further section 5.3.3 below).

Further, under the Family Law Act a person can only become a 'step-parent' of a child if he or she *marries* the birth parent and treats that child as a member of the family.²³ Since a same-sex couple cannot marry, neither a lesbian co-mother nor a gay co-father can become a 'step-parent' under the Family Law Act.

Therefore, a lesbian co-mother or gay co-father will not qualify as a step-parent unless the federal financial laws themselves define a 'step-parent' or 'step-child' more broadly.²⁴

5.2.4 A same-sex couple, lesbian co-mother or gay co-father cannot generally adopt a child

A same-sex couple, lesbian co-mother or gay co-father would all be recognised as the legal parents of a child in federal law if they could adopt that child.²⁵ And adoptive parents can generally access the same financial and work-related entitlements as birth parents.

In theory, adoption should be a powerful tool for same-sex families who face biological challenges to being birth parents. However, in practice, the adoption laws in the various states and territories make it extremely difficult – and sometimes impossible – for same-sex couples to adopt.

It is important to remember that the CRC requires that the best interests of a child be *the paramount consideration* in adoption (article 21). Adoption laws which arbitrarily exclude a couple on the grounds of sexuality will breach these rights because they fail to consider the best interests of a particular child.

(a) *A same-sex couple can only adopt an unrelated child in WA and ACT*

At present, only WA and ACT allow same-sex couples to register for adoption of an unrelated child.²⁶ However, even in those states very few gay or lesbian couples successfully adopt children in Australia.²⁷

An opposite-sex couple can apply to adopt an unrelated child under all state and territory laws.²⁸

(b) *A lesbian co-mother or gay co-father is unlikely to achieve 'step-parent adoption'*

One member of a couple can apply to adopt the birth child of the other member of the couple under 'step-parent adoption' laws. Theoretically this would be an effective mechanism for a lesbian co-mother or gay co-father to obtain legal parental status regarding the child he or she has been caring for from birth.

However, New South Wales, Victoria, Queensland, South Australia and the Northern Territory do not allow step-parent adoption for same-sex couples.²⁹

A lesbian co-mother or gay co-father could apply to adopt the birth child of their partner in Western Australia, the Australian Capital Territory and Tasmania.³⁰ However, the Australian Capital Territory and Tasmanian laws contain a general presumption against making an adoption order.³¹ This is because an adoption order severs the legal relationship between the child and one of the child's birth parents.

Due to the serious consequences of an adoption order, all step-parent adoption laws (including those applying to opposite-sex couples) contain a strong preference for dealing with new parenting arrangements through a parenting order rather than an adoption order.³²

The Victorian Law Reform Commission (VLRC) argues that the presumptions against step-parent adoption may not be appropriate for some same-sex couples. In the case of a lesbian co-mother of an ART child there is unlikely to be a competing interest.³³ In the case of other lesbian or gay co-parents, there may be consensual agreements between the various

people seeking to raise a child. The Inquiry supports amendments to legislation which open up additional options for a lesbian or gay couple to attain legal status and therefore better protect the best interests of their child.

(c) Overseas adoptions by gay and lesbian couples may not be recognised in Australia in the future

It appears that surrogacy and adoptions occurring overseas may not be recognised under Australian law in the future. As at March 2007, the federal government's list of legislation proposed for introduction includes the Family Law (Same Sex Adoption) Bill. The Bill is described as legislation to 'amend the Family Law Act 1975 to indicate that adoptions by same sex couples of children from overseas under either bilateral or multilateral arrangements will not be recognised in Australia.' However, the Bill is not available and it is unclear what will be the final form of the legislation (if it is indeed introduced).

(d) Restrictive and discriminatory adoption laws have a particularly serious impact on the children of gay couples

A lesbian co-mother may become a legal mother through a parenting presumption in her favour (although for the moment that is limited to ACT, WA and NT). But it is particularly difficult for a gay couple to become a legal parent of their child without adoption.

A gay male couple cannot have a child, whether through ART or intercourse, without involving a child-bearing woman. The Inquiry does not support the enactment of parenting presumptions which would automatically remove the rights of a child-bearing woman. Rather, it should be possible for a gay couple to adopt an unrelated child, or a child born through ART to a surrogate or friend, after the birth mother has made a positive decision to transfer her legal parenting rights.

However, the limited scope of state and territory adoption and step-parent adoption laws severely limits the possibility of adoption for gay and lesbian couples.

The outright prohibition of adoption by same-sex couples in some states and territories breaches article 21 of the CRC which requires that the best interests of the child be *the paramount consideration* in adoption. The other limitations may also compromise the best interests of the child under article 3(1) of the CRC.

(e) Comments from gay couples trying to adopt

Dr James Dowty compares adoption for same-sex couples in Australia and the Netherlands. He argues that adoption provides greater protection for children:

...I think it is important that same-sex couples should be allowed to adopt children. When the Dutch parliament was debating [legal] recognition of same-sex relationships they decided that same-sex couples should be given the same opportunities as opposite-sex couples to adopt. In a country where approximately 20% of lesbian couples have children from previous relationships, this was mainly seen as a way of ensuring the best outcome for the children in the event of the death or incapacity of the biological parent. Australian children deserve the same protections as Dutch children in such situations.³⁴

Frank Gomez comments on his experience when considering adoption:

I have over the years enquired about adopting a child, as I think this would be an option I would like to entertain if I was ever in a long term, serious relationship again. However I have found that it is impossible for gay men to even be considered for adoption, regardless of income, character or [the] seriousness of their relationships.³⁵

In his submission Marcus Blease discusses the issues of surrogacy and adoption for gay male couples:

My partner and myself would like to adopt a child. We would consider surrogacy from the US, however this is too expensive. We are however prohibited from adopting here and may have to move to the UK to do this if the law isn't changed within the next 5 years. If I sold a house I own in the UK we will consider surrogacy as a last resort, however this brings a set of discrimination as long as your arm. We would receive no family tax breaks as heterosexual couples, one of us would receive little federally recognised parenting rights of the child (the non biological one).³⁶

5.2.5 A lesbian co-mother or gay co-father(s) can seek a parenting order as 'other people significant to the care' of a child

As discussed previously, the Family Law Act acknowledges that children are frequently cared for by a range of 'other people significant to the care' of a child. Those people other than the two (or one) birth parents or adoptive parents can seek a parenting order from the Family Court of Australia if they wish to formalise their parenting role.³⁷

Lesbian co-mothers and gay co-fathers are amongst those 'others' under the current family law regime. They can obtain a parenting order in respect of their child, but a person with a parenting order is not always entitled to the same financial and work-related benefits as a legal (birth) parent. This may compromise the best interests of a child born to a lesbian or gay couple.

Parenting orders are discussed further in section 5.3.4 below.

5.3 How are same-sex families treated under federal financial laws?

The application of federal financial and work-related laws to same-sex families is very uncertain.

As suggested in the previous section of this chapter, the legal status of the various people involved in raising a child in a same-sex family is unclear. On top of this, there is inconsistency in the way a parent-child relationship is described within and between federal financial and work-related laws. And it is unclear how each of those definitions might apply to the various people involved in looking after a child – especially a lesbian co-mother, gay co-father or other social parents.

Some federal laws limit financial and work-related entitlements to the legal parents (or birth parents) of a child. Since the lesbian co-mother or gay co-father of a child is generally not considered a legal parent under family law, those laws will generally put the child of a same-sex couple at a disadvantage. This is because the lesbian co-mother or gay-co father cannot

access the benefits available to the opposite-sex birth parents – despite being the effective parents of the child since birth.

On the other hand, there are some laws which extend financial and work-related benefits to people who are legally responsible for a child, or to people who financially support a child. Those laws potentially include a lesbian co-mother or gay co-father – particularly if they have obtained a parenting order from the Family Court.

The Inquiry’s concern is that the best interests of a child are protected – irrespective of whether they are being raised by opposite-sex or same-sex parents. Senator Ruth Webber put it like this:

... it is completely absurd and unreasonable to argue for the best interests of children while at the same time promoting laws that discriminate against the children of same-sex parents. If benefits to couples are designed to promote the interests of children, then how can one possibly justify withholding those benefits from some children for no other reason than that their parents are both of the same gender?

It is most probable that the children of same-sex couples are harmed by the discrimination that same-sex couples and their families face. I do not find the argument that withholding rights from same-sex couples is in the interests of children very convincing.

Same-sex couples have continued to raise children in the current environment – demonstrating that current discrimination does nothing to “discourage” such behaviour. We are not preventing same-sex couples from raising children with current discriminatory practices – and nor should we – but we *are* making the lives of their children more difficult.³⁸

The lack of clarity in federal law in itself puts the best interests of children raised in same-sex families at risk. It also causes distress to same-sex couples who are trying to arrange their financial affairs to best care for their children:

For me, this is not about our rights as parents, but our child’s rights to have her family validated and accepted by her own country. It’s about her right to full legal protection in the case of the death of either of her parents. It is her right to be included on a Medicare card which lists every member of her family. It is blatantly wrong to deny children this protection because there are still so many in the community who neither approve of nor understand the sexuality of their parents. Our sexuality is not, or should not be the issue, it is all about our children who are Australian citizens, born of Australian citizens, and deserve every protection that is available to Australian children born to any other family.³⁹

The following sections try and make some sense of how federal financial and work-related laws might apply to same-sex families and what needs to change to ensure greater equality in financial assistance for the children raised in those families.

5.3.1 Summary of definitions used in federal laws

The following text selects a representative sample of the various definitions describing a parent-child relationship in federal financial and work-related laws and seeks to determine whether, or when, lesbian and gay parents may qualify for the relevant entitlements.

(a) Parent-child relationships are described by four types of definitions

The various legislative definitions can be categorised into four broad groups:

- laws which do not define the relevant parent-child relationship
- laws defining a child to include an adopted, ex-nuptial or step-child
- laws defining a child to include a person for whom an adult has legal responsibility or custody and care
- laws including a child who is wholly or substantially dependent on an adult or who stands in the position of a parent.

(b) Caveats in using these groups of definitions

In reading the following text it is important to keep in mind the following caveats.

Firstly, sometimes laws which determine financial and work-related entitlements use terms other than 'child', including 'dependant' or 'dependent child'. However, the following text uses the term 'child' to cover these various terms.

Secondly, these categories do not represent a comprehensive list of all the different definitions of 'child' discussed throughout this report. Rather, they are a sample of the general groups of definitions used. The specific definitions are discussed in the relevant topic chapters.

Thirdly, sometimes one piece of legislation will use different definitions in different parts of the act. The specific topic chapters provide a full explanation of the impact of the different definitions on financial and work-related entitlements.

Fourthly, this text should be used to assist in the interpretation of the definitions discussed in other chapters. However, these interpretations are not definitive and may vary in the context of the specific legislation.

Finally, this text tries to provide guidance in an area of law which is inherently uncertain. There may well be legitimate interpretations which are different to those discussed in this chapter.

Ultimately, the Inquiry's concern is that the application of these definitions to the children of a same-sex couple is inherently, and unnecessarily, unclear. This lack of clarity puts the best interests of the child at risk and threatens to discriminate against children and their parents. Thus there need to be amendments to the law to provide equality and clarity.

5.3.2 Laws which do not define the relevant parent-child relationship

Some federal legislation conferring financial and work-related entitlements does not specifically define who qualifies as a person's child. Other legislation assumes the meaning of 'mother', 'father', 'daughter', 'son'.

For example, the *Life Insurance Act 1995* (Cth) provides that, under certain circumstances, a life insurance company can pay out a policy to an insured person's child without going through probate.⁴⁰ However, the legislation does not define who qualifies as the person's child.

In another example, the definition of ‘dependant’ in the *Safety, Rehabilitation and Compensation Act 1988* (Cth) includes terms such as ‘father’, ‘mother’, ‘son’ and ‘daughter’.⁴¹ These terms are not defined in the legislation.

In the Inquiry’s view, where legislation does not define terms relating to a parent-child relationship, it is likely that the birth certificate will be determinative of who qualifies for the entitlements. This is because the Family Law Act presumes that a person who is noted as a parent on a birth register is the legal parent of that child.⁴²

These terms would also include an adopted child.⁴³

If this interpretation is correct, then the following children may (or may not) qualify for benefits under laws which do not define a parent-child relationship:

- the child of a *birth mother or birth father* (or the birth parents themselves) may qualify for the benefits
- the child of a *lesbian co-mother* (or the co-mother herself) is unlikely to qualify in the absence of adoption (unless the child is an ART child; the child has a birth certificate from WA, NT or ACT; and that birth certificate is recognised under federal law)⁴⁴
- the child of a *gay co-father* (or the co-father himself) will not qualify in the absence of adoption
- an adopted child may qualify.

5.3.3 Laws including an adopted, ex-nuptial or step-child

Some laws define a person’s child or dependant to ‘include an adopted child, a step-child or an ex-nuptial child of that person.’⁴⁵

In the Inquiry’s view, these definitions *assume* that a ‘child’ includes the child of his or her birth parents, as described on a birth certificate. It also explicitly extends the scope of the definition to include an ‘adopted’ child, ‘ex-nuptial’ child and ‘step-child’.

The discussion in section 5.2 above notes that a child of a lesbian co-mother or gay co-father cannot be a ‘step-child’ because a subsequent partner must marry the birth parent to become a step-parent. It is also highly unlikely that a child will be successfully adopted by a lesbian co-mother (or couple) or gay co-father (or couple).

It further appears that a child of a lesbian co-mother or gay co-father cannot be an ex-nuptial child. Neither the Family Law Act nor the federal legislation conferring federal and work-related benefits on parents defines who qualifies as an ‘ex-nuptial child’. Theoretically it is possible that this term could apply to the child of any couple who is not married – including a same-sex couple. However, the Inquiry does not believe that the term will be interpreted in this way, given the general non-recognition of same-sex couples under federal laws.

If the Inquiry’s interpretation of this type of definition is correct, then the following children may (or may not) qualify for benefits under laws using this definition:

- the child of a *birth mother or birth father* (or the birth parents themselves) in a same-sex or opposite-sex couple may qualify

- the child of a *lesbian co-mother* (or the co-mother herself) is unlikely to qualify in the absence of adoption (unless the child is an ART child; the child has a birth certificate from WA, NT or ACT; and that birth certificate is recognised under federal law)⁴⁶
- the child of a *gay co-father* (or the co-father himself) is unlikely to qualify in the absence of adoption
- the step-child of a person who has *married* the birth mother or birth father (opposite-sex only) may qualify
- an adopted child may qualify.

5.3.4 Laws including the child of an adult who is 'legally responsible'

Several laws give financial and work-related entitlements to adults who are legally responsible for a child.

These laws will automatically include the people noted as parents on a birth certificate because they are presumed to be the legal parents. But they also have the scope to include the child of a lesbian co-mother or gay co-father.

As discussed below, it is likely that a parenting order will be proof of 'legal responsibility' or 'custody and care' under the different pieces of legislation. However, the legislation itself does not explicitly recognise parenting orders and there does not appear to be specific case law to support the view that a gay co-father or lesbian co-mother with a parenting order will necessarily qualify under the relevant legislative definitions.

In the Inquiry's view the children who *may* qualify for benefits under laws using this definition include:

- the child of a *birth mother or birth father* (or the birth parents themselves) in a same-sex or opposite-sex couple may qualify
- the child of a *lesbian co-mother or gay co-father* with a parenting order (or the co-parents themselves) may qualify
- the step-child of a person who has *married* the birth mother or birth father (opposite-sex only) may qualify
- an adopted child may qualify.

However, greater clarity as to the status of a parenting order in favour of a gay co-father and lesbian co-mother would be of great assistance to those parents.

(a) A lesbian co-mother or gay co-father can probably assert legal responsibility through a parenting order

In the Inquiry's view, where a person has a parenting order setting out that person's legal responsibility for a child, then that child is likely to qualify for the entitlements available under these laws. This is because parenting orders cover issues like where and with whom a child should live, contact between a parent and child, financial maintenance of a child, parental responsibility over a child and any other aspect of the care, welfare or development of a child.⁴⁷

Any person with an interest in the 'care, welfare and development' of a child can approach the federal Family Court for a court order clarifying that person's parental responsibilities – a 'parenting order'.⁴⁸ And the federal Family Court can make a parenting order in favour of any person it thinks is proper, irrespective of gender, biological or legal relationships.⁴⁹

The Inquiry heard from several lesbian co-mothers and gay co-fathers who have been awarded parenting orders in their favour.

(b) *The benefits of parenting orders*

The main benefit of a parenting order for the purposes of this Inquiry is that it should be sufficient evidence that an adult will be 'legally responsible' for the child for the purposes of accessing certain financial and work-related entitlements.⁵⁰

Many of the people who made submissions or gave evidence to the Inquiry, spoke of the comfort they found in having a parenting order from the Family Court of Australia.

Some of the important aspects of parenting orders for gay and lesbian couples include:

- Parenting orders are made with the best interests of the child as a primary consideration.⁵¹ Thus the focus is on the impact on the child rather than the gender of the carers.
- Parenting orders are a flexible and practical mechanism for recognising the intended parenting role of both members of a same-sex relationship and any additional adults involved in the conception and care of a child.⁵²
- Parenting orders provide official evidence of the legal relationship between the lesbian co-mother, gay co-father and child so that the co-mother can prove her right to exercise parental authority and consent (for example, decisions about schooling, medical treatment etc).⁵³

(c) *The limitations of parenting orders*

Many people told the Inquiry that the process of obtaining a parenting order can be very onerous and prohibitively expensive. Some pointed out that it was unfair to be forced through a bureaucratic legal process just to prove what is already assumed for an opposite-sex couple – that the parents at birth are the legal parents.

Janet Jukes describes her frustration that a parenting order does not make her a legal mother:

Firstly, it is important to note that because we each conceived one of our daughters, we are not considered the legal parents of both our children. In Victoria we are not allowed to adopt our children to remedy this fact. In order to minimise the discrimination that this causes we have obtained court orders that give residency and contact responsibilities to us as a couple and limits the donor's responsibilities. Although this remedy has been invaluable in dealing with the hospital system, childcare and other service systems, it is inadequate because it does not and cannot make Hannah my daughter nor Ava Marion's daughter *in law*. Further, a court order is only relevant while the girls are minors, once Hannah is 18 years old she will have no legal relationship to me nor Ava to Marion. Although our daughters have the same father, they are not considered sisters *by law* and their birth certificates do not recognise the existence of each other.⁵⁴

A couple in Townsville talked about the considerable time, expense and intrusion involved in getting a court order recognising what they already knew to be true – that they are their son's parents. They also highlight that opposite-sex couples need not go through any of this:

We have recently undergone lengthy and expensive legal proceedings (incl. the hiring of a solicitor) to have parenting orders granted via the Family Law Court. Although we are very proud of this successful application, the order simply tells us what we know to be true – that our son is loved and cared for by his two mums, that he resides with us in our home, that we are both economically responsible for him, that we share every single decision about his care, welfare and development. To secure this order we had to lay bare information about how [name removed] and I met, our living arrangement, our financial position, our professions and working hours, how we came to have a son, how we decided who was going to be the birth mother, how we look after him given our working commitments, our plans for our son's education, not to mention the materials our house is constructed from, - and after all of that our son ended up with less legal security than his counterparts with heterosexual parents. At the end of this process [name removed] and I have been granted a watered down version of what heterosexual couples acquire automatically.⁵⁵

A lesbian woman at the Sydney Forum spoke about the barriers she and her former partner faced in obtaining a parenting order in relation to their child:

I am the biological mother of a daughter and [when] my then partner and I decided to have a child we made that decision together. My former partner is quite clearly in every sensible person's eyes the mother of our daughter. When our relationship broke up, when our daughter was three, we wanted to formalise and legalise, so to speak, the relationship between her and our daughter and it proved to be fairly difficult.

It's probably only due to the fact that I'm a lawyer and I'm stropic and obnoxious and I don't like being told no for an answer that we proceeded to do it. And also the fact that the break up was fairly amicable. We were still speaking and we could agree on a way to deal with custody arrangements. I don't know how couples would do it if they hated each other or weren't highly educated and very determined.

We went before the Family Court ... We both had to file affidavits attesting to the nature of our relationship, the nature of the relationship between us and our daughter, and how things worked. We came before a magistrate who asked us what I consider fairly offensive and inappropriate questions. I ended up, in effect, being my former partner's advocate. It wasn't her sphere and she didn't know how to respond to these ridiculous questions. The magistrate said things to me like well you've had one relationship and now that's broken up and then you'll have another relationship – basically trying to say that there is no relationship between my former partner and our child. There is and there was. My daughter is three years old and all she knew was that she had two mothers. ...

It took a lot of persuasion and I'm glad to say that in the judgement he almost apologised. He heard our submissions and he was impressed by the fact of the strength of feelings in the genuineness of the relationship between me and my daughter and my partner and her daughter. We now have Family Court orders that say that both of us are her legal guardians and we both have a say in her upbringing. All this would have been completely unnecessary of course had my partner had been formally recognised as my daughter's mother when she was born.⁵⁶

Other limitations of parenting orders include:

- Parenting orders do not confer any automatic parental status for the purposes of federal laws other than the Family Law Act.⁵⁷

- Parenting orders can be varied or challenged at any time.⁵⁸
- Legal costs of applying for a parenting order may be in the range of \$3000 to \$6000.⁵⁹
- Parenting orders expire once the child turns 18 years old.⁶⁰
- Parenting orders do not give the universal or durable status accorded by adoption.⁶¹
- The primary purpose of parenting orders is to address disputes between separating parents, rather than affirm the intention of parents who are in a couple.

5.3.5 Laws including a child who is wholly or substantially dependent on a person

Some laws take a much broader approach to the circumstances under which an adult may be entitled to financial and work-related benefits relating to a child.

Some definitions focus on whether a child is ‘*wholly or substantially dependent*’ on a person. Others talk about a child being wholly or substantially dependent on a person who ‘*stands in the position of a parent*’.

These laws will generally include the legal parents of a child automatically. But they also have the scope to include a child who is financially dependent on a lesbian co-mother or gay co-father.

A parenting order may assist in establishing that a child is wholly or substantially dependent or that a person is ‘standing in the position of a parent’. But a parenting order may not be necessary where there is other evidence of financial dependence.

In the Inquiry’s view the children who *may* qualify for benefits under laws using this definition include:

- the child of a *birth mother or birth father* (or the birth parents themselves) in a same-sex or opposite-sex couple
- the child of a *lesbian co-mother or gay co-father* with a parenting order (or the co-parents themselves)
- the child of a *lesbian co-mother or gay co-father* (or the co-parents themselves) where there is evidence of substantial financial dependence
- the step-child of a person who has *married* the birth mother or birth father (opposite-sex only)
- an adopted child.

Some of the laws using this broader concept tend to use the term ‘dependent child’, ‘dependant’ or other terms, rather than ‘child’ on its own. And some of the laws set out what will constitute being ‘wholly or substantially dependent’.

(a) *Dependence can be ‘liability to maintain a child’*

As discussed in more detail in Chapter 10 on Veterans’ Entitlements, the *Veterans’ Entitlements Act 1986* (Cth) (Veterans’ Entitlements Act) defines the ‘child of a veteran’ to include a child of whom the veteran is a mother or father, an adopted child, and:

any other child who is, or was immediately before the death of the veteran, *wholly or substantially dependent* on the veteran.⁶² (emphasis added)

The Veterans' Entitlements Act clarifies that if a veteran is 'liable to maintain a child, the child shall be deemed to be wholly or substantially dependent on that veteran'.⁶³

A definition like this seems to suggest that evidence of the 'liability to maintain a child' will be sufficient to qualify for an entitlement. A parenting order will likely assist in proving that liability. However, it would be helpful if the legislation were clear on this matter.

(b) Dependence can be 'living with a child'

Some workers' compensation laws state that a person living with the employee at the time of death will be 'wholly dependent' on that person.⁶⁴ There is no suggestion of a pre-existing legal relationship, just that the person be living with the deceased employee.

In definitions such as these there may be no need for a parenting order. However, it seems that parenting orders have 'been used on numerous occasions to confirm that the child legally resides with the co-mother as well as confirming her authority to make medical and educational decisions about the child'.⁶⁵

5.4 How are same-sex families treated under state and territory financial laws?

As discussed in Chapter 4 on Recognising Relationships, all of the states and territories have redefined the concept of de facto relationships so that same-sex and opposite-sex de facto couples can now access the same financial and work-related entitlements.

However, those reforms did not address the question of parental relationships between a lesbian co-mother or gay co-father and child, other than in WA, ACT and NT. And even in those states, the issue is only resolved with respect to lesbian couples conceiving a child through ART.

The Inquiry has not had sufficient resources to examine all the definitions of 'child', 'dependant', 'dependent child' and so on in all state and territory laws.

Where the Inquiry has identified problems they have been noted elsewhere in this report. However, the Inquiry urges all state and territory governments to audit laws to remove any existing discrimination in the treatment of children of same-sex couples, as described in the previous sections of this report.

5.5 How should federal law change to protect the best interests of all children?

Protecting the best interests of the child is a fundamental principle of international human rights law. So is the principle of non-discrimination.

This means that two members of a same-sex couple taking care of children should have the same access to financial and work-related entitlements as two members of an opposite-sex

couple in the same situation. The right of same-sex families to those entitlements, and the avenues for obtaining access to those entitlements, should also be clear.

This chapter has identified four different categories of definitions attempting to define who will qualify as the 'child' of a person for the purposes of accessing financial and work-related entitlements.

Those four categories are:

1. laws which do not define the relevant parent-child relationship
2. laws including an adoptive, ex-nuptial and step-child
3. laws including a child for whom an adult has specific legal responsibility or where the child is in 'the custody or care' of an adult
4. laws including a child who is wholly or substantially dependent on an adult (including an adult standing in the position of a parent).

None of the legislation using this range of definitions provide clear guidance on how they apply to the lesbian co-mother or gay co-father in a family. However, it does appear that a same-sex family is less likely to qualify for entitlements than an opposite-sex family because of the way that family law recognises the legal status of lesbian and gay co-parents.

5.5.1 Amended laws must recognise the reality of same-sex parenting

One problem with the various definitions of 'child' in federal financial and work-related laws lies in the variation between and within the laws.

Sometimes there are good reasons for the variations in the definitions. In some cases the entitlements are only intended to go to a narrow group of people defined by reference to the child and parents at birth (for example parental leave entitlements). In other cases the entitlements are intended to extend to those people who are, in a practical sense, financially supporting a child even if they are not the birth parents.

However, none of the definitions recognise a child being raised by lesbian and gay co-parents from birth in the same way as they recognise a child being raised by opposite-sex parents from birth. This is primarily because the definitions rely on federal family laws and state adoption laws which do not leave room to recognise legal parental status between a child and his or her lesbian co-mother or gay co-father(s).

The result is that same-sex families are excluded from a range of federally funded entitlements and benefits which are available to opposite-sex families. Denying access to benefits intended to help parents support their children leaves the children in a same-sex family worse off than other children.

Thus, the purpose of amending laws is to ensure equality for the children being raised in same-sex families, and clarity for the parents seeking to access entitlements to support their children in the best way they can.

5.5.2 Seven recommendations to ensure equality for the children of same-sex parents

In the Inquiry's view the following steps should be taken to better ensure equal protection for the children of same-sex parents:

1. *Federal laws without a definition of 'child' should include a definition which recognises the children of a birth mother, birth father, lesbian co-mother or gay co-father.*
2. *Federal laws should ensure that a lesbian co-mother of an ART child can access the same financial and work-related entitlements available to a birth mother and birth father (a legal parent).*

This could be achieved by amending:

- the *Family Law Act 1975* (Cth) (Family Law Act) to include a parenting presumption in favour of the lesbian co-mother of an ART child and ensuring that the definition of 'child' in any relevant legislation recognises the parenting presumptions in the Family Law Act; or
- the *Acts Interpretation Act 1901* (Cth) (Acts Interpretation Act) such that any references to a person's 'child' in federal legislation includes the ART child of a lesbian co-mother.

It could also be achieved if:

- all states enacted parenting presumptions in favour of a lesbian co-mother (following the models in WA, ACT and NT); and
- federal law clearly recognised those presumptions and the birth certificates flowing from those presumptions.

While parenting presumptions are appropriate for the ART child of a lesbian couple, broader adoption laws are the better solution for a gay couple having an ART child (as set out in the following recommendations 4–5).⁶⁶

3. *Federal financial and work-related laws should include a definition of 'step-child' which recognises a child under the care of a 'de facto partner' of a birth mother or birth father.*

Chapter 4 on Recognising Relationships suggests an appropriate definition of 'de facto partner'.

Amending laws in this way would generally recognise the child of a lesbian co-mother or gay co-father as a step-child. It would also include a child under the care of a subsequent de facto partner in an opposite-sex and same-sex couple. (Currently a step-child can only be a child under the care of a subsequent partner who marries the birth parent).

4. *'Step-parent adoption' laws should more readily consider adoption by a lesbian co-mother or gay co-father.*

This will require amendments to remove the prohibition on same-sex step-parent adoption in all state and territory laws other than in WA, the ACT and Tasmania.

It may also require reconsideration of the general presumption against step-parent adoption, in the event of gay and lesbian co-parenting arrangements. The Victorian Law Reform Commission is due to publish a report on this issue during 2007.

5. *Gay and lesbian couples should have equal rights to apply for adoption of an unrelated child.*

This will require amendments to adoption laws in all states and territories other than in WA and the ACT. Further, the federal government should not introduce legislation limiting the possibility of overseas adoptions by gay and lesbian couples.

6. *Where access to financial or work-related benefits is intended to extend beyond the legal parents, federal laws should explicitly recognise the eligibility of a person who has a parenting order from the Family Court of Australia.*

This could be achieved by amending:

- the relevant federal legislation to define a person who is 'legally responsible', has 'custody and care', is in the 'position of a parent' (and other similar terms) to *include* a person who has been granted a parenting order from the Family Court of Australia; or
 - the Acts Interpretation Act such that any reference to a person who is 'legally responsible', has 'custody and care', is in the 'position of a parent' (or other similar terms) *includes* a person who has been granted a parenting order from the Family Court of Australia.
7. *There should be a public information and education campaign to ensure that gay and lesbian families are aware of their rights and entitlements under federal financial and work-related laws.*

In particular, same-sex parents should be:

- informed about the role of parenting orders in asserting legal rights; and
- assisted through the process of obtaining such an order.

Endnotes

- 1 Australian Bureau of Statistics, *Year Book Australia*, 'Same-Sex Couple Families', p142 (2005). See also J Millbank, 'Recognition of Lesbian and Gay Families in Australian Law – Part Two: Children', *Federal Law Review*, vol 34, no 2, 2006, p206, referencing M Pitts et al, 'Private Lives: A Report on the Health and Wellbeing of GLBTI Australians' (2006); Victorian Law Reform Commission, *Assisted Reproductive Technology and Adoption Position Paper Two: Parentage*, (July 2005), para 3.1.
- 2 Assisted Reproductive Technology (ART) includes in vitro fertilisation (IVF), clinically-assisted donor insemination and self-insemination.
- 3 Felicity Martin and Sarah Lowe, Melbourne Hearing, 26 October 2006.
- 4 *Family Law Act 1975* (Cth), s 60B.
- 5 *Family Law Act 1975* (Cth), s 60B(2).
- 6 *Family Law Act 1975* (Cth), s 69R.
- 7 *Family Law Act 1975* (Cth), s 4.
- 8 See for example, *Births, Deaths and Marriages Act 1995* (NSW), pt 3, divs 1, 2, 4.
- 9 The term 'social parent' is adopted from the Victorian Law Reform Commission, *Assisted Reproduction and Adoption Position Paper Two: Parentage*, (July 2005).
- 10 *Family Law Act 1975* (Cth), ss 64B – 64C.
- 11 *Family Law Act 1975* (Cth), s 60H. A sperm donor is presumed not to be a parent of the child: *Status of Children Act 1996* (NSW), s 14(2); *Parentage Act 2004* (ACT), s 11(5); *Status of Children Act 1978* (Qld), s 18(1); *Status of Children Act 1974* (Vic), s 10F(1); *Artificial Conception Act 1985* (WA), s 7(2); *Status of Children Act 1978* (NT), s 5F(1); *Status of Children Act 1974* (Tas), s 10C(2); *Family Relationships Act 1975* (SA), s 10E(2). See also J Millbank, 'Recognition of Lesbian and Gay Families in Australian Law – Part Two: Children', *Federal Law Review*, vol 34, no 2, 2006, p233.
- 12 *Family Law Act 1975* (Cth), s 60H.
- 13 *Artificial Conception Act 1985* (WA), s 6A; *Status of Children Act 1979* (NT), s 5DA; *Parentage Act 2004* (ACT), s 8.
- 14 See J Millbank, 'Recognition of Lesbian and Gay Families in Australian Law – Part Two: Children', *Federal Law Review*, vol 34, no 2, 2006, p253.
- 15 Ruth Corris and Michelle Murray, Submission 56. See also Speaker, Adelaide Forum, 28 August 2006.
- 16 *Family Law Act 1975* (Cth), s 69R.
- 17 *Family Law Act 1975* (Cth), s 60H; Family Law Regulations 1984 (Cth), regs 12C, 12CA, schs 6 – 7. See also J Millbank, 'Recognition of Lesbian and Gay Families in Australian Law – Part Two: Children', *Federal Law Review*, vol 34, no 2, 2006, pp254-255.
- 18 A recent study suggested that among 43 lesbians trying to conceive, only two percent used intercourse: see J Millbank, 'Recognition of Lesbian and Gay Families in Australian Law – Part Two: Children', *Federal Law Review*, vol 34, no 2, 2006, p207, referencing McNair et al, 'Lesbian Parenting: Issues, Strengths and Challenges', *Family Matters*, vol 63, 2002, p40.
- 19 The federal Family Court found that a man was the legal parent of a child conceived through intercourse, even though the lesbian mother, the co-mother and the man had an express agreement that the man would have no legal rights or liabilities with respect to the child: *ND v BM* [2003] FamCA 469. See also J Millbank, 'Recognition of Lesbian and Gay Families in Australian Law – Part Two: Children', *Federal Law Review*, vol 34, no 2, 2006, p207.
- 20 *Family Law Act 1975* (Cth), s 60H; *Artificial Conception Act 1985* (WA), ss 3(1)-(2) 6; *Status of Children Act 1979* (NT), ss 5A(2), 5D; *Parentage Act 2004* (ACT), s 11(4).
- 21 See for example *Parentage Act 2004* (ACT), ss 41, 44; *Surrogate Parenthood Act 1988* (Qld), s 3; *Surrogacy Contracts Act 1993* (Tas), ss 4-5, 7; *Family Relationships Act 1975* (SA), ss 10G-H; *Infertility Treatment Act 1995* (Vic), ss 59, 61. See also J Millbank, 'Recognition of Lesbian and Gay Families in Australian Law – Part Two: Children', *Federal Law Review*, vol 34, no 2, 2006, pp212-214.
- 22 J Millbank, 'Recognition of Lesbian and Gay Families in Australian Law – Part Two: Children', *Federal Law Review*, vol 34, no 2, 2006, p217.

- 23 *Family Law Act 1975* (Cth), s 4.
- 24 J Millbank, 'Recognition of Lesbian and Gay Families in Australian Law – Part Two: Children', *Federal Law Review*, vol 34, no 2, 2006, p248. In footnote 245, Millbank notes that 'the Northern Territory introduced a change to redefine the child born to one party in a de facto relationship as a 'step-child' as a presumptive status in the same way that the child of a party to a legal marriage would be: see *Interpretation Act 1978* (NT), s 19A(4).
- 25 *Family Law Act 1975* (Cth), s 4.
- 26 *Adoption Act 1994* (WA), ss 38-39; *Adoption Act 1993* (ACT), s 18(1). In Tasmania, a same-sex partner can apply to adopt a child if that child is related to his or her partner: *Adoption Act 1988* (Tas), s 20(1)-(2A). See section 5.2.4(b).
- 27 See J Millbank, 'Recognition of Lesbian and Gay Families in Australian Law – Part Two: Children', *Federal Law Review*, vol 34, no 2, 2006, pp208-212.
- 28 In 2005–06 there were 576 adoptions in Australia: 73% were inter-country, 10% were local and 16% were 'known' child adoptions: Australian Institute of Health and Welfare (AIHW), 'Adoptions Australia 2005-06', *Child Welfare Series*, no 39, 2006, pvii.
- 29 *Adoption Act 1984* (Vic), s 11(5)-(6); *Adoption Act 2000* (NSW), s 30; *Adoption of Children Act 1994* (NT), s 15; *Adoption of Children Act 1964* (Qld), s 12; *Adoption Act 1988* (SA), s 12. See also, J Millbank, 'Recognition of Lesbian and Gay Families in Australian Law – Part Two: Children', *Federal Law Review*, vol 34, no 2, 2006, p248. See also Victorian Law Reform Commission, *Assisted Reproduction and Adoption Position Paper Two: Parentage*, (July 2005). At page 51, the Victorian Law Reform Commission recommends that 'the Adoption Act is amended to allow the court to make an adoption order in favour of a same-sex couple'.
- 30 *Adoption Act 1993* (ACT), s 18(1)-(2); *Adoption Act 1994* (WA), s 55; *Adoption Act 1988* (Tas), s 20(1),(2A). See also J Millbank, 'Recognition of Lesbian and Gay Families in Australian Law – Part Two: Children', *Federal Law Review*, vol 34, no 2, 2006, p249.
- 31 See *Adoption Act 1993* (ACT), s 18(2); *Adoption Act 1988* (Tas), s 20(7).
- 32 See *Adoption Act 1994* (WA), s 68(1)(fa); *Adoption Act 1993* (ACT), s 18(2); *Adoption Act 2000* (NSW), s 30; *Adoption of Children Act 1964* (Qld), s 12(3); *Adoption Act 1984* (Vic), s 11(5)-(6); *Adoption of Children Act 1994* (NT), s 15; *Adoption Act 1988* (SA), s 12(3)-(4). The Tasmanian provisions for registered significant relationships do not appear to be subject to this qualification: *Adoption Act 1988* (Tas), s 20. See also J Millbank, 'Recognition of Lesbian and Gay Families in Australian Law – Part Two: Children', *Federal Law Review*, vol 34, no 2, 2006, p249 and footnote 247.
- 33 Victorian Law Reform Commission, *Assisted Reproductive Technology and Adoption Position Paper Two: Parentage*, (July 2005), paras 3.34-3.39. The VLRC final report is due for release in 2007.
- 34 Dr James G Dowty, Submission 99.
- 35 Frank Gomez, Submission 216.
- 36 Marcus Blease, Submission 111.
- 37 *Family Law Act 1975* (Cth), s 64B.
- 38 Senator Ruth Webber, Submission 280.
- 39 Dr Kate Stewart, Submission 82.
- 40 *Life Insurance Act 1995* (Cth), ss 211-212.
- 41 *Safety, Rehabilitation and Compensation Act 1988* (Cth), s 4.
- 42 *Family Law Act 1975* (Cth), s 69R.
- 43 *Family Law Act 1975* (Cth), s 4.
- 44 See further, the discussion in section 5.2 above.
- 45 *Income Tax Assessment Act 1936* (Cth), s 6(1); *Income Tax Assessment Act 1997* (Cth), s 995.1; *Fringe Benefits Assessment Act 1986* (Cth), s 136(1); *Superannuation Industry (Supervision) Act 1993* (Cth), s 10; *Parliamentary Contributory Superannuation Act 1948* (Cth), s 19AA(5).
- 46 See further, the discussion in section 5.2 above.

- 47 *Family Law Act 1975* (Cth), s 64B(2). The Family Law Act defines 'parental responsibility' to mean 'all the duties, powers, responsibilities and authority which, by law, parents have in relation to children': *Family Law Act 1975* (Cth), s 61B.
- 48 *Family Law Act 1975* (Cth), s 65C. See J Millbank, 'Recognition of Lesbian and Gay Families in Australian Law – Part Two: Children', *Federal Law Review*, vol 34, no (2), 2006, p245.
- 49 *Family Law Act 1975* (Cth), s 65D(1).
- 50 For a further discussion of the legal implications of parenting orders see T Carney, 'Social Security Law and Policy', Federation Press, 2006, p178.
- 51 *Family Law Act 1975* (Cth), s 60CA.
- 52 *Family Law Act 1975* (Cth), s 64B(2)(d). A parenting order may be made in favour of a parent or any other person. More than two people can have a parenting order.
- 53 See, for example, Name Withheld, Submission 299.
- 54 Janet Jukes, Submission 276.
- 55 Speaker, Townsville Forum, 12 October 2006.
- 56 Speaker, Sydney Forum, 26 July 2006.
- 57 J Millbank, 'Recognition of Lesbian and Gay Families in Australian Law – Part Two: Children', *Federal Law Review*, vol 34, no 2, 2006, p248.
- 58 *Family Law Act 1975* (Cth), s 65D(2).
- 59 J Millbank, 'Areas of Federal Law that Exclude Same-Sex Couples and their Children', Inquiry Research Paper, September 2006, <http://www.humanrights.gov.au/samesex/index.html>. Some state registries are introducing simplified procedures which may allow couples to apply for a parenting order without the assistance of a solicitor and therefore save costs.
- 60 *Family Law Act 1975* (Cth), s 65H.
- 61 J Millbank, 'Recognition of Lesbian and Gay Families in Australian Law – Part Two: Children', *Federal Law Review*, vol 34, no 2, 2006, p248.
- 62 *Veterans' Entitlements Act 1986* (Cth), s 10(1)-(2).
- 63 *Veterans' Entitlements Act 1986* (Cth), s 10(3).
- 64 *Military Rehabilitation and Compensation Act 2004* (Cth), ss 15(2), 17; *Seafarers Rehabilitation and Compensation Act 1992* (Cth), ss 15(2), 3. See also *Military Rehabilitation and Compensation Act 2004* (Cth), ss 5, 15(2).
- 65 J Millbank, 'And then...the brides changed nappies: Lesbian mothers, gay fathers and the legal recognition of our relationships with the children we raise', Gay and Lesbian Rights Lobby (NSW), 2003, p12.
- 66 For further discussion see sections 5.2.2(b) and 5.2.4(d) above.



CHAPTER 6:

Employment

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6.1 What is this chapter about?

This chapter focuses on discrimination against same-sex couples and their families in the context of conditions of employment.

Employment is fundamental to the lives of Australian families. For many individuals, work is their major activity outside the home, and ensures their family's financial security.

However, workers in same-sex couples do not always enjoy the same employment conditions as workers in opposite-sex couples. In particular, a worker in a same-sex couple may not be guaranteed the following work rights:

- **leave entitlements** including carer's leave to look after a same-sex partner, compassionate leave to grieve a same-sex partner and parental leave to care for a newborn child
- **travel entitlements** allowing an employee to travel with his or her same-sex partner
- **employment allowances** to help support an employee's same-sex partner and children
- **workers' compensation** for an injured or deceased employee's same-sex partner
- **superannuation entitlements** for an employee's same-sex partner.

This chapter explores how employment laws discriminate against workers in same-sex couples in the first three of these areas. Workers' compensation is discussed in Chapter 7 and superannuation is discussed in Chapter 13.

This chapter also discusses how discrimination against same-sex couples in employment law breaches Australia's human rights obligations. The chapter ends by making recommendations as to how to avoid future discrimination and human rights breaches.

Specifically, this chapter addresses the following questions:

- How are employment conditions established for Australian workers?
- Can same-sex and opposite-sex couples access the same leave entitlements?
- Do federal government employees in same-sex and opposite-sex couples enjoy the same work conditions?
- Are same-sex couples protected from general discrimination in the workplace?
- Does employment legislation breach human rights?
- What must change to ensure equal access to work-related benefits for same-sex couples?

6.2 How are employment conditions established for Australian workers?

The rights enjoyed by a worker in a same-sex couple will depend on where that person works and how their work conditions are established.

Work conditions may be established by any one or more of the following mechanisms:

- an award
- a collective agreement
- an Australian Workplace Agreement (AWA)
- a common law contract
- a basic employment contract.¹

The new federal WorkChoices scheme (introduced by amendment to the *Workplace Relations Act 1996* (Cth)) protects five minimum conditions of employment.² Most Australian workers are covered by WorkChoices.³ But some workers remain within state industrial relations systems and in some areas of the public service there are specifically legislated work conditions.⁴

The five minimum conditions under WorkChoices are set out in the Australian Fair Pay and Conditions Standard (the WorkChoices Standard).⁵ Three of those minimum conditions guarantee leave entitlements:

- four weeks paid annual leave⁶
- ten days paid personal or carer's leave per year⁷
- 52 weeks unpaid parental leave.⁸

Carer's leave can be paid or unpaid leave. It is taken by an employee to provide care or support to a member of his or her 'immediate family' or household because of personal illness or injury, or an unexpected emergency.⁹

Compassionate leave is paid leave. It is taken by an employee:

- to spend time with a member of his or her 'immediate family' or household who has a personal illness or injury that poses a serious threat to life
- after the death of a member of his or her 'immediate family' or household.¹⁰

Parental leave includes maternity leave, paternity leave and adoption leave. It is taken by an employee who has just had a baby or adopted a baby.

The following sections explain where there is discrimination against workers in same-sex families regarding carer's leave, compassionate leave and parental leave.

6.3 Can same-sex and opposite-sex couples access the same leave entitlements?

The WorkChoices Standard does not protect the leave entitlements of an employee in a same-sex relationship in the same way as it protects an employee in an opposite-sex relationship.

However, awards and agreements can provide greater entitlements than those protected by WorkChoices. So the leave rights of some workers in same-sex families may be protected under individual awards and agreements.

For those workers still covered by state industrial laws, in most cases, same-sex and opposite-sex families enjoy the same rights.

The following sections explain why there are these differences in protections for same-sex couples.

6.3.1 WorkChoices does not protect carer's and compassionate leave for same-sex families

Carer's leave and compassionate leave are both protected under the WorkChoices Standard so that an employee can take leave to care or grieve for 'immediate family' or a member of the employee's household.¹¹

(a) 'Immediate family' excludes a same-sex family

The definition of 'immediate family' under the WorkChoices legislation includes a spouse, as well as a child, parent, grandparent, grandchild or sibling of the employee, or of the spouse of the employee.¹²

As discussed below, the definition of 'spouse' and 'child' does not incorporate a same-sex partner or lesbian or gay co-parent. Therefore, the concept of 'immediate family' does not incorporate a same-sex family.

(b) 'Spouse' and 'de facto spouse' exclude a same-sex partner

The definition of 'spouse' includes a 'de facto spouse' (as well as a 'former spouse' and 'former de facto spouse').¹³

The definition of 'de facto spouse' is explicitly restricted to a person of the opposite sex.¹⁴ This means that a same-sex partner cannot be a 'de facto spouse' and therefore will not qualify as a 'spouse'. Since a same-sex partner cannot be a 'spouse', he or she is not a member of an employee's 'immediate family'.

(c) 'Child' excludes the child of a lesbian co-mother or gay co-father

The WorkChoices legislation defines 'child' to include an adopted child, a step-child, an ex-nuptial child and an adult child.¹⁵ The legislation does not define who is a 'parent'.

Chapter 5 on Recognising Children notes that when children are born to a lesbian or gay couple their parents may include a birth mother, lesbian co-mother, birth father or gay co-father(s).¹⁶

Chapter 5 also explains that definitions of 'child' like that in the WorkChoices legislation will generally *include* the child of a birth mother or birth father but *exclude* the child of a lesbian co-mother or gay co-father(s) (in the absence of adoption).¹⁷

This means that the child of a lesbian co-mother or gay co-father will not be included in the definition of 'immediate family'.

(d) A same-sex partner may be a member of an employee's household

A 'member of the employee's household' is not defined anywhere in the WorkChoices legislation.

Submissions from the Australian Chamber of Commerce and Industry and a law academic, Anna Chapman, indicate that for the purposes of determining leave, this phrase covers any person ordinarily living with the employee, including a same-sex partner.¹⁸

Since a same-sex partner is not considered 'immediate family', the WorkChoices Standard will only protect the right to carer's or compassionate leave if the same-sex partners are living together. Opposite-sex couples are not restricted in this way.

The Inner City Legal Centre summarised the problems caused by requiring cohabitation as follows:

... there will be circumstances where the child in need of care is not a member of the household of the co-mother. For example, the co-mother may be separated from the birth mother and the child lives with the birth mother, or the child is an adult and lives in a separate household.¹⁹

ACON talked about the stress of proving cohabitation before being able to take carer's leave:

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.²⁰

(e) An employee in a same-sex relationship has limited rights to carer's and compassionate leave

In summary, the definitions of 'immediate family', 'spouse' and 'child' discriminate against same-sex families in the context of leave entitlements as follows.

An employee in a same-sex couple is only guaranteed leave to care for a partner if he or she is living with that partner. An employee in an opposite-sex couple has an automatic right to take leave to care for his or her partner.

A gay or lesbian employee is not guaranteed leave to care for a former same-sex partner.

An employee in a same-sex couple is not guaranteed leave to look after his or her partner's immediate family. For example, there is no guaranteed leave to care for a same-sex partner's sick mother, unless the mother is living with the couple. For example, the Inquiry heard that:

When my partner's mother passed away, after both of us caring for her in her final days, I was only offered annual leave to arrange her funeral and for the period after her funeral. Her brother unexpectedly passed away three weeks after this, I was only given half a day to attend the funeral, I couldn't even take an annual leave day.²¹

An employee in an opposite-sex relationship has an automatic right to take leave to care for his or her partner's immediate family.

A woman in a lesbian couple will only be entitled to carer's leave or compassionate leave regarding her birth child. The lesbian co-mother will not be entitled to leave.

A man in a gay couple will only be entitled to carer's leave or compassionate leave regarding his birth child. The gay co-father will not be entitled to leave.

Even where a member of a same-sex couple has an entitlement to carer's leave, he or she may not know of his or her entitlements or may be unwilling to insist on the entitlement being respected.

Sue McNamara and Leanne Nearmy described the impact of carer's leave restrictions as follows:

[O]ne of us had to have surgery in 2004, and the other needed to take some time off work to provide post-operative care. This leave could not be taken as family carer leave, as would be the case for an opposite sex partner.²²

Another couple told the Inquiry:

My (same-sex) partner suffers a long term debilitating illness and as I am the sole wage earner in our household/family it is very difficult for me to take time off to care for her. On those occasions when I do need to stay home to care for her, to take her to doctor appointments, or to the hospital, I have to use my annual leave as she is not legally recognized as my partner, therefore I am not entitled to carers leave. Our family is at a financial disadvantage because of this. In addition, using my annual leave in this way means I am left with less days off to spend with my family on happier occasions – like holidays, which leaves me more exhausted than I would like.²³

6.3.2 WorkChoices does not protect parental leave for both same-sex parents

Parental leave includes maternity leave, paternity leave and adoptive leave.

The purpose of parental leave is to provide time to both parents to care for a newborn, or newly-adopted, child.

As discussed in Chapter 5 on Recognising Children, very few gay and lesbian couples can successfully adopt a child. So the question of adoptive leave is unlikely to arise for same-sex couples.²⁴ If a same-sex couple does successfully adopt, there is no discrimination in the application of adoptive leave.

However, ever-increasingly, lesbian and gay couples are having a child through assisted reproductive technology (an ART child).

(a) A lesbian co-mother is not entitled to parental leave

Where a lesbian couple has a child, the birth mother will be entitled to maternity leave. The only leave theoretically available to the lesbian co-mother will be 'paternity' leave.²⁵

However, paternity leave is only available to a 'male employee' who is the 'spouse' of a woman giving birth.²⁶ A female partner of the birth mother is neither male, nor a 'spouse' under the legislation.²⁷

(b) *Neither member of a gay couple is entitled to paternity leave*

As discussed in Chapter 5, a gay couple may use a surrogate birth mother or enter an arrangement with a female friend to have a child through ART. If this occurs, neither of the men will be the 'spouse' of the woman giving birth so they will not be guaranteed parental leave.

(c) *Parental leave guarantees do not allow flexible parenting arrangements for same-sex couples*

Several submissions observed that parental leave provisions do not provide sufficiently flexible caring possibilities for the diverse range of same-sex families.²⁸

A gay father of a child, Anthony Brien, notes that current parental leave provisions do not adequately meet the needs of same-sex co-parenting arrangements:

Co-parenting is another method and this introduces all sorts of complications when a child may have a biological mother and father as well as a non-biological mother and father if each of the biological parents are same sex partnered. The child could live part time in each of two households and there are four parents. So how does the law deal with things such as who is entitled to parental leave (can it be shared amongst all 4 parents if they are all interested in having a parenting role in the child's life?).²⁹

The ACTU argues that it is not always the biological father who is the support person for a birth mother:

...that may be the mother's same sex partner but it might be grandma... [The purpose of parental leave should focus on] who is providing the care to infants and the support to a mother at the time of the birth of a child.³⁰

The ACTU also suggests that:

The purpose of parental leave is to ensure adequate care and support for mothers and their new-borns at and following the birth of a child, and to provide time off from work to ensure adequate care of infants and toddlers...

A more inclusive regime could be developed which allocates leave to a primary and secondary caregiver, which would give families more flexibility, regardless of the nature of the relationship between the child and the care-givers.³¹

(d) *Denying parental leave to same-sex parents can have a serious impact on the family*

As mentioned above, neither the lesbian co-mother nor the gay co-father(s) of a child will be guaranteed access to parental leave upon the birth of a child.³²

This may result in a lesbian co-mother or gay co-father(s) either resigning or giving up the opportunity of providing primary care for a young child.³³

One lesbian parent, Janet Jukes, told the Inquiry about her decision to resign:

Nine months after Hannah was born I resigned from my work to care for her full time while Marion returned to work. If we were in a heterosexual relationship I would have been entitled to take unpaid parental leave up to her first birthday under my award. In my case it was up to the discretion of my employer if they would allow unpaid leave.³⁴

6.3.3 WorkChoices non-discrimination provisions do not help same-sex families enjoy leave entitlements

As discussed above, the WorkChoices legislation discriminates against employees in same-sex relationships regarding leave entitlements.

A number of submissions to the Inquiry pointed out that this discrimination is inconsistent with the stated objectives of the WorkChoices legislation.³⁵

Those objectives include the following anti-discrimination measures:

- assisting employees to balance their work and family responsibilities effectively through the development of mutually beneficial work practices with employers³⁶
- respecting and valuing the diversity of the workforce by helping to prevent and eliminate discrimination on the basis of race, colour, sex, *sexual preference*, age, physical or mental disability, marital status, family responsibilities, pregnancy, religion, political opinion, national extraction or social origin.³⁷

The WorkChoices legislation also contains specific anti-discrimination measures which seek to eliminate discrimination in employment on the grounds of sexual orientation.³⁸

However, it seems that these provisions provide little practical protection for same-sex couples regarding workplace conditions.

6.3.4 Some state workplace laws protect leave entitlements for same-sex couples and parents

Some employees who are not covered by WorkChoices are covered by state workplace laws.

(a) *States where same-sex families do enjoy protection in leave entitlements*

Under Queensland,³⁹ South Australian,⁴⁰ and Western Australian⁴¹ workplace laws, same-sex partners receive the same leave entitlements as opposite-sex partners, including parental leave and carer's leave.

The Tasmanian *Industrial Relations Act 1984* is unclear about whether a same-sex partner or parent can access carer's leave.⁴² But same-sex parents are entitled to parental leave.⁴³

(b) *States where same-sex families do not enjoy protection in leave entitlements*

NSW industrial relations legislation does not provide for carer's leave. However, those same-sex couples covered by a NSW Award can access carer's leave.⁴⁴

Paternity leave is only available to the male partner of a woman who has given birth under NSW law.⁴⁵ The Gay and Lesbian Rights Lobby (NSW) explains that this discrimination:

...significantly limits the ability of co-parents who are covered under the Act as employees from taking on the role as primary care-giver. Lesbian co-parents are made to choose between leaving their employment to take on the primary care-giver role, or give up the opportunity all-together.⁴⁶

In the ACT, the NT and Victoria, federal industrial relations laws still apply.⁴⁷ Thus, the discrimination under WorkChoices legislation will affect employees in same-sex relationships in these states.

In addition, the ACT Attorney-General observed that under the *Parental Leave (Private Sector Employees) Act 1992* (ACT) parental leave is not available to a lesbian co-mother of an ART child.⁴⁸

However, the Equal Opportunity Commission of Victoria informed the Inquiry that access to leave is covered by the *Equal Opportunity Act 1995* (Vic).⁴⁹ This legislation and other state anti-discrimination provisions still seem to protect against discrimination contained within WorkChoices legislation.⁵⁰

6.3.5 Workplace agreements can protect leave entitlements for same-sex families

Workplace agreements include both collective agreements and individual agreements (AWAs). These agreements must contain the employment entitlements protected by the WorkChoices Standard. However, they can include conditions better than those contained in the WorkChoices Standard.

(a) *Examples of collective agreements protecting leave entitlements for same-sex families*

There are good examples of collective workplace agreements which treat same-sex and opposite-sex couples and parents in exactly the same way with regard to leave provisions. Some of the examples provided to the Inquiry include:

- Amnesty International Agreement⁵¹
- Canon Industries Agreement⁵²
- Harvest Fresh Cuts Pty Ltd Certified Agreement 2001. This agreement explicitly defines ‘spouse’ as including a spouse of the same sex.⁵³
- University of Western Australia Agreement. This agreement explicitly says that ‘partner’ means same-sex partner and refers to ‘parental’ leave rather than ‘maternity’ leave.⁵⁴

(b) *Not all collective agreements protect leave entitlements for same-sex families*

Although some workplace agreements contain good leave provisions, there is no legislative obligation for agreements to contain provisions treating same-sex and opposite-sex couples in the same way.

As a result, collective agreements vary as to whether they give equal access to leave for same-sex couples:

Through many collective agreements the ASU [Australian Services Union] has been able to establish rights for same-sex couples under provisions such as carer’s leave and parental leave. But these provisions are the exception to the rule.⁵⁵

One person in a same-sex relationship told the Inquiry about the insecurity caused by the absence of legislative guarantees:

In the workplace, we are currently not discriminated against, but that is because our respective certified agreements recognise same-sex couples in the taking of carer's and bereavement leave etc. When either one or both of us moves to a different workplace, we are not guaranteed those benefits. This puts constraints on our career and work choices.⁵⁶

(c) *Individual workplace agreements may protect same-sex couples*

The new WorkChoices system encourages the making of individual agreements between employers and employees. The government's WorkChoices website asserts that:

Bargaining at the workplace level is particularly suited to tailoring working arrangements in ways that assist employees to balance work and family responsibilities.⁵⁷

The Australian Chamber of Commerce and Industry (ACCI) argues that although the WorkChoices Standard does not protect employees in a same-sex relationship regarding entitlements to parental leave:

...it must be remembered that an employer and an employee can agree to more generous terms than that provided for in the Standard. Therefore, it is possible for same-sex entitlements to be contained in agreements.⁵⁸

One lesbian woman explained that her employer was willing to offer full access to parental leave irrespective of whether she was the birth mother:

My employer is willing to offer me 1 week (2 days paid, 3 days paid via leave accrued) parenting leave on the arrival of our child and 51 weeks un-paid maternity leave if I am the primary carer for our child regardless of biological relationship.⁵⁹

Another lesbian co-mother explained that she was able to negotiate short parental leave but not long parental leave:

In addition as I am organising time off from 2 part-time positions to be with Sarah and our babies, I have become aware of problems with the agreement in one workplace which only allows Parental Leave for a male spouse as defined by the terms of the agreement. Apart from the fact that it is only one week, I have been able to access this leave because I have an excellent manager who is willing to give it to me. The lack of access to longer paid leave and lack of acknowledgment of my role as Sarah's partner in parenting of the babies adds another financial burden to our new family.⁶⁰

ACCI also argues sexuality is a private and individual matter, which is better suited to an individual bargaining process, rather than a collective bargaining process:

The role of statutory individual bargaining agreements (AWAs) is important on a contentious issue such as the recognition of same sex relationships. Given that these are often very private and individual matters, and given that collective agreements can only be made by a majority vote of employees, then in many workplaces a majority may not support recognition of same sex relationships for employment purposes.⁶¹

(d) *Individual workplace agreements may place too much negotiating pressure on same-sex couples*

The Australian Services Union argues that individual agreement-making for a person in a same-sex relationship is an onerous task.⁶² This may be because of a reluctance to disclose sexuality in an environment where there is no legislated right to equal treatment, and where there may be some discriminatory attitudes.

One person told the Inquiry about her concerns about being sufficiently confident to negotiate for equal parental leave:

[The employment contract at my workplace] gives us an entitlement to ‘non-birth parent leave’ as opposed to ‘paternity leave’. There is no unnecessary gender-specific language, like father, husband or wife... these entitlements are important and we’re grateful for them... I was also grateful for the people who came before me to negotiate that agreement. What happens when we have to negotiate individual agreements? Do we feel confident and safe to negotiate ‘non-birth parent leave’ and similar on our own?⁶³

6.3.6 Some same-sex couples do not access leave because they do not want to ‘come out’ in the workplace

Even where state laws, awards or collective agreements allow for carer’s or parental leave, some ‘[p]eople are scared to apply for carer’s leave because they have to out themselves to their employers and to their workmates.’⁶⁴

Elis Hughes explains this fear by comparing the atmosphere in her workplace with the work environment in her partner’s workplace:

I am lucky to work in a progressive workplace which offers both maternity leave and non birth parent leave. When the time comes for us to have our child, I will be able to take leave at that time. My partner, on the other hand, works for a small business owned by a family with conservative values. She expects not to be granted parental leave and is in fact nervous about the impact of coming out to her employers under these circumstances. While anti-discrimination laws prevent her from being sacked directly for her sexuality, it is now easy for her employer to find another reason to sack her if they don’t agree with her values or if they don’t wish to grant her parental leave. If our relationship was recognised formally by the government then we would have more protection in these circumstances.⁶⁵

But even more important than the entitlements is the tone or the culture that they set for my workplace. They make our family visible and equal. This meant that I knew before I even sat at my desk on my first day at work that it was going to be ok to be open and proud about my family at work. I put Kristen’s photo on my desk and my boss smiled and said, ‘Is that your family?’ I didn’t have to make that coming out decision.⁶⁶

The fear of discrimination in the workplace can have a variety of consequences, including:

- not requesting leave at all
- taking annual leave instead of carer’s leave
- taking sick leave instead of carer’s leave.

The Australian Services Union described the problem as follows:

A large number of same-sex couples who don’t want to declare their sexuality may well feign illness rather than say that they’re caring for someone, which is in fact quite common amongst other workers. Mothers with young children will often feign personal illness rather than say it’s their children for fear of discrimination on the grounds of their parenting responsibilities.⁶⁷

Employees wishing to take annual leave or join the Christmas roster, or indeed deal with school holidays in an environment where due to the number of employees, rosters, or allotment of holiday ballots take place, are often reluctant to step forward and identify that they have parental obligations and need to participate in school holiday scheduling.⁶⁸

The Australian Services Union also told the Inquiry that an unwillingness to disclose sexuality affects access to compassionate leave:

Bereavement leave also delivers the same challenges for disclosure in the workplace without any form of instrumental protection. Attempting to attain bereavement for the loss of your partner's parent becomes extremely difficult if not impossible for you, [i]f you have not disclosed your status in the workplace, [or] if your status is not embraced and accepted in the workplace. Then you are less likely to ask for such a right in a regime of the quick dismissal.⁶⁹

6.3.7 Legislative protection gives confidence to employees in same-sex couples

Several submissions argued that legislative protection of the rights of same-sex couples is fundamental to an employee's willingness to disclose his or her relationship and claim his or her entitlements to adequate leave from employment:

If there was a legislative benchmark or right given and that was reinforced with the strength of a collectively bargained agreement then an employee should feel no fear in coming forward and be able to engage in balancing their work and family life.⁷⁰

There is some concern that even though the entitlement to take leave exists [as a member of a household], employees may not use such leave as they are not willing to make their personal circumstances known at work. Until and unless there is equal recognition before the law for same-sex couples in all areas, this may continue to be the case.⁷¹

Recognition of rights for same-sex couples is limited in our experience. It is limited for two reasons: one that individuals are too afraid to raise any such issues that are affecting them directly and second, that if and when their issues are raised there is not the law, regulation, policy or understanding to support their claims.⁷²

6.4 Do federal government employees in same-sex and opposite-sex couples enjoy the same work conditions?

Many federal employees work under collective or individual agreements. Some of those agreements will give equal access to employment conditions for opposite-sex and same-sex couples, others will not.

However, there is federal legislation determining specific work conditions for particular groups of federal employees.

This section discusses:

- a range of federal government agency **collective workplace agreements**
- **travel entitlements** for members of the federal Parliament, public office holders, judicial and statutory office holders
- employment benefits for members of the **Australian Defence Force (ADF)**.

6.4.1 Some federal government workplace agreements do not discriminate against same-sex employees

The employment conditions of most federal government employees are determined by comprehensive certified agreements rather than by legislation.⁷³ These agreements can include couple and family-related employment benefits and entitlements, including travel allowances, housing allowances, loans, health insurance and education.

(a) *Examples of federal government collective agreements protecting the rights of employees in same-sex couples*

Various federal government departments informed the Inquiry that their collective agreements do not discriminate against employees in same-sex relationships, including:

- AusAID Collective Agreement 2006–2009⁷⁴
- Department of Health and Ageing, People Leadership and Performance Improvement 2004–2007.⁷⁵

The Community and Public Sector Union (CPSU) also gave the Inquiry examples of federal agreements that include same-sex partners in entitlements, including the Centrelink Certified Agreement and the Northern Land Council Certified Agreement.⁷⁶

(b) *Concerns about using collective agreements to protect equality for same-sex couples*

The Inquiry heard concerns about the impact of the federal agreement-making processes on same-sex couples in the federal public service.

The CPSU notes that the Department of Employment and Workplace Relations (DEWR) produces Policy Parameters and Associated Guidelines for agreement-making. These guidelines prohibit the use of discriminatory terms, including ‘sexual preference’ in agreements. The CPSU recommend that a new parameter be developed to provide:

...a clear and unequivocal statement that public sector employers, regardless of the employment instrument, must not allow for any form of financial or employment-related discrimination on the basis of race, colour, gender, sexual preference, age, disability, marital status, family responsibilities, pregnancy, religion, political opinion, national extraction, membership or non membership of a trade union or social origin.⁷⁷

Furthermore, the CPSU expressed concern that the expression of work conditions is starting to move from collective agreements to government department policy documents. This may have a detrimental impact on same-sex couples:

In conducting this sample audit, it became apparent that a number of public sector agencies have transferred entitlements out of collective / certified agreements and into agency policy documents. For example the Department of Foreign Affairs and Trade (DFAT) have transferred all relocation expense entitlements in the DFAT Human Resource Manual (HRM), and the definition of family member for personal / carer’s leave is also within the HRM... As reported above, this transfer out of the agreement does not allow for public access or scrutiny of these entitlements and could lead to changes in employee entitlements which could establish discriminatory provisions.⁷⁸

6.4.2 Same-sex partners of members of the federal Parliament can only access some travel entitlements

The travel entitlements of members of the federal Parliament are determined by a combination of the conditions set out in *Remuneration Tribunal Determination 2006/18: Members of Parliament – Entitlements* (Determination 2006/18)⁷⁹ and the *Parliamentary Entitlements Act 1990* (Cth) (Parliamentary Entitlements Act).

Determination 2006/18 generally treats same-sex and opposite-sex partners in the same way. But the Parliamentary Entitlements Act does not.

(a) *Same-sex partners can access most travel entitlements under Determination 2006/18*

Same-sex partners are eligible for most (but not all) of the travel entitlements set out in Determination 2006/18. This is because the provisions for travel entitlements allow a 'spouse' or 'nominee' to accompany the member of the federal Parliament.

(i) *A same-sex partner cannot be a 'spouse'*

Determination 2006/18 defines 'spouse' so that it only includes the opposite-sex married or de facto partner of the member of the federal Parliament.⁸⁰

(ii) *A same-sex partner can be a 'nominee'*

A 'nominee' is defined as 'a person nominated by the senator or member and approved at the discretion of the Special Minister of State.'⁸¹ This definition could include a same-sex partner, but the same-sex partner must be approved by the Special Minister (unlike an opposite-sex de facto partner).

(iii) *A 'nominee' is entitled to a range of travel entitlements*

A 'spouse' or 'nominee' is entitled to:

- travel equivalent to the value of nine business class return trips to Canberra from the principal place of residence⁸²
- travel equivalent to the value of three business class return interstate trips per year⁸³
- travel in order to attend an official government, parliamentary or vice-regal function as an invitee⁸⁴
- car transport for specific purposes⁸⁵
- members entitled to costs of overseas travel for study will be covered for the costs of an accompanying spouse.⁸⁶ This entitlement may be available to a nominee at the discretion of the Special Minister of State.⁸⁷

(iv) *Some travel entitlements are only available to a 'spouse'*

There are some travel entitlements under Determination 2006/18 which are not available to a 'nominee', but are available to a 'spouse'. These entitlements will not be available to a

same-sex partner. For example, senators and members who are entitled to reimbursement for the cost of a hire car and charter aircraft may be accompanied by a 'spouse', but not a 'nominee'.⁸⁸

(v) The 'nominee' category may not be appropriate recognition of a same-sex partner

Former Senator Brian Greig drew the Inquiry's attention to discrimination he experienced when his partner became a member of his staff.

His partner's travel entitlements were withdrawn as a staff member could not also be a 'nominee'. This rule did not apply to opposite-sex partners who were also staff members.

The Remuneration Tribunal found in Senator Greig's favour and travel entitlements were restored. Senator Greig argues that the 'nominee' category is an inappropriate mechanism for recognising a same-sex partner. He argues that all members and senators should be able to register a 'partner'.⁸⁹

(b) Same-sex partners cannot access travel entitlements in some other Remuneration Tribunal determinations

There are some travel entitlements for partners which are set out in specific determinations made by the Remuneration Tribunal. At least one of those determinations does not extend the benefits to same-sex partners. That determination provides that a Minister or office holder accompanied by a spouse can access an additional \$10 per night travelling allowance.⁹⁰

(c) Same-sex partners cannot access travel entitlements under the Parliamentary Entitlements Act

The Parliamentary Entitlements Act sets out additional entitlements available to members of federal Parliament and their partners. However, a partner will only have access to those entitlements if he or she qualifies as a 'spouse' under the legislation and the definition of 'spouse' does not allow for a same-sex partner.

(i) A same-sex partner cannot be a 'spouse'

The Parliamentary Entitlements Act defines a 'spouse' as including 'a person who is living with the member as the spouse of the member on a genuine domestic basis although not legally married to the member'.⁹¹

As discussed in Chapter 4 on Recognising Relationships, the use of the word 'spouse' within this definition will exclude a same-sex partner.⁹²

(ii) A same-sex partner cannot access travel benefits available to a 'spouse'

A same-sex partner will be excluded from the following range of travel entitlements available to a 'spouse':

- for overseas travel, a member may downgrade the class of travel and use the difference in cost to offset the fare of an accompanying spouse⁹³
- the cost of travel for a spouse accompanying a Senior Officer travelling on official business either overseas or within Australia⁹⁴

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- the cost of travel for a spouse accompanying a member travelling overseas if the Prime Minister approves⁹⁵
- the cost of travel for a spouse accompanying an Opposition Office Holder or Presiding Officer travelling in Australia⁹⁶
- the cost of charter transport for a spouse accompanying the leader of a minority party.⁹⁷

(d) *Same-sex partners do not qualify for a Life Gold Pass*

The *Members of Parliament (Life Gold Pass) Act 2002* (Cth) provides a specified number of free domestic air trips per year for:

- a sitting or former member of the federal Parliament
- his or her spouses
- his or her widow or widower.⁹⁸

The legislation defines 'spouse' as 'the person's legally married husband or legally married wife'.⁹⁹ The legislation defines a 'widow' and 'widower' to be a surviving 'spouse'.¹⁰⁰ Thus, this legislation excludes a partner in an opposite-sex de facto couple as well as a same-sex couple.

6.4.3 Same-sex partners of judicial and statutory office holders can only access some travel entitlements

The *Judicial and Statutory Officers (Remuneration and Allowances) Act 1984* (Cth) gives judicial or statutory office holders the right to claim additional travel allowance when accompanied by a spouse.¹⁰¹ There is no definition of spouse in the legislation. As explained in Chapter 4 on Recognising Relationships, it is extremely unlikely that a same-sex partner will qualify as a spouse in the absence of a definition. Thus, a judicial or statutory office holder cannot claim a spouse travel allowance when accompanied by a same-sex partner.

However, there are also travel entitlements provided by Determination 2004/03 of the Remuneration Tribunal. That Determination provides travel entitlements regarding a 'partner'. The definition of 'partner' includes same-sex and opposite-sex couples alike.

Thus, judicial and statutory office holders in same-sex couples will receive the following entitlements under the Determination:

- An office holder may travel with his or her partner for purposes relating to official business at Commonwealth expense (within Australia or overseas).¹⁰²
- Where the Commonwealth meets the travel costs of the office holder's partner the difference between the cost of a single and double room is also paid.¹⁰³

6.4.4 Same-sex partners of public office holders can access all travel entitlements

The travel entitlements for the partner of a public officer holder (including a range of senior jobs in Commonwealth agencies) and principal executive officers are set out in determinations of the Remuneration Tribunal.¹⁰⁴

The most recent determination gives travel entitlements to the ‘spouse’ and ‘partner’ of an office holder.¹⁰⁵ A ‘partner’ is defined as ‘any person who lives with the office holder on a genuine domestic basis as the partner of the office holder’.¹⁰⁶ This definition will include a same-sex and opposite-sex partner on the same basis.

Consequently, same-sex partners of public office holders receive equivalent travel entitlements to those available to opposite-sex partners.

6.4.5 Same-sex partners of Department of Foreign Affairs and Trade employees can access all travel entitlements

An Administrative Circular issued by the Department of Foreign Affairs states that a de facto partner can accompany an officer on an overseas posting at official expense. The circular is quite explicit about including same-sex couples:

[A] de facto relationship may be deemed to exist where two people regardless of their gender, not being legally married, have a mutual commitment to living together on a genuine domestic basis, to the exclusion of all others.¹⁰⁷

A child normally living with the couple will also be entitled to accompany them if less than 18 years old.¹⁰⁸

6.4.6 Same-sex couples in the Australian Defence Force can access most work entitlements

The Secretary and the Chief of the Australian Defence Forces (ADF) can issue instructions covering the various conditions of service for ADF employees, subject to and in accordance with any directions of the Minister.¹⁰⁹

(a) ‘Spouse’ excludes a same-sex partner

The definition of dependant in the ADF Pay and Conditions Manual includes a ‘spouse’, defined as ‘a person who is married to the member in accordance with the *Marriage Act 1961*’.¹¹⁰ This definition excludes both opposite-sex de facto couples and same-sex couples, both of whom are recognised under the definition of ‘interdependent partner’.

(b) ‘Interdependent partner’ includes a same-sex partner

In 2005, the ADF amended its instructions to include an ‘interdependent partner’ as a person in a recognised relationship with an ADF employee.¹¹¹ The definition of ‘interdependent partner’ includes:

a person who, regardless of gender, is living in a common household with the member in a bona fide, domestic, interdependent partnership, although not legally married to the member...¹¹²

Thus, same-sex and opposite-sex partners are both categorised as an ‘interdependent partner’.¹¹³

The ADF instructions set out strict criteria for recognising an interdependent partnership, including:

- the member and his or her partner must have lived together for at least 90 consecutive days and maintained a common household¹¹⁴
- the couple must complete an application form and a statutory declaration¹¹⁵
- the couple must annex four items of documentary evidence, drawn from a compulsory list.¹¹⁶

Professor Jenni Millbank observes that these requirements contrast with all other federal laws which recognise de facto relationships without any formal step of registering the relationship with authorities.¹¹⁷

The Department of Defence informed the Inquiry that the interdependency category provides greater flexibility and gives more scope for an inclusive approach to relationships than the definitions of 'spouse' or 'de facto partner' used in other federal laws.¹¹⁸ However, it is possible for the ADF to retain discretion, whilst treating opposite-sex de facto and same-sex couples in the same manner as married couples.

(c) *An 'interdependent partner' is entitled to a range of benefits*

The ADF Pay and Conditions Manual covers a range of employment benefits for an ADF employee and his or her interdependent partner, including:

- relocation allowances¹¹⁹
- travel costs associated with relocation¹²⁰
- temporary accommodation allowances¹²¹
- entitlement to a service residence¹²²
- leave entitlements including compassionate, parental and carer's leave¹²³
- education and training benefits.¹²⁴

Same-sex and opposite-sex de facto couples have equal access to these entitlements because of the definition of 'interdependent partner' in the ADF instructions.

The ADF Pay and Conditions Manual also provides that both members of a couple can take parental leave at the birth of a child irrespective of the gender of the parents.¹²⁵ Thus, the lesbian co-mother and gay co-father of a child would be entitled to leave if in a relationship with the birth parent.

(d) *Some benefits are not available to same-sex partners*

Under the *Defence Force (Home Loans Assistance) Act 1990* (Cth), ADF employees are entitled to low-interest home loans if they own an interest in a house that:

- is more than a half-interest; or
- when added to the interest of a 'spouse' or 'child', is more than a half-interest.¹²⁶

The definition of ‘spouse’ does not include a same-sex partner.¹²⁷ So an ADF member who buys a house as a joint tenant with a same-sex partner is not eligible for the loan. To qualify for the entitlement, the ADF member would have to:

- buy the house in his or her own name; or
- buy more than half the house as a tenant-in-common with his or her same-sex partner.

An ADF member in an opposite-sex couple can buy a house jointly with a partner and still qualify for the subsidised loan.

The definition of ‘child’ includes ‘a child, step-child or legally adopted child of the person.’¹²⁸ As discussed in Chapter 5 on Recognising Children, definitions of ‘child’ such as this will generally *include* the child of a birth mother or birth father but *exclude* the child of a lesbian co-mother or gay co-father.

Some provisions in the Act also rely on a definition of ‘family member’, which excludes a same-sex partner and his or her child.¹²⁹ This may have a negative impact on how the loan scheme applies in relation to same-sex families.¹³⁰

Further, if the ADF member dies, the subsidised loan remains available to his or her surviving spouse.¹³¹ This benefit is not available to a surviving same-sex partner because the same-sex partner of an ADF member is not included in the definition of ‘widow’ or ‘widower’.¹³²

The ADF informed the Inquiry that the legislation governing this entitlement is currently under review.¹³³

6.5 Are same-sex couples protected from general discrimination in the workplace?

Many people in same-sex couples described to the Inquiry their experiences of discrimination in the workplace.¹³⁴ The Inquiry’s Terms of Reference do not extend to investigating individual cases of workplace discrimination. However, it is clear that a discriminatory workplace environment (be it actual or perceived) can have a strong impact on whether a person in a same-sex relationship is willing to assert or negotiate his or her workplace entitlements.

6.5.1 Examples of discrimination in the workplace

The Coalition of Activist Lesbians described the following example of harassment in a NSW government department:

A lesbian working in a NSW government department described to me having obscene emails sent to her, including sexualised cartoons of lesbians, pornography and at one point a sex toy was left on her desk. When she spoke with her supervisor she received more harassment and left her place of employment.¹³⁵

Graeme Moffatt told a story about a colleague who was held back from promotion because he was gay:

Another instance that really shook me and showed me how little things had changed in many ways occurred to a senior colleague of mine during my employment with one major bank. My colleague, [name withheld], as an indication of the regard he was held in for his professional abilities... was the relationship manager to the bank's largest single customer group. He was taken aside and advised that rumours had circulated in regards to his sexuality. He was further advised that if any basis was found for the rumours, it would affect his possibility for promotion. In light of this, he decided to leave and was hired by an international bank. Many people would ask why he did not take legal action or lodge a complaint, but I would imagine that the financial services industry is much like any other close knit community - any hint of non conformity is quickly spread by people seeking to advance themselves at the expense of others trying to achieve their goals through legitimate hard work.¹³⁶

Several people described their concern about 'coming out' in the workplace because of the possibility of discrimination:

Some workplaces ask for your 'next of kin contact' and then ask 'relationship to you'. I am forced to either 1. come out or 2. put my partner as next of kin and lie about our relationship or 3. not put my partner as next of kin. I placed my partner's Aunty as a next of kin contact so she can contact my partner in an emergency. This means I do not have to come out and risk my employment. However, I would prefer if they simply did not ask about your relationship to your next of kin.¹³⁷

Ultimately, the pressure of hiding my relationship became unbearable, and I resigned from the school. This had a huge financial impact on me. I lost wages and benefits, and for a while I was in a very precarious financial position until I found a position where I could be open about who I am.¹³⁸

A lesbian woman who was employed as a teacher in a private school told the Inquiry of the long term damage discrimination has had on her career:

Some of the other teachers were aware that I am a lesbian. One of my superiors advised me that if any of the pupils found out I am a lesbian, I would be sacked. I knew that the school had the power to do so, and it made me feel very uncomfortable and insecure. I had to be very careful about everything I said, making sure I never used the word 'we' when describing any activity or event in my life. I was forced to be constantly on my guard, in case I inadvertently implied that I had a partner or that I was in a same-sex relationship.

This experience of discrimination continues to affect me today. Although I relate very well with young people, I have not worked with children since that time. This has restricted my employment options and stopped me from pursuing work in areas that I love. This discrimination also affects the community, because young people miss out on the positive qualities and input that I have to offer. Young people also get inaccurate and destructive messages when it is implied that all people are heterosexual, or when those who are not are silenced, as I was.¹³⁹

6.5.2 Inadequate protection against discrimination in federal law

Several submissions to the Inquiry express concern about the quality of legal protection against discrimination of people in same-sex couples.

The Equal Opportunity Commission of Victoria notes that most states and territories provide some degree of protection from discrimination on the grounds of sexuality.¹⁴⁰ However, protection at the federal level is limited:

...at the Federal level there are almost no effective avenues of redress for people who experience such discrimination. The *Human Rights and Equal Opportunity Commission Act 1986* provides an extremely limited avenue for redress for discrimination on the ground of 'sexual preference', but only in relation to Commonwealth bodies and agencies and in employment. Complainants wishing to pursue redress through this avenue may access HREOC's complaint-handling service only, as HREOC has no power to make enforceable determinations in respect of complaints under the Act and complainants have no access to a formal determination of an entitlement to remedy by a Court. Where complaints cannot be resolved by conciliation, the only option available is for HREOC to report its findings and recommendations to the Commonwealth Attorney-General who is required to table the report in the Federal Parliament.¹⁴¹

The Australian Chamber of Commerce and Industry argues that employers are subject to a complex array of overlapping anti-discrimination laws, including federal and state anti-discrimination laws. They argue that employers face difficulty in:

...trying to comply with all of the following, sometimes incompatible and overlapping laws: Commonwealth minimum employment entitlements (under legislation such as WR Act, or awards), Commonwealth anti-discrimination legislation (such as the SDA Act or HREOC Act), State/Territory anti-discrimination laws, State and Territory industrial awards and State/Territory minimum employment entitlements.¹⁴²

The Inquiry also heard arguments both for and against retention of the exemptions in relation to employment discrimination for religious organisations.¹⁴³

Some submissions to the Inquiry made general comments about the absence of federal anti-discrimination laws protecting against discrimination on the basis of sexual orientation.¹⁴⁴ Such legislation would protect gay and lesbian employees against the discrimination described above. It would also require amendment of employment-related laws to remove discrimination and may assist gay and lesbian employees to assert their rights in the workplace.

6.6 Does employment legislation breach human rights?

This chapter identifies a number of workplace laws which fail to protect the rights of workers in same-sex couples in the same way as they protect the rights of workers in opposite-sex couples. It also identifies areas where the best interests of the child of a same-sex couple are not protected in the same way as the child of an opposite-sex couple.

The Inquiry's main finding is that the definitions in federal employment legislation regarding couples and children cause a breach of the right to equal protection of the law without discrimination (*International Covenant on Civil and Political Rights*, article 26).

This discrimination leads to further breaches of Australia's obligations under:

- *International Covenant on Civil and Political Rights* (ICCPR) – articles 2(1), 2(3) (right to a remedy), 23(1) (protection of families).
- *Discrimination (Employment and Occupation) Convention 1958* (ILO 111) – articles 2, 3(b)-(c) (equal opportunity in the workplace).
- *Convention on the Rights of the Child* (CRC) – articles 2, 3(1) (best interests of the child), 18 (common responsibilities of, and assistance to, parents).

- *International Covenant on Economic Social and Cultural Rights* (ICESCR) – articles 2(2), 7 (just and favourable work conditions), 10 (protection of the family).

These principles are discussed in more detail in Chapter 3 on Human Rights Protections.

6.6.1 Employment legislation breaches the right to non-discrimination

The Inquiry finds that the following legislation breaches the rights to non-discrimination set out in the ICCPR (article 26), ILO 111 (articles 2 and 3) and ICESCR (articles 7, 2(2)):

- *Workplace Relations Act 1996* (Cth) – same-sex couples are not guaranteed the same personal and parental leave as opposite-sex couples.
- *Parliamentary Entitlements Act 1990* (Cth) – members of the federal Parliament in same-sex couples are not guaranteed the same travel entitlements as opposite-sex couples.
- *Members of Parliament (Life Gold Pass) Act 2002* (Cth) – travel entitlements are only granted to the married spouse of sitting and former members of federal Parliament and same-sex couples cannot marry.
- *Defence Force (Home Loans Assistance) Act 1990* (Cth) – same-sex couples cannot access low-interest home loans available to opposite-sex couples.

6.6.2 Discrimination in parental leave entitlements breaches the rights of children and families

The *Workplace Relations Act 1996* (Cth) does not guarantee parental leave to the lesbian or gay co-parents of a newborn child. This means that the child may only have the benefit of one carer in the weeks and months after birth.

This discrimination against the lesbian co-mother and gay co-father in the area of parental leave results in breaches of the CRC for the following reasons:

- The child of a same-sex couple cannot enjoy the same level of parental care as the child of an opposite-sex couple – this amounts to *discrimination* against the child on the basis of the status of his or her parents (CRC, article 2(2))
- The child's *best interests* are not a primary consideration – if the child's best interests were considered, both parents would be entitled to leave (CRC, articles 3(1), 2(1))
- The parental leave provisions do not *recognise and support the common responsibilities* of *both* same-sex parents to fulfil child-rearing responsibilities (CRC, articles 18, 2(1)).

Discrimination in parental leave entitlements also breaches those articles of the ICCPR and ICESCR which require Australia to provide non-discriminatory protection and assistance to the family (ICCPR, articles 23(1), 2(1); ICESCR, articles 10, 2(2)).

6.7 What must change to ensure equal access to work-related benefits for same-sex couples?

This chapter describes a range of workplace legislation which discriminates against same-sex couples.

The Inquiry recommends amending the legislation to avoid future breaches of the human rights of people in same-sex couples.

The following sections summarise where the problems lie and how to fix them.

6.7.1 Narrow definitions are the main cause of discrimination

Most same-sex couples and parents in Australia are not guaranteed the same carer's and compassionate leave as opposite-sex couples because of narrow definitions of 'spouse' and 'child' in the WorkChoices legislation.

Neither a lesbian co-mother nor a gay co-father of a child is guaranteed parental leave under WorkChoices because of the definition of 'paternity leave'.

Federal members of Parliament, statutory office holders and judges in same-sex couples only sometimes get the same travel entitlements as their opposite-sex counterparts. Again, the root cause of the problem is a definition of 'spouse' which includes opposite-sex de facto partners but not same-sex partners.

ADF personnel in same-sex couples mostly enjoy the same work benefits because the ADF introduced the concept of 'interdependent partners' which applies to both opposite-sex and same-sex couples. However, there are still some entitlements which are only available to a 'spouse' and that definition excludes a same-sex partner.

6.7.2 The solution is to amend the definitions and recognise both same-sex parents of a child

Since the main problem is the narrow scope of legislative definitions, the solution is to amend those definitions so they are inclusive, rather than exclusive, of same-sex couples and families.

Chapter 4 on Recognising Relationships presents two alternative approaches to amending federal law to remove discrimination against *same-sex couples*.

The Inquiry's preferred approach for bringing equality to same-sex couples is to:

- retain the current terminology used in federal legislation (for example retain the term 'spouse' in the WorkChoices legislation)
- redefine the terms in the legislation to include same-sex couples (for example, redefine 'spouse' to include a 'de facto partner')
- insert new definitions of 'de facto relationship' and 'de facto partner' which include same-sex couples.

Chapter 5 on Recognising Children sets out how to better protect the rights of the *children of same-sex couples*.

Amongst other things, Chapter 5 recommends that the federal government implement parenting presumptions in favour of a lesbian co-mother of a child conceived through assisted reproductive technology (ART child). This would mean that an ART child born to a lesbian couple would automatically be the 'child' of both members of the couple (in the same way as an ART child is automatically the 'child' of both members of an opposite-sex couple).

The following list sets out the definitions which would need to be amended according to these suggested approaches.

The Inquiry notes that if the government were to adopt the alternative approach set out in Chapter 4, then different amendments would be required.

6.7.3 A list of federal legislation to be amended

The Inquiry recommends amendments to the following legislation discussed in this chapter:

Defence Act 1903 (Cth)

'child' (no need to insert definition if the child of a lesbian co-mother or gay co-father may be recognised through reformed parenting presumptions or adoption laws)

'de facto partner' (insert new definition)

'de facto relationship' (insert new definition)

'dependant' (insert definition to include a 'de facto partner' and 'child')

'member of a family' (s 58A – no need to amend if new definition of 'dependant')

Defence Force (Home Loans Assistance) Act 1990 (Cth)

'child' (s 3 – no need to amend if the child of a lesbian co-mother or gay co-father may be recognised through reformed parenting presumptions, adoption laws or a new definition of 'step-child')

'de facto partner' (insert new definition)

'de facto relationship' (insert new definition)

'family member' (s 6 – no need to amend if 'spouse' is amended and a lesbian co-mother or gay co-father and their children may be recognised through reformed parenting presumptions, adoption laws or a new definition of 'step-child').

'spouse' (s 3 – amend to include a 'de facto partner')

'step-child' (insert new definition)

'widow' (s 3 – amend to remove gender specific language, otherwise no need to amend if 'spouse' is amended)

'widower' (s 3 – amend to remove gender specific language, otherwise no need to amend if 'spouse' is amended)

Judicial and Statutory Officers (Remuneration and Allowances) Act 1984 (Cth)

‘de facto partner’ (insert new definition)

‘de facto relationship’ (insert new definition)

‘spouse’ (insert new definition including a ‘de facto partner’)

Members of Parliament (Life Gold Pass) Act 2002 (Cth)

‘de facto partner’ (insert new definition)

‘de facto relationship’ (insert new definition)

‘spouse’ (s 4 – amend to include a ‘de facto partner’)

‘widow’ (s 4 – amend to remove gender specific language, otherwise no need to amend if ‘spouse’ is amended)

‘widower’ (s 4 – amend to remove gender specific language, otherwise no need to amend if ‘spouse’ is amended)

Parliamentary Entitlements Act 1990 (Cth)

‘de facto partner’ (insert new definition)

‘de facto relationship’ (insert new definition)

‘spouse’ (s 3 – amend to include a ‘de facto partner’)

Workplace Relations Act 1996 (Cth)

‘child’ (s 240 – no need to amend if the child of a lesbian co-mother or gay co-father are recognised through reformed parenting presumptions, adoption laws or a new definition of ‘step-child’)

‘de facto relationship’ (insert new definition)

‘de facto spouse’ (ss 240, 263 – replace with new definition of ‘de facto partner’)

‘immediate family’ (s 240 – no need to amend if ‘spouse’ is amended and a lesbian co-mother or gay co-father and their children may be recognised through reformed parenting presumptions, adoption laws or a new definition of ‘step-child’)

‘paternity leave’ (s 282(1) – amend to remove gender specific language, otherwise no need to amend if ‘spouse’ is amended)

‘spouse’ (ss 240, 263 – amend to replace all references to ‘de facto spouse’ with ‘de facto partner’)

‘step-child’ (insert new definition)

6.7.4 Other instruments to be amended

Determination 2006/14: Members of Parliament – Travelling Allowance

- ‘de facto partner’ (insert new definition)
- ‘de facto relationship’ (insert new definition)
- ‘spouse’ (insert new definition including a ‘de facto partner’)

Determination 2006/18: Members of Parliament – Entitlements

- ‘de facto partner’ (insert new definition)
- ‘de facto relationship’ (insert new definition)
- ‘spouse’ (insert new definition including a ‘de facto partner’)

Australian Government Department of Defence, ADF Pay and Conditions Manual

- ‘de facto partner’ (insert new definition)
- ‘de facto relationship’ (insert new definition)
- ‘spouse’ (ch 1, pt 3, div 2, cl 1.3.77 – amend to include a ‘de facto partner’)

6.7.5 A list of state legislation to be amended

The Inquiry recommends amendment of the following legislation:

- *Parental Leave (Private Sector Employees) Act 1992* (ACT)
- *Industrial Relations Act 1996* (NSW).

6.7.6 Anti-discrimination legislation would help protect against general workplace discrimination

The Inquiry recommends the introduction of federal legislation to protect against discrimination in employment on the grounds of sexual orientation.

Federal anti-discrimination legislation would not only provide a legal remedy for discrimination in the workplace, it would send a strong message to the community as a whole that gay and lesbian employees are entitled to the same rights as any other employee.

Federal anti-discrimination legislation should also result in a range of consequential legislative changes – for instance equal treatment in leave entitlements under WorkChoices.

Anti-discrimination legislation may also give gay and lesbian employees greater confidence to ‘come out’ to their employer and assert their rights to leave to care for their same-sex partner. In this regard, such legislation may also provide confidence to gay and lesbian employees negotiating workplace agreements.

Endnotes

- 1 Community and Public Sector Union (CPSU), PSU Group, Submission 135.
- 2 *Workplace Relations Amendment (Work Choices) Act 2005* (Cth), commenced operation on 27 March 2006 (schs 1, 2, 4 (Items 3-24) and 5 of the Bill commenced 27 March 2006; the remainder had already commenced on Royal Assent on 14 December 2005).
- 3 See Australian Government, WorkChoices, *WorkChoices and who is covered, Fact Sheet 1*, <https://www.workchoices.gov.au/ourplan/publications/html/WorkChoicesandwhoiscovered.htm>, viewed 15 January 2007.
- 4 Community and Public Sector Union (CPSU), PSU Group, Submission 135. See for example *Public Service Act 1999* (Cth) and other Acts of Parliament such as those governing maternity and long service leave.
- 5 The scope of the Standard is set out in *Workplace Relations Act 1996* (Cth), s 171(2). The WorkChoices Standard also includes the minimum wage set by the Australian Fair Pay Commission and a maximum of 38 ordinary hours of work per week.
- 6 *Workplace Relations Act 1996* (Cth), s 232. Shift workers are entitled to an additional week.
- 7 *Workplace Relations Act 1996* (Cth), ss 245-249. This includes sick leave and carer's leave, with provision for an additional two days of unpaid carer's leave (ss 250-252) and two days of paid compassionate leave per occasion (ss 257-259).
- 8 *Workplace Relations Act 1996* (Cth), ss 266, 283.
- 9 *Workplace Relations Act 1996* (Cth), s 244(b).
- 10 *Workplace Relations Act 1996* (Cth), s 257(1).
- 11 *Workplace Relations Act 1996* (Cth), ss 250, 257. The *Workplace Relations Act 1996* (Cth), does not define 'member of the employee's household'.
- 12 *Workplace Relations Act 1996* (Cth), s 240.
- 13 *Workplace Relations Act 1996* (Cth), ss 240, 263. For discussion about the definition of 'spouse' see Australian Council of Trade Unions (ACTU), Submission 39.
- 14 *Workplace Relations Act 1996* (Cth), ss 240, 263: 'de facto spouse, of an employee, means a person of the opposite sex to the employee who lives with the employee as the employee's husband or wife on a genuine domestic basis although not legally married to the employee'.
- 15 *Workplace Relations Act 1996* (Cth), s 240.
- 16 For an explanation of these terms see the Glossary of Terms.
- 17 See Chapter 5 on Recognising Children.
- 18 See Australian Chamber of Commerce and Industry, Submission 301(I); Anna Chapman, Submission 229. See also A Chapman, 'Challenging the Constitution of the (White and Straight) Family in Work and Family Scholarship', *Law in Context*, vol 23, no 1, 2005, pp65-87. See further *Family Leave Test Case – November 1994* (1994) 57 IR 121; *Family Leave Test Case, Supplementary Decision* (1995) AILR 3-060.
- 19 Inner City Legal Centre, Opening Statement, Sydney Hearing, 26 July 2006.
- 20 ACON, Submission 281.
- 21 Graeme Moffatt, Submission 122. See also Law Institute of Victoria, Submission 331.
- 22 Sue McNamara and Leanne Nearmy, Submission 298.
- 23 Name Withheld, Submission 116.
- 24 The relevant provisions on adoptive leave are in the *Workplace Relations Act 1996* (Cth), ss 298-315.
- 25 The relevant provisions on paternity leave are in the *Workplace Relations Act 1996* (Cth), ss 282-285.
- 26 *Workplace Relations Act 1996* (Cth), s 282(1). 'Spouse includes the following: (a) a former spouse; (b) a de facto spouse; (c) a former de facto spouse': s 263.
- 27 See Gay and Lesbian Rights Lobby (NSW), Submission 333; Law Institute of Victoria, Submission 331; Anna Chapman, Submission 229.

- 28 See ACON, Submission 281.
- 29 Anthony Brien, Submission 64.
- 30 Australian Council of Trade Unions, Melbourne Hearing, 27 September 2006.
- 31 Australian Council of Trade Unions, Submission 39.
- 32 See also Gay and Lesbian Rights Lobby (NSW), Submission 333.
- 33 Gay and Lesbian Rights Lobby (NSW), Submission 333.
- 34 Janet Jukes, Submission 276.
- 35 See Australian Council of Trade Unions, Submission 39; Anna Chapman, Submission 229.
- 36 *Workplace Relations Act 1996* (Cth), s 3(l).
- 37 *Workplace Relations Act 1996* (Cth), s 3(m). See Australian Chamber of Commerce and Industry, Submission 301(I); Australian Council of Trade Unions, Submission 39.
- 38 *Workplace Relations Act 1996* (Cth), ss 104-106, 151(3), 222, 568(2)(e). See Anna Chapman, Submission 229.
- 39 Under the *Industrial Relations Act 1999* (Qld), parental leave entitlements are available on ‘the birth of a child of an employee’s spouse’: s 18(3). ‘Spouse’ is defined by the *Acts Interpretation Act 1954* (Qld) to include a de facto partner: s 36. The definition of ‘de facto partner’ is ‘either 1 of 2 persons who are living together as a couple on a genuine domestic basis...’: s 32DA(1). The ‘gender of the persons is not relevant’: s 32DA(5).
- 40 The *Statutes Amendment (Domestic Partners) Act 2006* (SA). This Act had not commenced as at 10 April 2007. It will amend the *Fair Work Act 1994* (SA). See *Fair Work Act 1994* (SA), sch 5, Item 2.
- 41 The *Acts Amendment (Equality of Status) Act 2003* (WA) amended the *Minimum Conditions of Employment Act 1993* (WA). See *Minimum Conditions of Employment Act 1993* (WA), s 20A.
- 42 *Industrial Relations Act 1984* (Tas), s 47AF. However, it seems that amendments to the State Service Regulations 2001 (Tas) may have clarified this issue for Tasmanian public sector employees. Dr Samantha Hardy, Dr Sarah Middleton, Dr Lisa Butler, Submission 125. See State Service Regulations 2001 (Tas), reg 25(1). ‘Spouse’ is now defined as including the person with whom a person is, or was at the time of his or her death, in a significant relationship, within the meaning of the *Relationships Act 2003* (Tas): reg 3(1).
- 43 *Industrial Relations Act 1984* (Tas), sch 2, Item 2: a ‘partner’ as defined in the *Relationships Act 2003* (Tas) is entitled to parental leave.
- 44 Australian Chamber of Commerce and Industry, Submission 301(I). See for example, *State Personal/Carer’s Leave Case – August 1996* (1996) 68 IR 308; *Aged Care General Services (State) Award 2006* (NSW), section 18, http://www.industrialrelations.nsw.gov.au/awards/pathways/results.jsp?award_code=964&show=Content&content_id=1622124, viewed 9 March 2007. See also NSW Department of Commerce, Office of Industrial Relations, *Carer’s and bereavement leave*, <http://www.industrialrelations.nsw.gov.au/resources/carersleave.pdf>, viewed 9 March 2007.
- 45 *Industrial Relations Act 1996* (NSW), s 55(3). See ACON, Submission 281; Gay and Lesbian Rights Lobby (NSW), Submission 333; Anti-Discrimination Board of NSW, Sydney Hearing, 26 July 2006.
- 46 Gay and Lesbian Rights Lobby (NSW), Submission 333. See also ACON, Submission 281.
- 47 In the ACT and the NT, individual industrial relations systems have not been enacted. In Victoria, general industrial relations powers were referred to the Commonwealth in 1996: *Commonwealth Powers (Industrial Relations) Act 1996* (Vic) and *Workplace Relations and other Legislation Amendment Bill (No.2) 1996* (Cth).
- 48 Simon Corbell MLA (Attorney-General for the ACT), Opening Statement, Canberra Hearing, 20 November 2006. The *Parental Leave (Private Sector Employees) Act 1992* (ACT) applies to employees who are either not covered by an industrial award, or whose industrial award does not include entitlement to parental leave and does not preclude such an entitlement: *Parental Leave (Private Sector Employees) Act 1992* (ACT), s 4. Section 5 refers to the Parental Leave Case (Australian Industrial Relations Commission *Decision 773/1990*, 26 July 1990), attachment A.

- 49 Equal Opportunity Commission of Victoria, Daylesford Forum, 28 September 2006. See *Equal Opportunity Act 1995* (Vic). An employer must not discriminate against an employee by denying or limiting access by the employee to opportunities for promotion, transfer or training or to any other benefits connected with employment: s 14. Discrimination is prohibited on the basis of such attributes as ‘marital status’ and ‘sexual orientation’: s 6. ‘Marital status’ includes ‘domestic partner’ which is defined as a person living with another as a couple on a genuine domestic basis, irrespective of gender: s 4.
- 50 Section 16(1) of the *Workplace Relations Act 1996* (Cth) outlines the state and territory legislation that is excluded by the Act, primarily state or territory industrial laws or laws that apply to employment generally and deal with leave. However, s 16(2)(a) specifies that state and territory laws that deal with ‘the prevention of discrimination’ or ‘the promotion of EEO’ are not excluded.
- 51 Australian Services Union, documents provided at Sydney Hearing, 26 July 2006.
- 52 Australian Services Union, documents provided at Sydney Hearing, 26 July 2006.
- 53 Australian Chamber of Commerce and Industry, Submission 301(I).
- 54 University of Western Australia, Perth Hearing, 9 August 2006.
- 55 Australian Services Union, Submission 296.
- 56 Name Withheld, Submission 297.
- 57 Australian Government, WorkChoices, *WorkChoices and Australian Families*, <https://www.workchoices.gov.au/ourplan/publications/html/WorkChoicesandAustralianfamilies.htm>, viewed 5 March 2007.
- 58 Australian Chamber of Commerce and Industry, Submission 301(I).
- 59 Rebecca Wealands, Submission 132.
- 60 Felicity Martin and Sarah Lowe, Submission 145.
- 61 Australian Chamber of Commerce and Industry, Submission 301(I).
- 62 Australian Services Union, Submission 296.
- 63 Eilis Hughes, Melbourne Hearing, 27 September 2006.
- 64 ACON, Sydney Hearing, 26 July 2006. See also, Australian Services Union, Opening Statement, Sydney Hearing, 26 July 2006.
- 65 Eilis Hughes, Submission 37. Also quoted in Victorian Gay and Lesbian Rights Lobby, Submission 256.
- 66 Eilis Hughes, Melbourne Hearing, 27 September 2006.
- 67 Australian Council of Trade Unions, Melbourne Hearing, 27 September 2006.
- 68 Australian Services Union, Opening Statement, Sydney Hearing, 26 July 2006.
- 69 Australian Services Union, Opening Statement, Sydney Hearing, 26 July 2006. See also Australian Council of Trade Unions, Melbourne Hearing, 27 September 2006.
- 70 Australian Services Union, Opening Statement, Sydney Hearing, 26 July 2006.
- 71 Law Institute of Victoria, Submission 331.
- 72 Australian Services Union, Submission 296.
- 73 Community and Public Sector Union (CPSU), PSU Group, Submission 135. ‘Certified agreements made before the commencement of WorkChoices will continue to operate until they are replaced by a collective agreement or an AWA made after WorkChoices commences’: WorkChoices, *WorkChoices and federal awards and agreements, Fact Sheet 2*, <https://www.workchoices.gov.au/ourplan/publications/html/WorkChoicesandfederalawardsandagreements.htm>, viewed 13 March 2007.
- 74 T Mills, Assistant Director-General, Human Resources Branch, Australian Agency for International Development, Correspondence to the Human Rights and Equal Opportunity Commission, 24 November 2006.
- 75 Australian Government, Department of Health and Ageing, *People Leadership and Performance Improvement 2004-2007*, in D Kalisch, Deputy Secretary, Department of Health and Ageing, Correspondence to the President, Human Rights and Equal Opportunity Commission, 6 November 2006.

- 76 Community and Public Sector Union (CPSU), PSU Group, Submission 135.
- 77 Community and Public Sector Union (CPSU), PSU Group, Submission 135.
- 78 Community and Public Sector Union (CPSU), PSU Group, Submission 135.
- 79 Additional entitlements under the Act may be determined by the Remuneration Tribunal or by regulation: *Parliamentary Entitlements Act 1990* (Cth), s 5(1)(a). Where the regulations are inconsistent with a determination by the Remuneration Tribunal under subsections 5(1)(a) or 9(1), the regulations prevail and the determination is void to the extent of the inconsistency: *Parliamentary Entitlements Act 1990* (Cth), s 10(1).
- 80 Remuneration Tribunal, *Determination 2006/18*, cl 2.8.
- 81 Remuneration Tribunal, *Determination 2006/18*, cl 2.8.
- 82 Remuneration Tribunal, *Determination 2006/18*, cls 2.9, 2.12(a).
- 83 Remuneration Tribunal, *Determination 2006/18*, cl 2.15.
- 84 Remuneration Tribunal, *Determination 2006/18*, cl 2.20(a).
- 85 Remuneration Tribunal, *Determination 2006/18*, cls 3.14-3.15.
- 86 Remuneration Tribunal, *Determination 2006/18*, cl 9.1(d).
- 87 Remuneration Tribunal, *Determination 2006/18*, cl 9.13. This clause was amended by Remuneration Tribunal, *Determination 2006/20*, cl 3.2. See J Conde, President, Remuneration Tribunal, Correspondence to the President, Human Rights and Equal Opportunity Commission, 11 December 2006.
- 88 Remuneration Tribunal, *Determination 2006/18*, cl 6.5.
- 89 Brian Greig, Submission 110. See Remuneration Tribunal, *Determination 2006/18*, cl 2.8: the definition of ‘nominee’ does not exclude a Senator’s or Member’s staff members. Clause 2.8 of *Determination 2003/14* was amended by *Determination 2005/09* to remove the condition that a ‘nominee’ be a person ‘other than a member of the staff of the senator or member’: see Remuneration Tribunal, *Determination 2005/09*, cl 2.8.
- 90 Remuneration Tribunal, *Determination 2006/14*, cl 2.8.
- 91 *Parliamentary Entitlements Act 1990* (Cth), s 3.
- 92 The use of the phrase ‘as the spouse’ would still exclude same-sex couples if the interpretation given by the Federal Court in *Commonwealth of Australia v Human Rights and Equal Opportunity Commission and Anor* [1998] 138 FCA (27 February 1998) continues to be followed. See further I Watt, Secretary, Department of Finance and Administration, Correspondence to the President, Human Rights and Equal Opportunity Commission, 24 November 2006.
- 93 *Parliamentary Entitlements Act 1990* (Cth), sch 1, pt 1, s 9(2).
- 94 *Parliamentary Entitlements Act 1990* (Cth), sch 1, pt 2, s 3(1)-(2). A senior officer is a Minister, an Opposition Office Holder or a Presiding Officer (President of the Senate or the Speaker of the House of Representatives): *Parliamentary Entitlements Act 1990* (Cth), s 3.
- 95 Parliamentary Entitlement Regulations 1997 (Cth), regs 3B-3C.
- 96 Parliamentary Entitlement Regulations 1997 (Cth), sch 1, pt 2, para 1(1)(e).
- 97 Parliamentary Entitlement Regulations 1997 (Cth), sch 1, pt 2, para 1(1)(f).
- 98 See *Members of Parliament (Life Gold Pass) Act 2002* (Cth), ss 10(1), 11(2), 12. See also *Determination 2006/18*, cl 2.20(b).
- 99 *Members of Parliament (Life Gold Pass) Act 2002* (Cth), s 4.
- 100 *Members of Parliament (Life Gold Pass) Act 2002* (Cth), s 4.
- 101 *Judicial and Statutory Officers (Remuneration and Allowances) Act 1984* (Cth), ss 4-7. These office holders include judges of the High Court, the Federal Court, the Family Court, the Supreme Court of the ACT, the Chairman of the Commonwealth Grants Commission and the President of the Inter-State Commission.
- 102 Remuneration Tribunal, *Determination 2004/03*, cl 1.10.
- 103 Remuneration Tribunal, *Determination 2004/03*, cl 3.2.

- 104 *Remuneration Tribunal Act 1973* (Cth), ss 5(2A), 7(3)-(4). Public office holders include a range of senior jobs in Commonwealth bodies: see Remuneration Tribunal, *Full-time Offices*, <http://www.remtribunal.gov.au/fullTimeOffices/default.asp?menu=Sec1&switch=on>, viewed 9 March 2007. Principal executive officers include a range of chief executives and managing directors of federal agencies.
- 105 Remuneration Tribunal, *Determination 2004/03*.
- 106 Remuneration Tribunal, *Determination 2004/03*, cl 1.5.7. The same definition of 'partner' appears in determinations covering the travel allowance of other senior office holders such as the Solicitor-General and Director of Public Prosecutions: see Remuneration Tribunal, *Determination 2000/15*, cl C3.
- 107 Department of Foreign Affairs and Trade, *Administrative Circular P0265*, 22 May 2000, in S Merrifield, Assistant Secretary, Staffing Branch, Department of Foreign Affairs and Trade, Correspondence to V Lesnie, Director, Human Rights Unit, Human Rights and Equal Opportunity Commission, 1 November 2006.
- 108 Department of Foreign Affairs and Trade, *Administrative Circular P0046*, 28 February 1997, in S Merrifield, Assistant Secretary, Staffing Branch, Department of Foreign Affairs and Trade, Correspondence to V Lesnie, Director, Human Rights Unit, Human Rights and Equal Opportunity Commission, 1 November 2006.
- 109 *Defence Act 1903* (Cth), ss 9A, 58B. There is no definition of 'spouse' or 'de facto spouse' in the Act. The definition relevant to the entitlements available to the family of ADF members is that of 'member of the family', which includes: '(a) in relation to a member - a member of the household of the member and a dependant of the member; or (b) in relation to a cadet - a member of the household of the cadet and a dependant of the cadet': s 58A.
- 110 Australian Government Department of Defence, *ADF Pay and Conditions Manual*, Chapter 1, Part 3, Division 2, cl 1.3.77.
- 111 Australian Government Department of Defence, *Defence Instructions (General) Personnel 53-1* amended the *Defence Instruction (General) Manual* and the *ADF Pay and Conditions Manual*.
- 112 Australian Government Department of Defence, *Defence Instructions (General) Personnel 53-1*, Item 4(b).
- 113 Australian Government Department of Defence, *ADF Pay and Conditions Manual*, Chapter 1, Part 3, Division 2, cls 1.3.74-1.3.79.
- 114 Australian Government Department of Defence, *Defence Instructions (General) Personnel 53-1*, Item 7. Although the Approving Authority may waive this requirement if there is a temporary separation because of service emergencies or unforeseen circumstances: Australian Government Department of Defence, *Defence Instructions (General) Personnel 53-1*, Item 8.
- 115 Australian Government Department of Defence, *Defence Instructions (General) Personnel 53-1*, Item 9.
- 116 Australian Government Department of Defence, *Defence Instructions (General) Personnel 53-1*, Item 9.
- 117 J Millbank, 'Areas of Federal Law that Exclude Same-Sex Couples and their Children', Inquiry Research Paper, September 2006, available at [www.http://www.humanrights.gov.au/samesex/index.html](http://www.humanrights.gov.au/samesex/index.html), p15.
- 118 RC Smith, Secretary, Department of Defence, Correspondence to the President, Human Rights and Equal Opportunity Commission, 3 November 2006.
- 119 Australian Government Department of Defence, *ADF Pay and Conditions Manual*, Chapter 6, Part 1.
- 120 Australian Government Department of Defence, *ADF Pay and Conditions Manual*, Chapter 6, Parts 4, 7.
- 121 Australian Government Department of Defence, *ADF Pay and Conditions Manual*, Chapter 7, Part 4.
- 122 Australian Government Department of Defence, *ADF Pay and Conditions Manual*, Chapter 7, Part 5.
- 123 Australian Government Department of Defence, *ADF Pay and Conditions Manual*, Chapter 5.
- 124 See generally Australian Government Department of Defence, *ADF Pay and Conditions Manual*, Chapter 8. See also J Millbank, 'Areas of Federal Law that Exclude Same-Sex Couples and their Children', Inquiry Research Paper, September 2006, available at [www.http://www.humanrights.gov.au/samesex/index.html](http://www.humanrights.gov.au/samesex/index.html), pp15-16.

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- 125 Australian Government Department of Defence, *ADF Pay and Conditions Manual*, Chapter 5, Part 5, cl 5.5.3.
- 126 *Defence Force (Home Loans Assistance) Act 1990* (Cth), s 5.
- 127 *Defence Force (Home Loans Assistance) Act 1990* (Cth), s 3.
- 128 *Defence Force (Home Loans Assistance) Act 1990* (Cth), s 3.
- 129 *Defence Force (Home Loans Assistance) Act 1990* (Cth), s 6 defines members of a person's family as their spouse, the child of the person or their spouse, or the dependent parent of the person or their spouse.
- 130 See, for example, *Defence Force (Home Loans Assistance) Act 1990* (Cth), ss 20, 32.
- 131 *Defence Force (Home Loans Assistance) Act 1990* (Cth), s 30.
- 132 *Defence Force (Home Loans Assistance) Act 1990* (Cth), s 3.
- 133 RC Smith, Secretary, Department of Defence, Correspondence to the President, Human Rights and Equal Opportunity Commission, 3 November 2006.
- 134 See for example, Name Withheld, Submission 49; University of Western Australia, Submission 185; Women's Health Victoria, Submission 318; Anthony Brien, Submission 64.
- 135 Coalition of Activist Lesbians, Submission 171.
- 136 Graeme Moffatt, Submission 122.
- 137 Name Withheld, Submission 49.
- 138 Name Withheld, Submission 267.
- 139 Name Withheld, Submission 267.
- 140 Equal Opportunity Commission of Victoria, Submission 327.
- 141 Equal Opportunity Commission of Victoria, Submission 327. See also Anna Chapman, Submission 229.
- 142 Australian Chamber of Commerce and Industry, Submission 301(I).
- 143 See Association of Independent Schools of South Australia, Submission 261; Lesbian and Gay Solidarity (Melbourne), Submission 89a.
- 144 Public Interest Advocacy Centre, Submission 328; ACON, Submission 281.



CHAPTER 7:

Workers' Compensation

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7.1 What is this chapter about?

This chapter focuses on discrimination against same-sex couples and their families in the context of federal workers' compensation schemes.

Workers' compensation schemes are intended to provide compensation to an employee who is incapacitated because of a work-related accident or to an employee's dependants if the employee dies because of a work-related accident.

Most workers in Australia are covered by state and territory workers' compensation schemes. Those schemes appear to treat same-sex and opposite-sex couples in the same way.

However, federal public servants and employees of federal government agencies, amongst others, are covered by federal workers' compensation schemes (including Comcare). Those schemes do not recognise an employee's same-sex partner as someone eligible for compensation on an employee's death. Further, a same-sex partner is not automatically included in the calculation of compensation if an employee is incapacitated.

Thus, an opposite-sex partner of a federal employee has the security of knowing that he or she will receive financial support in the event of his or her partner's death or incapacitation. A same-sex partner has no such security.

There is discrimination against same-sex couples in federal workers' compensation schemes because the definition of 'dependant' in the *Safety, Rehabilitation and Compensation Act 1988* (Cth) and *Seafarers Rehabilitation and Compensation Act 1992* (Cth) relies on the definition of 'spouse'. The definition of 'spouse' only includes someone in an opposite-sex couple.

The definition of 'dependant' also includes the children of an injured or deceased federal worker. It appears that this definition may include the child of a lesbian co-mother and gay co-father(s) as well as a child's birth mother or birth father.¹

This chapter explains how federal workers' compensation schemes apply to same-sex couples and their children. It also briefly discusses the application of state workers' compensation schemes to same-sex couples and families. The chapter sets out why the legislation breaches human rights and makes recommendations as to how to avoid discrimination in the future.

Specifically, this chapter addresses the following questions:

- What are the federal workers' compensation schemes?
- Do federal workers' compensation schemes recognise same-sex families?
- Can a same-sex family access workers' compensation death benefits?
- Is a same-sex family recognised in compensation calculations for an injured worker?
- Do state workers' compensation schemes discriminate against same-sex couples?
- Does workers' compensation legislation breach human rights?
- How should workers' compensation legislation be amended to avoid future breaches?

7.2 What are the federal workers' compensation schemes?

The main federal workers' compensation scheme is called Comcare. Comcare administers the *Safety, Rehabilitation and Compensation Act 1988* (Cth) (Safety and Compensation Act).

The Victorian Gay and Lesbian Rights Lobby notes that Comcare applies to federal public servants, government agencies and, since 2005, employees of some private companies:

The [Safety, Rehabilitation and Compensation] Act applies to all Commonwealth public servants, employees of Government Business Agencies (Telstra, Australia Post, ADI, CSL etc) and, since 30 June, 2005 – applies to any private sector company that is granted a licence to self-insure under the scheme. To date, Optus, Linfox, Linfox Armaguard and K&S Freight have been granted a licence (K&S has not actually entered the scheme yet, but the others have). There are many other private sector companies interested in [Safety, Rehabilitation and Compensation] Act coverage.²

Licensing arrangements allow large companies to apply for a licence to opt out of compulsory state workers' compensation schemes. If a licence is granted to an eligible corporation, the Safety and Compensation Act will apply to employees of that corporation.³ There appear to be financial advantages for private employers to use Comcare, however employees in same-sex families may be at a disadvantage, as discussed in this chapter.

The Seafarers Safety, Rehabilitation and Compensation Authority, known as the Seacare Authority, administers the *Seafarers Rehabilitation and Compensation Act 1992* (Cth) (Seafarers Compensation Act). The Seacare Authority applies to all seafarers on prescribed ships in Australian waters.⁴

Finally there are workers' compensation schemes for members of the Australian Defence Force. Those schemes administer the *Veterans' Entitlements Act 1986* (Cth) and the *Military Rehabilitation and Compensation Act 2004* (Cth). These schemes are discussed in Chapter 10 on Veterans' Entitlements.

7.3 Do federal workers' compensation schemes recognise same-sex families?

Both the Safety and Compensation Act and the Seafarers Compensation Act provide workers' compensation benefits to the 'dependant' of an employee.⁵

The legislation also provides for additional compensation payments if a 'prescribed child' was 'wholly or mainly dependent' on the employee at the time of death; or a 'prescribed person' or 'prescribed child' was 'wholly or mainly dependent' on the employee at the time of injury.

The same-sex partner of a federal employee or seafarer cannot qualify as a 'dependant'. However, he or she may qualify as a 'prescribed person'.

The child of a same-sex couple may qualify as a 'dependant' or 'prescribed child' in certain circumstances.

7.3.1 'Dependant' excludes a same-sex partner

The Safety and Compensation Act and the Seafarers Compensation Act define a 'dependant' to include an employee's 'spouse'.⁶

Both acts define 'spouse' to be a person of the 'opposite-sex'.⁷ Thus a same-sex partner will never be an employee's 'spouse'.

Since a same-sex partner cannot be a 'spouse' he or she will never be a 'dependant' for the purposes of federal workers' compensation.

7.3.2 'Dependant' may include the child of a same-sex couple

The definition of 'dependant' under the Safety and Compensation Act and the Seafarers Compensation Act includes the following list of people in addition to a 'spouse':

(a) ... father, mother, step-father, step-mother, father-in-law, mother-in-law, grandfather, grandmother, son, daughter, step-son, step-daughter, grandson, grand-daughter, brother, sister, half-brother or half-sister of the employee; or

(b) a person in relation to whom the employee stood in the position of a parent or who stood in the position of a parent to the employee;

being a person who was wholly or partly dependent on the employee at the date of the employee's death.⁸

Chapter 5 on Recognising Children notes that when children are born to a lesbian or gay couple, their parents may include a birth mother, lesbian co-mother, birth father or gay co-father(s).⁹

Chapter 5 explains that the reference to a 'mother', 'father', 'daughter' or 'son' in subsection (a) of the definition of 'dependant' is likely to recognise only a birth mother, birth father, birth daughter, birth son or an adoptive relationship. Thus, the child of a lesbian co-mother would only qualify as her 'daughter' or 'son' if federal law recognised parenting presumptions in her favour or the lesbian co-mother adopted the child. The child of a gay co-father would only be recognised as his 'daughter' or 'son' if the co-father adopted the child.¹⁰

Chapter 5 also explains that a person can only be a 'step-father', 'step-mother', 'step-son' or 'step-daughter' in a same-sex family if the lesbian co-mother or gay co-father marries the birth parent. This is not currently possible for a same-sex couple.

However, subsection (b) refers to a relationship where a person 'stands in the position of a parent'.

The legislation does not specify what is required to prove that a person is 'standing in the position of a parent'. But, in the Inquiry's view, a lesbian co-mother or gay co-father would likely qualify under this definition, especially if he or she has a parenting order from the Family Court of Australia.¹¹

7.3.3 'Prescribed person' may include a same-sex partner or parent in limited circumstances

A 'prescribed person' is defined by the Safety and Compensation Act and the Seafarers Compensation Act to include a 'spouse' as well as a person who is:

- (i) the father, mother, step-father, step-mother, father-in-law, mother-in-law, grandfather, grandmother, son, daughter, step-son, step-daughter, grandson, granddaughter, brother, sister, half-brother or half-sister of the employee;
- (ii) a person in relation to whom the employee stands in the position of a parent or who stands in the position of a parent to the employee;
- (iii) a person (other than the spouse of the employee or a person referred to in subparagraph (i) or (ii)) who is wholly or mainly maintained by the employee and has the care of a prescribed child, being a child who is wholly or mainly dependent on the employee.¹²

A same-sex partner will not automatically qualify as a 'prescribed person' under this definition because he or she does not qualify as a 'spouse'. To this extent the definition of 'prescribed person' discriminates against a same-sex couple.

However, if the same-sex partner was 'wholly or mainly maintained' by his or her partner at the time of injury, and is looking after their child, he or she may qualify as a 'prescribed person'.

Further, a birth mother, lesbian co-mother, birth father, gay co-father and their children may all qualify as a 'prescribed person' because they are a birth parent or they 'stand in the position of a parent' (see section 7.3.2 above).

7.3.4 'Prescribed child' may include the child of a same-sex couple

A 'prescribed child' is defined by both the Safety and Compensation Act and the Seafarers Compensation Act to include a person under the age of 16, or aged between 16 and 25 and receiving full-time education and not working.¹³ This definition could include any child.

7.4 Can a same-sex family access workers' compensation death benefits?

The 'dependant' of an employee who dies as a direct result of a work-related injury or illness is entitled to receive a lump sum compensation payment under Comcare and the Seacare Authority.¹⁴

7.4.1 A same-sex partner does not qualify for death benefits

A same-sex partner of a deceased employee will not be entitled to this lump sum payment. The Castan Centre for Human Rights Law explains as follows:

- [I]f a Commonwealth employee dies, their same-sex partner will not be entitled to compensation that would otherwise be provided to the dependants of an employee. In comparison with most

State jurisdictions, the Federal Government has failed to recognise that surviving same-sex partners should be entitled to compensation if the death of their partner has been caused by a workplace injury.¹⁵

Dr Rob Guthrie from Women in Social and Economic Research, comments at the Perth Hearing:

Commonwealth legislation stands out as excluding same-sex couples because it requires a dependant to be an opposite-sex partner of the employee.¹⁶

7.4.2 The child of a lesbian or gay co-parent may qualify for death benefits

The child of a same-sex couple may be entitled to the lump sum payment irrespective of whether it is the birth mother, birth father, lesbian co-mother or gay co-father who dies. However, it may be easier to prove the right to the entitlement in the case of a deceased birth parent.

Additional regular payments may be made regarding a 'prescribed child' who was 'wholly or mainly dependent' on the deceased employee.¹⁷ The child of a same-sex couple may also qualify for this payment.

7.4.3 Any person can qualify for funeral expenses

Comcare and the Seacare Authority will pay funeral expenses to any person who paid for the funeral of a deceased employee.¹⁸ It does not matter whether a person is a 'dependant' for this payment. If a same-sex partner pays for the funeral, he or she may be reimbursed.

7.5 Is a same-sex family recognised in compensation calculations for an injured worker?

Comcare and the Seacare Authority will pay compensation to an employee whose injury results in incapacity. The amount of that payment will depend on whether there is a 'prescribed person' or 'prescribed child' who was 'wholly or mainly dependent' on the employee at the time of injury.¹⁹

7.5.1 A same-sex partner is not automatically relevant to compensation calculations

An opposite-sex partner would automatically qualify as a 'prescribed person' for the purposes of calculating the amount of compensation payable to an incapacitated employee. A same-sex partner will not automatically qualify because he or she is not a 'spouse'.

However, a same-sex partner may be recognised for the purposes of payments if he or she was 'wholly or mainly maintained' by his or her partner at the time of injury, and is looking after their child.

7.5.2 A dependent child of a lesbian or gay co-parent will generally be relevant to compensation calculations

The child of an injured employee will generally qualify as a 'prescribed child' or a 'prescribed person' for the purposes of calculating the payment, if he or she was 'wholly or mainly dependent' on the employee at the time of injury.

7.6 Do state workers' compensation schemes discriminate against same-sex couples?

Workers' compensation arrangements in Australia are primarily a state and territory responsibility.²⁰ Some submissions to the Inquiry suggested that there is still discrimination against same-sex couples in state workers' compensation schemes.²¹

However, Inquiry research suggests that same-sex couples have equivalent entitlements to opposite-sex partners under workers' compensation law in all states.

7.6.1 A same-sex partner is recognised under state and territory workers' compensation schemes

In most cases, the discrimination was removed as part of the broad state and territory reforms changing the relevant definitions relating to couples. These reforms are generally described in Chapter 4 on Recognising Relationships. The following lists the amendments to the relevant state and territory legislation.

- In the Australian Capital Territory, 'domestic partners', including same-sex partners, are included in the definition of 'dependant' in the *Workers Compensation Act 1951* (ACT).²²
- In Queensland, same-sex partners may be considered dependants in the *Workers' Compensation and Rehabilitation Act 2003* (Qld) as the relevant definition of 'de facto partner' includes same-sex partners.²³
- In South Australia, a 'domestic partner', including a same-sex partner, will have equivalent entitlements to a spouse under the *Workers Rehabilitation and Compensation Act 1986* (SA).²⁴
- In Tasmania, under the *Workers Rehabilitation and Compensation Act 1988* (Tas), a 'spouse' includes a person with whom the deceased was in a 'significant relationship' within the meaning of the *Relationships Act 2003* (Tas). This includes a same-sex partner.²⁵
- In Western Australia, the definition of 'dependant' in the *Workers' Compensation and Rehabilitation Act 1981* (WA) includes same-sex partners as they are captured by the definition of 'de facto partner'.²⁶
- In Victoria, a 'domestic partner', including a same-sex partner, is included in the definition of 'partner' in the *Accident Compensation Act 1985* (Vic).²⁷

- In the Northern Territory, the definition of 'spouse' in the *Work Health Act* (NT) includes a 'de facto partner' of a person. The definition of 'de facto partner' in the *Work Health Act* (NT) includes those in a same-sex relationship.²⁸
- In New South Wales, the definition of 'de facto relationship' in the *Workplace Injury Management and Workers Compensation Act 1998* (NSW) includes a same-sex partner.²⁹

The Gay and Lesbian Rights Lobby (NSW) emphasises in their submission that:

...a discrepancy exists between NSW and federal worker's compensation legislation, which affects whether or not a surviving same-sex partner is eligible for workers' compensation in the event of the employee's death. Under the NSW *Workers' Compensation Act 1997*, same-sex de facto spouses are considered dependants and therefore may qualify for lump sum compensation in the event that their partner dies, or a weekly payment where they are totally incapacitated.³⁰

7.6.2 A child in a same-sex family is recognised under state and territory workers' compensation schemes

State, territory and federal laws use similar terms to describe the parent-child relationship. State and territory laws use language such as:

a person to whom the worker acted in place of a parent or who acted in place of a parent for the worker.³¹

The state and territory definitions also require that the child is financially dependent on the deceased worker in order to receive compensation following a work-related death.

In Victoria, the definition is slightly different:

'dependent child' means a child, including an orphan child, wholly, mainly or partly dependent on the worker's earnings.³²

In all cases the definitions appear to be sufficiently broad to include the child of a birth mother, birth father, lesbian co-mother and gay co-father.

7.7 Does workers' compensation legislation breach human rights?

The failure to recognise a same-sex partner as a 'spouse' in the Safety and Compensation Act and the Seafarers Compensation Act means that a same-sex partner cannot receive certain workers' compensation payments. It also means that an employee with a same-sex partner may receive less compensation than an employee with an opposite-sex partner.

The Inquiry therefore finds that the Safety and Compensation Act and the Seafarers Compensation Act breach Australia's obligations under article 26 of the *International Covenant of Civil and Political Rights* (ICCPR).

This discrimination also breaches Australia's obligations under:

- *Discrimination (Employment and Occupation) Convention 1958* (ILO 111) – articles 2, 3(b) and 3(c) (equal opportunity in the workplace).

- *International Covenant of Economic Social and Cultural Rights* (ICESCR) – articles 9 and 2(2) (right to social security – which includes employment injury benefits – without discrimination).

These principles are discussed in more detail in Chapter 3 on Human Rights Protections.

The children of a same-sex couple may have more difficulty in proving their right to workers' compensation benefits on the death or injury of a lesbian co-mother or gay co-father. However, the legislation does not deny them access to those benefits outright so the Inquiry makes no finding of breach insofar as the laws apply to the children of same-sex couples.

Nevertheless, to the extent that a same-sex family may be financially worse-off because of discrimination, the best interests of the child (which are protected by article 3(1) of the *Convention on the Rights of the Child*) may be compromised.

7.8 How should workers' compensation legislation be amended to avoid future breaches?

This chapter describes the treatment of same-sex couples and families under the Safety and Compensation Act and the Seafarers Compensation Act.

A same-sex partner is denied access to lump sum death benefits which are available to an opposite-sex partner. And a same-sex partner is not automatically counted for the purposes of calculating the amount of compensation payable upon an employee's incapacitation.

A child of a same-sex couple can generally access death benefits and will usually be counted in compensation calculations. However, the child of a birth mother or birth father will be assumed to have those rights, whereas the child of a lesbian co-mother or gay co-father will need to prove those rights.

These consequences may affect more and more employees as private companies seek to move from state regulation of workers' compensation entitlements to the federal system under the Safety and Compensation Act's licensing arrangements.³³

The Inquiry recommends amending federal workers' compensation legislation to avoid future breaches of the human rights of people in same-sex relationships.

The following sections summarise where the problems lie and how to fix them.

7.8.1 Definitions are the main cause of discrimination

The definition of 'dependant' under the Safety and Compensation Act and the Seafarers Compensation Act relies on the definition of 'spouse' and the definition of 'spouse' is limited to a person of the opposite-sex.

The definition of 'prescribed person' also relies on the definition of 'spouse' and discriminates against a same-sex partner to that extent. However, a 'prescribed person' also includes a person who is:

- 'wholly or mainly maintained' by an employee at the time of death or injury, and
- looking after a child who was dependent on the employee.

Thus, a 'prescribed person' may include a same-sex partner in limited circumstances, but a same-sex partner's access will be far more limited than an opposite-sex partner.

The definition of 'dependant' and 'prescribed person' may include a child of a same-sex couple. But the child of a birth mother or birth father will automatically be included within that definition, whereas a child of a lesbian co-mother or gay co-father will have to prove the parent-child relationship.

7.8.2 The solution is to amend the definitions and clearly recognise both same-sex parents of a child

Chapter 4 on Recognising Relationships presents two alternative approaches to amending discriminatory definitions within federal law as it relates to *same-sex couples*.

The Inquiry's preferred approach for bringing equality to same-sex couples is to:

- retain the current terminology used in federal legislation (for example retain the terms 'dependant' and 'spouse' in the Safety and Compensation Act and the Seafarers Compensation Act)
- redefine the terms in the legislation to include same-sex couples (for example, redefine 'spouse' to include a 'de facto partner')
- insert new definitions of 'de facto relationship' and 'de facto partner' which include same-sex couples.

Chapter 5 on Recognising Children sets out how to better protect the rights of the *children of same-sex couples*.

Chapter 5 recommends that the federal government implement parenting presumptions in favour of a lesbian co-mother of a child conceived through assisted reproductive technology (ART). This would mean that a lesbian co-mother of an ART child would automatically be the 'mother' of the child (in the same way as the father in an opposite-sex couple is automatically the 'father').

Chapter 5 also suggests that it should be easier for a lesbian co-mother and gay co-father to adopt a child, for the same reasons.

Chapter 5 further recommends the insertion of a new definition of 'step-child' (or 'step-parent') which would include a child under the care of a 'de facto partner' of the birth parent. This would make it easier for the child of a lesbian co-mother or gay co-father to qualify under the definition of 'dependant'.

Finally, Chapter 5 suggests that federal legislation should clearly recognise the status of a person who has a parenting order from the Family Court of Australia. This would mean that gay and lesbian parents with parenting orders could more confidently assert their rights as a person 'who stands in the position of a parent'.

The following list sets out the definitions which would need to be amended according to these suggested approaches.

The Inquiry notes that if the government were to adopt the alternative approaches set out in Chapter 4, then different amendments would be required.

7.8.3 A list of legislation to be amended

The Inquiry recommends amendments to the following legislation discussed in this chapter:

Safety, Rehabilitation and Compensation Act 1988 (Cth)

‘de facto partner’ (insert new definition)

‘de facto relationship’ (insert new definition)

‘dependant’ (s 4(1) – amend to clarify the role of a parenting order and to change references to a ‘step-son’, ‘step-daughter’, ‘step-mother’ and ‘step-father’ to ‘step-child’ and ‘step-parent’ respectively. Otherwise no need to amend if ‘spouse’ is amended and a lesbian co-mother or gay co-father and their children may also be recognised through reformed parenting presumptions, adoption laws or a new definition of ‘step-child’ and ‘step-parent’)

‘prescribed child’ (s 4(1) – no need to amend)

‘prescribed person’ (s 19(12) – amend to clarify the role of a parenting order and to change references to a ‘step-son’, ‘step-daughter’, ‘step-mother’ and ‘step-father’ to ‘step-child’ and ‘step-parent’ respectively. Otherwise no need to amend if ‘spouse’ is amended and a lesbian co-mother or gay co-father and their children may also be recognised through reformed parenting presumptions, adoption laws or a new definition of ‘step-child’ and ‘step-parent’)

‘spouse’ (s 4(1) – amend to include a ‘de facto partner’)

‘step-child’ (insert new definition)

‘step-parent’ (insert new definition)

Seafarers Rehabilitation and Compensation Act 1992 (Cth)

‘de facto partner’ (insert new definition)

‘de facto relationship’ (insert new definition)

‘dependant’ (s 3 – amend to clarify the role of a parenting order and to change references to a ‘step-son’, ‘step-daughter’, ‘step-mother’ and ‘step-father’ to ‘step-child’ and ‘step-parent’ respectively. Otherwise no need to amend if ‘spouse’ is amended and a lesbian co-mother or gay co-father and their children may also be recognised through reformed parenting presumptions, adoption laws or a new definition of ‘step-child’ and ‘step-parent’)

‘prescribed child’ (s 3 – no need to amend)

'prescribed person' (s 3 – amend to clarify the role of a parenting order and to change references to a 'step-son', 'step-daughter', 'step-mother' and 'step-father' to 'step-child' and 'step-parent' respectively. Otherwise no need to amend if 'spouse' is amended and a lesbian co-mother or gay co-father and their children may also be recognised through reformed parenting presumptions, adoption laws or a new definition of 'step-child' and 'step-parent')

'spouse' (s 3 – amend to include a 'de facto partner')

'step-child' (insert new definition)

'step-parent' (insert new definition)

Endnotes

- 1 See the Glossary of Terms and Chapter 5 on Recognising Children for an explanation of these terms.
- 2 Victorian Gay and Lesbian Rights Lobby, Submission 256.
- 3 The Minister may grant a licence to a corporation that: was previously a Commonwealth authority; is about to cease being a Commonwealth authority; or is carrying on business in competition with a Commonwealth authority or previous Commonwealth authority: *Safety, Rehabilitation and Compensation Act 1988* (Cth), s 100. See also *Safety, Rehabilitation and Compensation Act 1988* (Cth), pt VIII, ss 104(1), 108(1). The High Court of Australia recently held that these licensing provisions are valid: *Attorney-General (Vic) v Andrews* [2007] HCA 9 (21 March 2007).
- 4 The term 'seafarer' refers to a person employed in any capacity on a prescribed ship, on the business of the ship, other than: (a) a pilot; or (b) a person temporarily employed on the ship in port; or (c) a person included in the class of persons defined as *special personnel* in section 283 of the *Navigation Act 1912* (Cth): *Seafarers Rehabilitation and Compensation Act 1992* (Cth), s 3. 'Special personnel' includes persons carried on board a 'special purpose ship' other than the master, any crew member, a pilot, or any person temporarily employed on the ship in port: *Navigation Act 1912* (Cth), s 283.
- 5 *Safety, Rehabilitation and Compensation Act 1988* (Cth), ss 17, 19; *Seafarers Rehabilitation and Compensation Act 1992* (Cth), ss 29, 31.
- 6 *Safety, Rehabilitation and Compensation Act 1988* (Cth), s 4(1); *Seafarers Rehabilitation and Compensation Act 1992* (Cth), s 3.
- 7 *Safety, Rehabilitation and Compensation Act 1988* (Cth), s 4(1); *Seafarers Rehabilitation and Compensation Act 1992* (Cth), s 3.
- 8 *Safety, Rehabilitation and Compensation Act 1988* (Cth), s 4(1); *Seafarers Rehabilitation and Compensation Act 1992* (Cth), s 3.
- 9 For an explanation of these terms see the Glossary of Terms.
- 10 For further background on adoption and parenting presumptions, see Chapter 5 on Recognising Children.
- 11 For further background on parenting orders, see Chapter 5 on Recognising Children.
- 12 *Safety, Rehabilitation and Compensation Act 1988* (Cth), s 19(12); *Seafarers Rehabilitation and Compensation Act 1992* (Cth), s 3.
- 13 *Safety, Rehabilitation and Compensation Act 1988* (Cth), s 4(1); *Seafarers Rehabilitation and Compensation Act 1992* (Cth), s 3.
- 14 *Safety, Rehabilitation and Compensation Act 1988* (Cth), s 17(3)-(4); *Seafarers Rehabilitation and Compensation Act 1992* (Cth), s 29(3)-(4).
- 15 Castan Centre for Human Rights Law, Monash University, Submission 126.
- 16 Women in Social and Economic Research (WISER), Perth Hearing, 9 August 2006.
- 17 *Safety, Rehabilitation and Compensation Act 1988* (Cth), s 17(5)-(6); *Seafarers Rehabilitation and Compensation Act 1992* (Cth), s 29(5)-(6).
- 18 *Safety, Rehabilitation and Compensation Act 1988* (Cth), s 18; *Seafarers Rehabilitation and Compensation Act 1992* (Cth), s 30.
- 19 *Safety, Rehabilitation and Compensation Act 1988* (Cth), s 19(8)-(9); *Seafarers Rehabilitation and Compensation Act 1992* (Cth), s 31(9)-(11).
- 20 K Purse, R Guthrie and F Meredith, 'Faulty Frameworks: The Productivity Commission and Workers' Compensation', *Australian Journal of Labour Law*, vol 17, no 3, 2004, p306. See also A Clayton, R Johnstone and S Sceats, 'The Legal Concept of Work-Related Injury and Disease in Australian OHS and Workers' Compensation Systems', *Australian Journal of Labour Law*, vol 15, no 2, 2002, p105.
- 21 Castan Centre For Human Rights Law, Monash University, Submission 126; Women in Social and Economic Research (WISER), Submission 221.
- 22 *Workers Compensation Act 1951* (ACT), Dictionary. See definitions of 'dependant', 'domestic partner' and 'member of the family'.

- 23 A 'dependant' may include a spouse: *Workers' Compensation and Rehabilitation Act 2003* (Qld), ss 27-28. A 'spouse' may include a 'de facto partner' within the meaning of the *Acts Interpretation Act 1954* (Qld), s 32DA: *Workers' Compensation and Rehabilitation Act 2003* (Qld), s 29. The non-gender specific definition of 'de facto partner' set out in section 32DA of the *Acts Interpretation Act 1954* (Qld) applies to all Queensland legislation unless an Act expressly provides to the contrary: *Acts Interpretation Act 1954* (Qld), s 32DA(6).
- 24 The *Workers Rehabilitation and Compensation Act 1986* (SA) will be amended by the *Statutes Amendment (Domestic Partners) Act 2006* (SA). Compensation payments to a person on the death of a partner at work are only payable if the death occurs after the commencement of the amendment: *Statutes Amendment (Domestic Partners) Act 2006* (SA), s 228. This Act had not commenced as at 5 April 2007.
- 25 *Workers Rehabilitation and Compensation Act 1988* (Tas), s 3(1).
- 26 *Workers' Compensation and Rehabilitation Act 1981* (WA), s 5(1).
- 27 *Accident Compensation Act 1985* (Vic), ss 5, 92A. A same-sex partner is only entitled to compensation where the worker died after the commencement of the *Statute Law (Relationships) Amendment Act 2001* (Vic), (June 2001): see *Accident Compensation Act 1985* (Vic), s 5, definition of 'partner'; Castan Centre For Human Rights Law, Monash University, Submission 126.
- 28 *Work Health Act* (NT), s 49. The definition of 'de facto partner' and 'de facto relationship' are contained within sections 3(2) and 3A of the *De Facto Relationships Act* (NT) and apply to all legislation in the Northern Territory: *Interpretation Act* (NT), s 19A(3). These definitions were added by the *Law Reform (Gender, Sexuality and De Facto Relationships) Act 2003* (NT). Compensation is only payable in relation to an injury that occurred after the commencement of schedule 1, part 48 of the Act on 17 March 2004: *Law Reform (Gender, Sexuality and De Facto Relationships) Act 2003* (NT), ss 82, 89.
- 29 *Workplace Injury Management and Workers Compensation Act 1998* (NSW), s 4(1). This definition is different to that contained in section 4(1) of the *Property (Relationships) Act 1984* (NSW), which applies to most other NSW legislation. A person in a same-sex relationship is only eligible for workers' compensation where a worker died or received an injury after 1 December 1998 (the commencement of Schedule 7 to the *Workers Compensation Legislation Amendment (Dust Diseases and Other Matters) Act 1998* (NSW): *Workplace Injury Management and Workers Compensation Act 1998* (NSW), s 4(1), definition of 'spouse'.
- 30 Gay and Lesbian Rights Lobby (NSW), Submission 333.
- 31 *Workers Compensation Act 1951* (ACT), Dictionary. See also *Workers' Compensation and Rehabilitation Act 2003* (Qld), ss 27-28; *Workers Rehabilitation and Compensation Act 1986* (SA), s 3(1); *Workers Rehabilitation and Compensation Act 1988* (Tas), s 3; *Workers' Compensation and Rehabilitation Act 1981* (WA), s 5(1); *Work Health Act* (NT), s 49(1); *Workplace Injury Management and Workers Compensation Act 1998* (NSW), s 4(1).
- 32 'Child' means a person who (a) is under the age of 16 years; or (b) is 16 years or more but under the age of 21 years and is a full-time student: *Accident Compensation Act 1985* (Vic), s 92A(1).
- 33 *Safety, Rehabilitation and Compensation Act 1988* (Cth), ss 100, 104(1), 108(1). See also *Attorney-General (Vic) v Andrews* [2007] HCA 9 (21 March 2007).



CHAPTER 8: *Tax*

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8.1 What is this chapter about?

This chapter focuses on discrimination against same-sex couples and their families in the context of Australia's federal taxation system.

Same-sex couples are not eligible for a range of rebates and tax concessions available to opposite-sex couples. This means same-sex couples may end up paying more tax than opposite-sex couples because tax legislation does not recognise their relationship.

Further, some children raised by same-sex couples are not recognised as the children of both members of that couple for the purposes of tax law. This means that same-sex parents and their children may miss out on tax benefits intended to help families.¹

The problem arises as a result of the definitions of 'spouse' and 'child' in the relevant taxation legislation. The definition of 'spouse' excludes a person in a same-sex couple. And the definition of 'child' does not encompass a child born to a lesbian co-mother or gay co-father.

The chapter explains how Australia's taxation system currently applies to same-sex couples and families. It discusses income tax, the Medicare levy, capital gains tax, fringe benefits tax and goods and services tax. The chapter sets out how discrimination against same-sex couples and families in tax law breaches Australia's human rights obligations. And it makes recommendations as to how to avoid future discrimination and human rights breaches.

Specifically, this chapter addresses the following questions:

- Do the definitions in tax legislation exclude same-sex partners and parents?
- Do same-sex couples pay the same tax but get less back?
- Do same-sex families qualify for dependant tax offsets?
- Do same-sex and opposite-sex couples get equal access to the senior Australians tax rebate?
- Can same-sex couples claim the baby bonus?
- Can same-sex couples claim the child care tax rebate?
- Do same-sex couples have to spend more to access the medical expenses tax offset?
- Do same-sex couples pay a higher Medicare levy and surcharge?
- Do same-sex couples pay more tax on relationship breakdown?
- Do same-sex couples pay more capital gains tax?
- Are employers liable for more fringe benefits tax in respect of same-sex couples?
- Are same-sex couples covered by tax integrity and anti-avoidance measures?
- Does tax legislation breach human rights?
- How should tax legislation be amended to avoid future breaches?

Taxation issues also arise in other chapters of this report. Chapter 13 on Superannuation discusses how superannuation is taxed. Chapter 9 on Social Security discusses the Family Tax Benefit (A and B) as these benefits are welfare payments established under family assistance legislation.

8.2 Do the definitions in tax legislation exclude same-sex partners and parents?

There are two principal pieces of federal income tax legislation, the *Income Tax Assessment Act 1936* (Cth) (Income Tax Assessment Act 1936) and the *Income Tax Assessment Act 1997* (Cth) (Income Tax Assessment Act 1997).² This legislation covers a variety of issues related to personal income taxation, including how to assess tax liability and various income deductions and tax offsets.

8.2.1 'Spouse' excludes a same-sex partner

The Income Tax Assessment Act 1997 defines a 'spouse' as follows:

spouse of a person includes a person who, although not legally married to the person, lives with the person on a genuine domestic basis as the person's husband or wife.³

The Income Tax Assessment Act 1936 adopts the definition in the 1997 legislation.⁴

In 1995, the Administrative Appeals Tribunal interpreted a similar definition of spouse and found that:

[t]he fact that the persons must be of opposite sex is inherent ... in the use of the words 'husband' and 'wife'.⁵

The Australian Taxation Office (ATO) has followed the interpretation of the Administrative Appeals Tribunal.⁶ Consequently, a same-sex partner cannot qualify as a 'spouse' under tax legislation.

8.2.2 'Child' excludes the child of a lesbian co-mother or gay co-father

The Income Tax Assessment Act 1997 defines a 'child' as follows:

child of a person includes the person's adopted child, step-child or ex-nuptial child.⁷

The Income Tax Assessment Act 1936 adopts the definition in the 1997 legislation.⁸

Chapter 5 on Recognising Children notes that when children are born to a lesbian or gay couple their parents may include a birth mother, lesbian co-mother, birth father or gay co-father(s).⁹

Chapter 5 also explains that definitions of 'child' like that in the Income Tax Assessment Act 1997 will generally *include* the child of a birth mother or birth father but *exclude* a child of a lesbian co-mother and gay co-father (in the absence of adoption).¹⁰

Therefore, where a child is born to and raised by a same-sex couple, taxation law will not recognise one of the child's two parents.

8.3 Do same-sex couples pay the same tax but get less back?

Submissions to the Inquiry repeatedly made the point that same-sex couples contribute through the payment of tax, without receiving the tax and other benefits available to most Australian families.

The following is a sample of the comments received:

- I do not think that [it's] right that the Commonwealth takes our tax and does not recognise our relationships.¹¹
- It's not like the government gives us a choice in these matters. We can't opt out of the Medicare Levy or superannuation. Given the compulsion in the tax, Medicare and superannuation systems, it's reasonable to expect that having contributed at the same rate as everyone else, we'll get the same benefits – but we don't. Very simply we believe that forcing us to contribute to a system which discriminates against us is just plain wrong.¹²
- I have a loving partner. I pay lots of tax. And yes I am gay. As a member of society who contributes financially through taxes and helps people every day in a health related profession why shouldn't my partner and I have the same rights as [heterosexual] couples[?]¹³
- If we are to pay the same tax as our heterosexual and de facto fellow citizens, we should be entitled to the same privileges.¹⁴
- Firstly, in relation to tax rebates ... neither of us is able to access a variety of tax rebates ... Although we both work in public government service industries, have lived together for several years with joint bank accounts, pool our salaries, pay taxes and contribute to charity, our relationship is not considered valid. Our contributions to our community and our society are taken gladly but our relationship remains invalid for financial purposes compared with heterosexual couples, whether they are legally married or not. In addition, we are unable to access the variable rates of Medicare levy charges ... which may be in our favour, particularly when we have dependent children.¹⁵
- Under the present definitions, my partner is not entitled to claim me or our child as dependents. It is unfair that we pay proportionally higher tax than heterosexual couples do, and that we get less benefits for our tax dollars than heterosexual couples do.¹⁶

8.4 Do same-sex families qualify for dependant tax offsets?

Income tax offsets (also known as rebates or credits) directly reduce the amount of tax an individual pays.¹⁷ There are a number of tax rebates available to a taxpayer because he or she is supporting a 'dependant'.¹⁸ Those rebates include:

- Dependent spouse tax offset
- Parent or spouse's parent tax offset
- Housekeeper tax offset
- Child-housekeeper tax offset
- Invalid relative tax offset.

A taxpayer in a same-sex relationship cannot access these offsets in many cases.

The Australian Coalition for Equality explains the purpose of such tax offsets as follows:

Australia's taxation laws provide deductions and offsets, assisting taxpayers in their individual and family situations. Families receive tax offsets and benefits to alleviate some of the financial strain of raising a family or having a dependant.¹⁹

There are also some tax offsets which are paid at a higher rate if the taxpayer has a 'dependant', including:

- Overseas forces tax offset
- Zone tax offset for people living in rural and remote areas.

Finally, the Australia-US Joint Space and Defence Projects tax exemption is only available to a 'dependant' of a tax payer.

The following sections explain that none of these tax credits are available in respect of a same-sex partner. And they are only available to a birth mother or birth father of a child born into a same-sex family – thus excluding a lesbian co-mother and gay co-father.

8.4.1 'Dependant' excludes a same-sex partner and the child of a lesbian co-mother and gay co-father

For the purposes of tax offsets, a 'dependant' includes, amongst others, a 'spouse', 'child', 'invalid relative' and 'child-housekeeper'.²⁰

The offsets relying on the definition of 'spouse' will exclude a taxpayer supporting a same-sex partner.

The offsets relying on the definition of 'child' will not permit either the lesbian co-mother or the gay co-father of a child to claim a rebate.

An 'invalid relative' is a 'child', brother or sister of the taxpayer who has a disability and who is receiving support or has a certificate to say he or she cannot work.²¹

A 'child housekeeper' is the 'child' of the taxpayer (but not necessarily under 18 years of age) who is wholly engaged in keeping house for that taxpayer.²²

8.4.2 A same-sex partner cannot access the dependent spouse tax offset

A taxpayer who is not already claiming Family Tax Benefit B (discussed in Chapter 9 on Social Security) can claim a dependent spouse tax offset.²³

The taxpayer will be eligible for the dependent spouse tax offset if he or she lives with and financially supports a 'spouse'.²⁴ Since the definition of a 'spouse' excludes a same-sex partner, a taxpayer with a same-sex partner can never claim this offset.²⁵

For the 2005–2006 tax year the maximum dependent spouse tax offset a taxpayer could claim was \$1610.²⁶ This means that a same-sex couple who does not qualify for Family Tax Benefit B is potentially \$1610 worse off than an opposite-sex couple in the same circumstances.

Many people making submissions to the Inquiry talked about the impact of being denied access to the dependent spouse tax offset:

● Same-Sex: Same Entitlements

- The first thing was when I started employment, I found out I could not claim dependent spouse tax rebate even though [my partner] was my dependent.²⁷
- When we first moved up here and my partner didn't work for a while. The tax write off for having a dependant for a while would have been fantastic. We live in the same house, have the same bank account, and pay the same bills.²⁸
- I earn a very good wage and pay very high taxes. I am unable to claim my partner as a dependent on my tax return during periods where he was not working, as the tax law discriminates between same-sex couples and heterosexual relationships. Why are tax breaks delivered to heterosexual couples, but not to same sex-couples?²⁹
- I would like to draw your attention to my experience of discrimination in the area of dependent spouse tax offset. As a woman in a relationship with another woman, I cannot claim the dependent spouse tax offset for my partner. We qualify against virtually all the necessary criteria:
 - both my partner and I are Australian citizens
 - I contributed to the maintenance of [my] partner
 - my partner as a student receives a tax free scholarship from the federal government, therefore is under the threshold for the entitlements of \$6,569
 - my partner and I were not eligible for the Family Tax Benefit (FTB) Part B.

However, I was unable to claim the dependent spouse tax offset for my partner because she does not meet the definition of 'spouse' under the legislation. A 'spouse' must be of the opposite sex to his or her partner.³⁰

- Shortly I will be an at-home mother, financially dependant on my partner. Because our relationship is not recognised, my partner will not be able to declare me as a dependant. We will not be able to access health or tax concessions available to heterosexual couples.³¹
- My partner and I are not able to enjoy any of the tax concessions which are currently available to married or de facto couples. Further, my partner did not qualify as a dependent spouse when he was not working.³²

8.4.3 A same-sex partner cannot access the tax offset for a same-sex partner's parent

A taxpayer supporting a parent or spouse's parent may claim a tax offset.³³

Because a same-sex partner does not qualify as a 'spouse', a taxpayer cannot claim this offset if he or she is maintaining the parent of his or her same-sex partner.

For the 2005–2006 tax year, the maximum spouse's parent tax offset a taxpayer could claim was \$1448.³⁴ This means that a same-sex couple who cannot claim this offset is potentially \$1448 worse off than an opposite-sex couple in the same circumstances.

Action Reform Change Queensland and the Queensland AIDS Council provide the following example of discrimination in accessing the spouse's parent tax offset:

...if Natalie's mother moves in with them and becomes in need of care and has medical expenses she cannot cover, Penny will not be able to claim her as a dependent for tax purposes, even if Natalie is unemployed and Penny is footing all of the bills.³⁵

8.4.4 A same-sex partner, lesbian co-mother and gay co-father cannot access the housekeeper tax offset

The housekeeper tax offset is designed to help a taxpayer who has employed a person full-time to keep house for them and to care for:

- a 'child' of the taxpayer who is under 21 years old
- any other 'child' aged under 21 years (including a student aged under 21 years) who is the taxpayer's dependant and whose Separate Net Income is less than \$1786
- an 'invalid relative' for whom the taxpayer can claim a dependant tax offset
- a 'spouse' who receives a disability support pension.³⁶

Because of the definitions of 'spouse', 'child' and 'invalid relative', a taxpayer in a same-sex family can only claim this offset if the taxpayer is the birth mother or birth father of a child who otherwise qualifies under these criteria.

In other words, it does not permit a person to claim the offset if there is a housekeeper looking after a same-sex partner or the child of a lesbian co-mother or gay co-father.

For the 2005–2006 tax year, the maximum claimable housekeeper tax offset for a taxpayer was \$1610, or \$1930 if the taxpayer had an eligible dependent 'child' or student.³⁷ Thus a same-sex couple who cannot claim this offset is potentially \$1930 worse off than an opposite-sex couple who can.

ACON expressed concern about discrimination against same-sex couples regarding this offset:

The Federal Government provides financial assistance to couples and families who employ carers to look after dependants and spouses who receive the disability support pension. 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 [\$1610] a year, because of the definition of 'spouse' under the *Income Tax Assessment Act*, which excludes same-sex couples.³⁸

8.4.5 The lesbian co-mother and gay co-father cannot access the child-housekeeper tax offset

Where a taxpayer's 'child' (of any age) is wholly engaged in keeping house for the taxpayer, the taxpayer is entitled to the child-housekeeper tax offset.³⁹

Because of the definition of 'child', this tax offset will only be available to a taxpayer parent in a same-sex couple if she is the birth mother or he is the birth father of the child who is keeping house.⁴⁰ Neither the lesbian co-mother nor the gay co-father of a child can claim this offset.

For the 2005–2006 tax year, the maximum child-housekeeper tax offset a taxpayer could claim was \$1610, or \$1930 if they had another eligible dependent child or student.⁴¹ This means that a same-sex parent who cannot claim this offset is potentially \$1930 worse off than an opposite-sex parent who can.

8.4.6 A lesbian co-mother and gay co-father cannot access the invalid relative tax offset

A taxpayer who maintains an 'invalid relative' may be entitled to claim the invalid relative tax offset.⁴²

In a same-sex couple only a birth mother or birth father of the person with a disability can claim this rebate. This is because the definition of an 'invalid relative' relies on the definition of 'child'.⁴³ The lesbian co-mother and gay co-father cannot claim this offset.

For the 2005–2006 tax year, the maximum amount of invalid relative tax offset that a taxpayer could claim was \$725 for each 'invalid relative'.⁴⁴ This means that a member of same-sex couple who cannot claim this offset is potentially \$725 worse off than an opposite-sex couple who can.

8.4.7 A same-sex couple gets a smaller overseas forces tax offset

A tax offset is available to Australians who serve overseas with:

- a United Nations force⁴⁵
- the Australian Defence Force (in a specified overseas locality if their income was not specifically exempt from tax).⁴⁶

Both of these tax offsets are paid at a higher rate if the taxpayer is eligible for a dependant rebate, including for their 'spouse' or 'child'.⁴⁷ A taxpayer cannot claim a same-sex partner or a child other than a birth child as a 'dependant'.

In addition to a fixed amount of \$338, a person eligible for the overseas forces tax offset may claim 50% of the sum of other tax offsets for 'dependants'. This means that a same-sex partner who is unable to claim a tax offset for a dependant can only claim the fixed amount of \$338.⁴⁸

8.4.8 A same-sex couple gets a smaller zone tax offset

Australians who live or work in a remote or isolated area of Australia are entitled to a zone tax offset.⁴⁹

This tax offset will be higher where the taxpayer has a 'dependant', including a 'spouse' or 'child'.⁵⁰ A taxpayer cannot claim a same-sex partner or a child other than a birth child as a 'dependant'.

In addition to a fixed amount which varies according to the location of work or residence, a person eligible for the zone tax offset may claim up to 50% of the sum of other tax offset components for dependants.⁵¹ This means that a same-sex partner who is unable to claim a tax offset for a dependant can only claim the fixed amount.

8.4.9 A US defence force same-sex partner cannot access tax exemptions

The 'dependants' of United States (US) Defence Forces and civilian employees working at specific US facilities in Australia are exempt from income tax if they are otherwise taxed in the United States.⁵²

A same-sex partner cannot claim a tax exemption; nor can the child of a lesbian co-mother or gay co-father.⁵³

8.5 Do same-sex and opposite-sex couples get equal access to the senior Australians tax rebate?

The senior Australians tax offset (also known as the low income aged persons rebate) is available to taxpayers who meet age and income eligibility conditions and are eligible for federal government pensions or similar payments.⁵⁴

8.5.1 Same-sex partners face individual income tests

Where a taxpayer has a 'spouse', the combined taxable income of the couple will be assessed against an income test to determine eligibility for the offset.⁵⁵ However, as a same-sex partner is not a 'spouse' under tax law, both members of a same-sex couple will be assessed as individuals.

This different tax treatment will generally benefit a same-sex couple. For example, a same-sex couple will be advantaged if the individual income of each partner is less than the individual income test threshold (\$39 808) but the combined income is more than the couple threshold (\$62 126). Each member of the same-sex couple would be able to claim the offset while neither member of an opposite-sex couple in the same circumstances would be able to do so.

8.5.2 Same-sex partners receive a higher rate of offset

The amount of senior Australians tax offset will depend upon whether the taxpayer has a spouse. Individuals receive a higher offset than taxpayers who are considered to be members of a couple.⁵⁶ Again, same-sex partners are treated as individuals. This will often benefit a taxpayer who is in a same-sex relationship. For example:

Fred and Eva are a married couple who are both eligible for the senior Australians tax offset.

- Fred's taxable income is \$25 000 and his tax offset is \$757.57
- Eva's taxable income is \$16 000 and her tax offset is \$1602.58

This opposite-sex couple's total tax offset is \$2359.

Fred and John are a same-sex couple who are each eligible for the senior Australians tax offset.

- Fred's taxable income is \$25 000 and his tax offset is \$1817.59
- John's taxable income is \$16 000 and his tax offset is \$2230.60

This same-sex couple's total tax offset is \$4047.

8.5.3 Any unused entitlement cannot be transferred to a same-sex partner

One same-sex partner is not able to transfer any unused offset entitlement to the other partner.

If a taxpayer is eligible for the senior Australians tax offset and his or her spouse is eligible for either the senior Australians tax offset or the pensioner tax offset, any unused portion of either person's offset may be transferred to the other person.⁶¹ As a same-sex partner is not considered a spouse, she or he cannot take advantage of this benefit.

The following is based on an example from the ATO:

Sonya is married to Russell and they lived together for the whole [income tax] year. Russell – who is a veteran – received a service pension. Sonya and Russell were both over pension age and their combined taxable income was less than \$62 126. They were both eligible for the senior Australians tax offset. Sonya's taxable income was \$20 800 and Russell's was \$10 200. Sonya is eligible for a senior Australian tax offset of \$1283, while Russell is eligible for the full offset of \$1602.

However if Russell only owes tax of \$485 then the remainder of his offset (\$1117) can be transferred to Sonya, who can claim a total tax offset of \$2400.⁶²

As a taxpayer in a same-sex relationship cannot transfer any unused offset to their partner, any excess amount that is not absorbed against his or her tax will be lost.

8.6 Can same-sex couples claim the baby bonus?

It is unclear whether the baby bonus is available to a lesbian co-mother or gay co-father.

8.6.1 The baby bonus is available to one parent only

The first-child tax offset, known as the 'baby bonus', was available to a parent having or adopting a child in the years 2001-2004.⁶³ Only one parent, usually the birth mother, could claim the offset.⁶⁴

The bonus is calculated according to the parent's reduction in income in the tax years after they gained responsibility for a child.⁶⁵ It is paid for the income years up to and including the year the child turns five.⁶⁶ While this offset has now been repealed, eligible taxpayers may continue to claim for the income years up to and including the year ending 30 June 2009.

8.6.2 A 'natural parent' has the primary entitlement

The relevant part of the Income Tax Assessment Act 1997 refers to a tax offset for a person's 'child', which is defined as including a 'person's adopted child, step-child or ex-nuptial child'.⁶⁷ This would exclude the child of a lesbian co-mother or gay co-father.

On the other hand, the offset becomes available when a person has a 'child event'. And this occurs when a person becomes 'legally responsible for a child'.⁶⁸

As explained in Chapter 5 on Recognising Children, a lesbian co-mother or gay co-father with a parenting order from the Family Court of Australia can be a person 'legally responsible for a child'.

However, the tax legislation sets out a hierarchy of who gets the primary entitlement to the offset, putting the 'natural' and adoptive parents first.⁶⁹ Thus, it seems that a same-sex parent with a parenting order will only have access to the baby bonus if there is no other person who can claim the rebate.

8.6.3 A 'natural parent' cannot transfer the entitlement to a same-sex partner

A parent with the primary entitlement can transfer the baby bonus to his or her 'spouse'.⁷⁰ This transfer can be valuable if the partner to whom the baby bonus is transferred would receive a higher payment for that year.⁷¹ However, because a same-sex partner is not a 'spouse' the birth mother cannot transfer the entitlement to her lesbian partner.⁷²

8.7 Can same-sex couples claim the child care tax rebate?

The child care rebate covers 30% of out-of-pocket child care expenses for approved child care. The maximum amount claimable is \$4000 per year for each eligible child.⁷³ The rebate is not 'refundable' and so does not generate cash in hand. Instead, like most dependant rebates, it reduces the amount of income tax paid by an eligible taxpayer.⁷⁴

8.7.1 Payments by a lesbian co-mother or gay co-father may attract the rebate

To be eligible for the child care tax rebate, an individual must be entitled to Child Care Benefit at least one week in a year.⁷⁵

Chapter 9 on Social Security explains that eligibility for Child Care Benefit depends on whether the child is an 'FTB child' of the taxpayer or the taxpayer's partner. A person who has legal responsibility for a child is considered to have an 'FTB child'.⁷⁶

As discussed in Chapter 9, this definition of 'FTB child' would likely include the child of a lesbian co-mother or gay co-father with a parenting order, as well as the child of a birth mother or birth father.

However, eligibility for the rebate may be restricted by the definition of 'child' in the Income Tax Assessment Act 1997. Thus, the rebate may only be available for the child of a birth mother or birth father (even though eligibility for Child Care Benefit may extend beyond those birth parents).⁷⁷

8.7.2 Payments by a same-sex partner do not attract the rebate

The child care tax rebate applies when child care payments are made by an eligible person or his or her 'partner'.⁷⁸ 'Partner' is limited to a member of an opposite-sex couple.⁷⁹

This means that any child care payments made by the same-sex partner of a person eligible for the rebate cannot be counted in calculating the amount of child care rebate to which

that person is entitled.⁸⁰ In contrast, payments made by a partner of an eligible person in an opposite-sex couple can be counted towards the approved fees in calculating the rebate. This will increase the available amount of the rebate for that member of the opposite-sex couple (up to a ceiling limit of \$4000 per child).

8.7.3 A same-sex partner cannot transfer the unused value of the rebate

A person in a same-sex couple cannot transfer any unused value of the child care rebate to their same-sex partner in order to minimise tax in a specific tax year.⁸¹ This is because of the narrow definition of 'spouse' in the tax legislation. In contrast, a person in an opposite-sex couple can transfer the unused value of the rebate to their partner, thereby potentially saving a large amount of tax.

The ATO provides the following example of how unused child care tax offset may be transferred:

Sean and Evelyn are [a de facto couple] with two children. Both children attended approved child care in 2004–2005. Sean is the manager of a local IT company and Evelyn is studying full time. Since Evelyn is the Child Care Benefit claimant she must be the parent to claim the 30% child care tax rebate. In July 2006, Evelyn visits the Tax Office website and discovers that she does not need to lodge a tax return as she received no income during the 2005–06 income year. Evelyn can transfer her 30% child care tax rebate to Sean to help reduce his tax liability.⁸²

The transfer function can amount to a significant amount of money. For example:

If the total rebate available was:

- David (for after school care) – \$1500
- Bella (for long day care) – \$3735

A total rebate of \$5325 would be available to Evelyn. Even though she pays no tax Sean can take advantage of this rebate.⁸³

8.7.4 Restrictions on transfer may result in no rebate at all

Restrictions on transferring the value of the rebate between same-sex partners may result in a same-sex couple being denied the child care rebate completely.

As indicated above, the rebate is not a 'cash in hand' refund. Instead, like most dependant rebates, it reduces the amount of income tax paid by an individual.⁸⁴ The rebate is only a benefit if a person has a tax liability in the year in which they claim the rebate.

The following example illustrates how a same-sex couple may lose the benefit of the rebate despite making eligible child care payments.

Anna and Christine are a same-sex couple raising a child, Joe, aged 4. Anna, who is the birth mother of Joe, is the Child Care Benefit claimant. She also pays the child care fees for the 2004–2005 income year. In 2005–2006 she is eligible for the child care tax offset. However, in that year, she has taxable income of only \$7000 from a casual job and so pays no income tax as a result of the tax-free threshold and low income tax rebate.

Anna cannot transfer the rebate to her partner Christine who has a much higher income and has been supporting the family. Even if Christine pays the child care fees as Anna's 'partner', she will not be eligible for the child care rebate.⁸⁵

8.8 Do same-sex couples have to spend more to access the medical expenses tax offset?

In addition to the Medicare Safety Net described in Chapter 11 on Health Care, if a taxpayer spends over \$1500 in net medical expenses, they may claim a 20% rebate for medical expenses over that sum.⁸⁶ This rebate is not a refund but reduces the taxpayer's income tax.

The taxpayer can meet the threshold of \$1500 by adding up his or her own expenses and the expenses paid on behalf of a 'dependant'.⁸⁷ A 'dependant' includes the 'spouse' or 'child' of the taxpayer.⁸⁸

These definitions exclude a same-sex partner and the child of a lesbian co-mother or gay co-father.

So, a taxpayer in a same-sex relationship can only meet the spending threshold on his or her own expenses.

The parent of a person in a same-sex relationship told the Inquiry:

My son and his partner are not second class citizens but this is how the government treats them. Their costs are higher because they can't combine their expenses. When my son was sick his partner paid most of the bills but couldn't claim tax benefits because they were not recognised as a couple.⁸⁹

8.9 Do same-sex couples pay a higher Medicare levy and surcharge?

The Medicare levy is a tax imposed upon personal incomes to fund the Medicare scheme. It is composed of two parts, the general Medicare levy and the Medicare surcharge.

8.9.1 Same-sex couples may pay a higher Medicare levy

The Medicare levy is 1.5% of an individual's taxable income.⁹⁰ However, at low levels of income the levy may reduce according to either individual or family income. Further, a taxpayer may be exempt from the levy depending, in part, on family circumstances.⁹¹

(a) It may be harder for a same-sex family to get an exemption

A Medicare levy exemption is available to an individual taxpayer whose income is less than \$16 284.⁹²

A Medicare levy exemption is also available to a taxpayer:

- with a married or de facto spouse; or
- who is entitled to a dependent rebate

if their family income (the combined income of a taxpayer and his or her spouse) is less than \$27 478. The family income threshold increases for each dependent child or student.⁹³

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A taxpayer in a same-sex relationship can only receive an exemption if his or her income is under the individual income threshold exemption (\$16 284). This may be an advantage or disadvantage to a same-sex couple – depending on the income levels of each member of the couple.

In addition, a person will be eligible for the Medicare levy exemption if he or she is a ‘prescribed person’.⁹⁴ A ‘prescribed person’ who has dependants will only qualify for the exemption if his or her dependants are also:

- in an exemption category, or
- the dependants of a ‘spouse’ who had to pay the Medicare levy.⁹⁵

A taxpayer in a same-sex couple may be disadvantaged by this test because his or her birth children will not be considered the ‘dependants’ of his or her same-sex partner.⁹⁶ Further, a same-sex couple cannot complete a ‘family agreement’ determining which parent will pay the half levy for joint dependants.⁹⁷

(b) *It may be harder for a same-sex family to qualify for a reduced Medicare levy*

If an individual’s income is more than \$16 284, or the family income is more than \$27 478, the Medicare levy is phased in at a rate of 20 cents for each dollar over the threshold.

But a reduction in the Medicare levy, based on family income, Medicare levy is only available to taxpayers on low incomes if the taxpayer:

- has a spouse
- was entitled to a child-housekeeper or housekeeper tax offset
- has been a sole parent.⁹⁸

The definitions of both ‘spouse’ and ‘child’ in Medicare levy legislation adopt those in income tax law.⁹⁹ This means that a taxpayer in a same-sex relationship is excluded from any reduction in the general Medicare levy if his or her eligibility relies on a relationship with a spouse or a child who is not a birth child.¹⁰⁰

Whether this is an advantage or disadvantage to a same-sex couple depends on the income levels of each member of the couple.

(c) *Impact of the Medicare levy on same-sex couples*

A range of submissions to the Inquiry commented on the impact of being denied access to a reduced Medicare levy.

At the Townsville Forum, a same-sex couple told the Inquiry:

Under the *Medicare Levy Act 1986*, the eligibility of a taxpayer for payment of the Medicare Levy is decreased if they have a dependent spouse. This option is not available for same-sex interdependent couples as the law excludes same-sex partners from the definition of a ‘spouse’.¹⁰¹

The Law Institute of Victoria told the Inquiry:

Taxpayers can claim an exemption or reduction in the Medicare levy payable if they meet certain income threshold requirements. Based on the definition of 'spouse', taxpayers in same-sex relationships cannot benefit from access to low income exceptions for families.¹⁰²

8.9.2 Same-sex couples may pay a higher Medicare levy surcharge

The Medicare levy surcharge is an additional 1% of taxable income payable where:

- a person's income is above the relevant threshold; and
- the person or his or her 'spouse' do not have private health insurance for the tax year.¹⁰³

For the 2005–2006 tax year, the surcharge threshold was \$50 000 for an individual and \$100 000 for a family.¹⁰⁴ The family threshold increases by \$1500 for each dependent child when there is more than one.¹⁰⁵ The family threshold is met by a person's taxable income plus the taxable income of a spouse.¹⁰⁶

(a) *Same-sex partners are assessed on individual thresholds*

Since same-sex partners are excluded from the definition of a 'spouse', taxpayers who are in same-sex relationships are assessed under the individual rather than the family threshold.

This can disadvantage a same-sex couple. For example, if one partner in a same-sex couple was earning \$40 000 and the other \$59 000 the latter partner would be required to pay a surcharge of \$590 because \$59 000 is over the \$50 000 individual threshold. However, an opposite-sex couple in the same situation would not pay any surcharge because the joint income of the two partners (\$99 000) is under the family threshold of \$100 000.¹⁰⁷

(b) *Impact of the Medicare levy surcharge thresholds on same-sex couples*

A range of submissions to the Inquiry commented on the impact of this discrimination in the Medicare levy surcharge.

The submission from Action Reform Change Queensland and the Queensland AIDS Council included the following personal story:

My partner actually did our tax return one year on E TAX and it didn't have the tick box that you answer, asking you whether you do or don't have a partner of the opposite sex, just whether you have a partner. She ticked 'yes' and we paid over \$500 less tax that year. Being unsure of the legality of this my partner checked it out with a 'tax info person'. She was told that we should pay the higher amount, i.e. for two single person's tax, but we didn't opt to do that. I guess we would have been fined for being illegal if we'd been audited and that's ridiculous.¹⁰⁸

Trish Kernahan told the Inquiry:

The Federal government's refusal to define the term 'spouse' to include people in same sex relationships costs me over \$800 every year in additional tax via the Medicare Levy. I earn over \$50,000 p.a. which is the levy limit set for 'single' people but less than the \$100,000 limit set for a heterosexual person with a dependent spouse.¹⁰⁹

Another person reported:

On February 2006, [Mr A] was sent a letter by the Australian Taxation Office (ATO) claiming that he owed \$545.95 for a Medicare Levy Surcharge... While [Mr A] exceeded the individual person threshold (\$50,000), [Mr A] and [Mr B] as a married family did not exceed the combined threshold for a married couple with no children (\$100,000).¹¹⁰

8.10 Do same-sex couples pay more tax on relationship breakdown?

The transfer of property to a spouse or child following family breakdown may attract favourable tax treatment. Further, income earned on property held for the benefit of a child after a relationship breakdown may also be eligible for favourable treatment. These concessions are not available to same-sex families.

8.10.1 Same-sex couples pay capital gains tax when transferring property to a partner

Favourable capital gains tax treatment is available for transfer of property to a 'spouse' or 'former spouse' following a relationship breakdown. However, a transfer to a same-sex partner is not a transfer to a 'spouse' so same-sex couples do not enjoy these benefits.

As explained by Miranda Stewart:

Effectively, the tax on any capital gain in the assets transferred to the spouse is deferred and the gain is taxable only on the subsequent disposal of those assets by the spouse.¹¹¹

(a) *Only a 'spouse' can attract the favourable tax treatment*

The property transfer only attracts the favourable tax treatment if the transfer is made:

- under a federal court order issued by the Family Court of Australia
- under a state or territory court order dealing with property division in de facto relationships
- pursuant to a binding financial or written agreement.¹¹²

As discussed in Chapter 12 on Family Law, a state and territory court can issue property division orders in relation to same-sex couples. However, because of the narrow definition of 'spouse' under tax law, these court-ordered transfers still do not attract favourable tax treatment.¹¹³

(b) *Impact on same-sex couples*

The burden of this discrimination is described in a recent decision of the Administrative Appeals Tribunal.

In *The Roll-over Relief Claimant and Commissioner of Taxation* the applicant and her partner faced a bill for capital gains tax of \$19 262 and \$22 780 respectively on relationship breakdown.¹¹⁴ An opposite-sex couple in the same situation would pay no capital gains tax on this property transfer.

The Victorian Gay and Lesbian Rights Lobby provided another example of the impact on same-sex couples:

Jane and Sarah have been in a relationship for 8 years. On breakdown of the relationship, under state relationship property laws, Jane transfers some shares to Sarah. The shares cost \$3000 in the year 2000 and are currently worth \$7000.

The transfer of the shares from Jane to Sarah will lead to a capital gains tax liability for Jane, calculated on [50% of] the amount of appreciation in value of the shares, being \$7000 – \$3000 = \$4000 [x 50%], even if the shares are transferred as a gift, as the transfer will be deemed to take place for market value consideration.¹¹⁵

In contrast, if Jane and Sarah were an opposite-sex couple and Jane agreed to transfer the shares as part of a court order or maintenance agreement under either the *Family Law Act 1975* (Cth) or state property relationship legislation, the transfer of the shares would not attract capital gains tax at that time. Instead, Sarah would be deemed to acquire the shares at a cost of \$3,000 (Jane's original cost). Capital gains tax would only apply at a time in the future when Sarah decides to sell the shares.¹¹⁶

8.10.2 Same-sex couples do not pay GST when transferring property

A goods and services tax (GST) applies to most transactions involving the supply of goods and services.¹¹⁷ However, the ATO has determined that the transfer of assets as a result of matrimonial property division will not usually be subject to GST because of the private nature of the transaction.¹¹⁸

The term 'matrimonial property division' is not defined, but the ATO ruling specifically states that the directions apply to property distributions between 'de facto or same-sex relationship breakdown'.¹¹⁹

This means that same-sex couples will not usually be liable to pay GST on property transfers arising from an agreement concerning property division on relationship breakdown.

8.10.3 Same-sex families pay tax on property held for a child

Favourable tax treatment is available for income earned on property that has been transferred to a child, or a trustee on behalf of a child, if such a transfer is 'the result of a family breakdown'.¹²⁰ The property transfer must be pursuant to an order, determination or assessment for maintenance of the child, which could include an order for child support under the *Child Support (Assessment) Act 1989* (Cth).¹²¹ Without this favourable tax treatment, the income would be taxable at a penalty rate.

(a) *A family breakdown excludes separation of same-sex couples*

The Income Tax Assessment Act 1936 states that a family breakdown occurs when:

a person ceases to live with another person as the spouse of that person on a genuine domestic basis (whether or not legally married to that person).¹²²

Since a same-sex partner is not a 'spouse' this provision does not cover a separating same-sex couple.¹²³

(b) Impact on same-sex couples

The effect of the family breakdown provision is that a same-sex couple transferring property to a child (or a trustee on behalf of a child) when their relationship breaks down will be taxed at the top marginal rate. An opposite-sex couple in the same situation will be taxed at normal marginal rates, which usually are much lower.

Miranda Stewart explains the impact of this exclusion as follows:

On breakdown of an opposite-sex marriage or de facto couple relationship, a taxpayer may establish a child maintenance trust for the financial support of children of the relationship. The income of such a trust [is] exempted from the penal “children’s tax” rules that usually apply tax at (approximately) the top individual marginal rate in respect of income of minor children.¹²⁴ The income from such trusts is taxable at normal marginal tax rates to the trustee; where the child has no or little other income, this means that a low rate of tax will frequently apply...

For a child maintenance trust to be eligible for this tax concession, the contributing parent must have maintenance obligations in respect of the child and the contributions must be made because of a family breakdown.¹²⁵

For example, shares may be transferred to a trust for the benefit of a child following an eligible family breakdown. Dividends earned on the shares held on trust for the child will be taxed at normal marginal rates in respect of that child, rather than at a penalty rate equal to the top individual rate.

8.10.4 Same-sex couples pay tax on maintenance payments

A ‘spouse’ or ‘former spouse’ receiving maintenance payments for him or herself or a child does not have to pay income tax on those payments.¹²⁶

Since a same-sex partner is not a ‘spouse’, he or she is likely to be liable for income tax on those periodic payments.¹²⁷

8.11 Do same-sex couples pay more capital gains tax?

As noted above, same-sex couples are excluded from a capital gains tax concession for property that is transferred after a relationship breakdown.

Two further aspects of capital gains provisions affect same-sex couples.

Same-sex couples are excluded from a capital gains tax exemption for an inherited dwelling that was the main residence of the ‘spouse’ of the deceased.¹²⁸ Thus, same-sex couples have a higher liability for capital gains tax on the death of a partner.

On the other hand, a same-sex couple may have a tax advantage if they own and live in two separate properties. This is because capital gains tax is not payable on capital gains on a dwelling that is the taxpayer’s main residence.¹²⁹

If a person lives in a separate main dwelling from their ‘spouse’, they must either choose one of the residences or nominate both as their main residences. If both are nominated, the capital gains tax exemption is split.¹³⁰

Same-sex couples are not subject to this provision. So, if a same-sex couple owns and lives in two separate properties, they may legitimately claim an exemption for each residence.¹³¹

8.12 Are employers liable for more fringe benefits tax in respect of same-sex couples?

Fringe benefits tax (FBT) is assessed on an employer who provides benefits such as loans, free housing or other benefits to an employee or his or her 'associates'.

8.12.1 A same-sex partner is not an 'associate'

An 'associate' includes a 'spouse', 'relative', or 'child'.¹³² The *Fringe Benefits Tax Assessment Act 1986* (Cth) defines all these terms by reference to the *Income Tax Assessment Act 1997*.¹³³ This means that a same-sex partner and his or her relations would not be included when considering liability for FBT.

8.12.2 There may be FBT where a same-sex partner gets benefits under an 'arrangement'

The ATO accepts that same-sex partners are not 'associates' under the legislation. But a same-sex partner will be treated as receiving a fringe benefit if there is an 'arrangement'.¹³⁴ It seems likely that where a fringe benefit is provided to a same-sex partner of an employee, an 'arrangement' will be found to exist in many cases such that this integrity provision will apply.

8.12.3 Same-sex partners are not eligible for FBT 'spouse' exemptions

However, a same-sex partner is not covered by a range of FBT exemptions available to a 'spouse'.

For example, FBT is not payable on the following benefits for a 'spouse' or 'child':

- provision of accommodation, residential fuel and meals to a residential employee during a period of accommodation¹³⁵
- benefits provided by a religious employer to an employee who is a religious practitioner, or to their spouse or child¹³⁶
- provision of transport benefits for an employee and a 'close relative' of the employee if they are used to attend the funeral of a 'close relative' of the employee.¹³⁷

Since a same-sex partner is not a 'spouse' there will be no FBT exemption if a same-sex couple enjoys these benefits.

8.12.4 Same-sex couples may not benefit from salary packaging

Employment benefits which are FBT-exempt can be used for salary packaging. Salary packaging allows an employee to receive less income as salary and to receive non-taxable benefits for the benefit of themselves or an eligible spouse or child. These benefits will not be available to a same-sex couple.

Dr Jeremy Field talks about salary packaging in the public health service:

My small contribution to this inquiry concerns an employment benefit of working, as I do, for the public health service. Salary packaging is available to employees of 'public benevolent institutions' and allows certain personal expenses to be claimed as fringe benefits – free of tax. These expenses may be incurred under the employee's name or their partner's, providing they be of opposite sex. I would like to echo the feeling of being a 'first-class taxpayer but second-class citizen' expressed by others making submissions to this inquiry.¹³⁸

8.13 Are same-sex couples covered by tax integrity and anti-avoidance measures?

Tax law contains numerous anti-avoidance measures.¹³⁹ For example:

- a taxpayer is not entitled to deduct a payment to a 'relative' from an income assessment if it exceeds a reasonable amount¹⁴⁰
- rules that deem loans or payments to be dividends from private companies generally apply to loans or payments to a shareholder or his or her 'associates'.¹⁴¹

'Associate' is variously defined within different provisions, but includes a 'relative', 'child' or 'spouse' of the taxpayer in all instances.¹⁴² All of these definitions exclude same-sex partners and children other than birth children.

This means that anti-avoidance rules relating to 'spouse' or family of a taxpayer may not apply to same-sex couples.

However, it should be noted that the general income tax anti-avoidance rule in Part IVA of the *Income Tax Assessment Act 1936* may apply to transactions entered into for the dominant purpose of obtaining a tax benefit, whether or not a same-sex partner is included in the definition of 'spouse'.¹⁴³ Further, some anti-avoidance rules specifically exclude 'ordinary family or commercial dealing'.¹⁴⁴ It is unclear whether the provision of a benefit to a same-sex partner would qualify as 'ordinary' family dealing for this purpose. But it may be the case that same-sex couples are not accorded the safe harbour that is available for opposite-sex spouses.

8.14 Does tax legislation breach human rights?

This chapter identifies a number of taxation laws which fail to ensure that same-sex and opposite-sex couples and families enjoy the same taxation benefits.

The failure of tax legislation to recognise same-sex couples and, in some circumstances, the lesbian co-mother or gay co-father of a child, amounts to discrimination in breach of article 26 of the *International Covenant on Civil and Political Rights* (ICCPR).

The failure to ensure that same-sex parents can access the tax concessions and rebates available to assist opposite-sex parents support their children, results in further breaches of Australia's obligations to protect the rights of families without discrimination. Those rights are protected by the ICCPR (articles 23(1), 2(1)) and the *International Covenant on Economic Social and Cultural Rights* (ICESCR) (articles 10, 2(2)).

The fact that lesbian and gay families will often pay more tax than opposite-sex families, just because of the sexuality of the parents, may also breach the *Convention on the Rights of the Child* (CRC) because:

- A same-sex family will be at a financial disadvantage when compared to an opposite-sex family in the same position. This amounts to *discrimination* against the child on the basis of the status of his or her parents (CRC, article 2(2)).
- The *best interests of a child* being raised in a same-sex family are not a primary consideration – if they were, the people raising a child would be entitled to the same tax benefits irrespective of their sexuality (CRC, articles 2(1), 3(1)).
- The tax provisions do not *recognise and support the common responsibilities* of both same-sex parents to fulfil child-rearing responsibilities – in particular tax legislation does not recognise the responsibilities of the lesbian co-mother or gay co-father of a child (CRC, articles 18, 2(1)).

Finally, under ICESCR, any steps Australia takes to guarantee the right to social security (including tax concessions intended to assist individuals and families in certain circumstances) must occur without discrimination (articles 9, 2(2)). The discriminatory treatment of same-sex couples and families in taxation law may breach this right.

Chapter 3 on Human Rights Protections describes Australia's human rights obligations towards same-sex couples and families in more detail.

8.15 How should tax legislation be amended to avoid future breaches?

It is clear that same-sex couples and families are denied access to a range of tax offsets and concessions which are available to opposite-sex de facto couples and parents.

The Inquiry recommends amending the legislation to avoid future breaches of the human rights of people in same-sex couples.

The following sections summarise where the problems lie and how to fix them.

8.15.1 Narrow definitions are the main cause of discrimination

Same-sex couples are worse off than opposite-sex couples because the definitions in the taxation legislation fail to include same-sex couples and families.

In particular, the narrow definition of 'spouse' in the Income Tax Assessment Act 1997 has a huge impact on same-sex couples because most other tax legislation refers back to this definition.

The definition of 'child' in the Income Tax Assessment Act 1997 is also problematic because it excludes one of a child's parents where a child is born to a gay or lesbian couple.

8.15.2 The solution is to amend the definitions and recognise both same-sex parents of a child

Since the main problem is the narrow scope of legislative definitions, the solution is to amend those definitions so they are inclusive, rather than exclusive, of same-sex couples and families.

Chapter 4 on Recognising Relationships presents two alternative approaches to amending federal law to remove discrimination against same-sex couples.

The Inquiry's preferred approach for bringing equality to *same-sex couples* is to:

- retain the current terminology used in federal legislation (for example retain the term 'spouse' in the Income Tax Assessment Act 1997)
- redefine the terms in the legislation to include same-sex couples (for example, redefine 'spouse' to include a 'de facto partner')
- insert new definitions of 'de facto relationship' and 'de facto partner' which include same-sex couples.

Chapter 5 on Recognising Children sets out how to better protect the rights of both the *children of same-sex couples* and the parents of those children.

Chapter 5 recommends that the federal government implement parenting presumptions in favour of a lesbian co-mother of a child conceived through assisted reproductive technology (an ART child). This would mean that an ART child born to a lesbian couple would automatically be the 'child' of both members of the lesbian couple (in the same way as an ART child is automatically the 'child' of both members of an opposite-sex couple).

Chapter 5 also suggests that it should be easier for a lesbian co-mother or gay co-father to adopt a child for the same reasons.

Chapter 5 further recommends the insertion of a new definition of 'step-child' which would include a child under the care of a 'de facto partner' of the birth parent. This would make it easier for the child of a lesbian co-mother or gay co-father to qualify under the definition of 'child'.

It may not be necessary to amend the definition of 'child' if these three things occur, because a lesbian co-mother and gay co-father will fall under the current definition.

Finally, Chapter 5 suggests that federal legislation should clearly recognise the status of a person who has a parenting order from the Family Court of Australia. This would mean that gay and lesbian parents with parenting orders could more confidently assert their rights as people who are 'legally responsible'.

The following list sets out the definitions which would need to be amended according to these suggested approaches.

The Inquiry notes that if the government were to adopt the alternative approach set out in Chapter 4, then different amendments would be required.

8.15.3 A list of legislation to be amended

The Inquiry recommends amendments to the following legislation discussed in this chapter:

A New Tax System (Family Assistance) Act 1999 (Cth)

‘member of a couple’ (s 3 – no need to amend if ‘member of a couple’ is amended in the *Social Security Act 1991* (Cth) (Social Security Act))

‘partner’ (s 3 – no need to amend if ‘member of a couple’ is amended in the Social Security Act)

‘FTB child’ (s 22 – no need to amend if the child of a lesbian co-mother or gay co-father may also be recognised through reformed parenting presumptions or adoption laws)

Fringe Benefits Tax Assessment Act 1986 (Cth)

‘associate’ (s 136(1) – no need to amend if ‘spouse’ is amended in the *Income Tax Assessment Act 1997* (Cth) (Income Tax Assessment Act 1997) and the child of a lesbian co-mother or gay co-father may be recognised through reformed parenting presumptions, adoption laws or a new definition of ‘step-child’ in the Income Tax Assessment Act 1997)

‘child’ (s 136(1) – no need to amend if the child of a lesbian co-mother or gay co-father may be recognised through reformed parenting presumptions, adoption laws or a new definition of ‘step-child’ in the Income Tax Assessment Act 1997)

‘relative’ (s 136(1) – no need to amend if ‘spouse’ is amended in the Income Tax Assessment Act 1997 and a lesbian co-mother or gay co-father may be recognised as a parent through reformed parenting presumptions, adoption laws or a new definition of ‘step-child’ in the Income Tax Assessment Act 1997)

‘spouse’ (s 136(1) – no need to amend if ‘spouse’ is amended in the Income Tax Assessment Act 1997)

Income Tax Assessment Act 1936 (Cth)

‘associate’ (s 318 – no need to amend if ‘spouse’ is amended in the Income Tax Assessment Act 1997 and the child of a lesbian co-mother or gay co-father may be recognised through reformed parenting presumptions, adoption laws or a new definition of ‘step-child’ in the Income Tax Assessment Act 1997)

‘child’ (s 6(1) – no need to amend if the child of a lesbian co-mother or gay co-father may be recognised through reformed parenting presumptions, adoption laws or a new definition of ‘step-child’ in the Income Tax Assessment Act 1997)

‘child-housekeeper’ (s 159J(6) – no need to amend if the child of a lesbian co-mother or gay co-father may be recognised through reformed parenting presumptions, adoption laws or a new definition of ‘step-child’ in the Income Tax Assessment Act 1997)

‘dependant’ (s 251R – no need to amend if ‘spouse’ is amended in the Income Tax Assessment Act 1997; ‘member of a couple’ is amended in the Social Security Act; and the child of a lesbian co-mother or gay co-father may be recognised through reformed parenting presumptions, adoption laws or a new definition of ‘step-child’ in the Income Tax Assessment Act 1997)

‘invalid relative’ (s 159J(6) – no need to amend if the child of a lesbian co-mother or gay co-father may be recognised through reformed parenting presumptions, adoption laws or a new definition of ‘step-child’ in the Income Tax Assessment Act 1997)

‘relative’ (s 6(1) – no need to amend if ‘spouse’ is amended in the Income Tax Assessment Act 1997 and a lesbian co-mother or gay co-father may be recognised as a parent through reformed parenting presumptions or adoption laws or a new definition of ‘step-child’ in the Income Tax Assessment Act 1997)

‘spouse’ (s 6(1) – no need to amend if ‘spouse’ is amended in the Income Tax Assessment Act 1997)

Income Tax Assessment Act 1997 (Cth)

‘child’ (s 995-1(1) – no need to amend if the child of a lesbian co-mother or gay co-father may be recognised through reformed parenting presumptions, adoption laws or a new definition of ‘step-child’)

‘child event’ (s 61-360(a) – no need to amend if ‘legally responsible’ is amended and the child of a lesbian co-mother or gay co-father may also be recognised through reformed parenting presumptions or adoption laws)

‘de facto partner’ (insert new definition)

‘de facto relationship’ (insert new definition)

‘legally responsible’ (s 995-1(1) – amend to clarify that a parenting order is evidence of legal responsibility)

‘partner’ (s 61-490(1)(b) – no need to amend if ‘member of a couple’ is amended in the Social Security Act 1991)

‘relative’ (s 995-1(1) – no need to amend if ‘spouse’ is amended and a lesbian co-mother or gay co-father may be recognised as a parent through reformed parenting presumptions or adoption laws)

‘spouse’ (s 995-1(1) – amend to include a ‘de facto partner’)

‘step-child’ (insert new definition)

Medicare Levy Act 1986 (Cth)

The *Medicare Levy Act 1986* (Cth) does not define the relevant terms, but relies on definitions in the *Income Tax Assessment Act 1936* (Cth)(s 3(1)). Changes to that Act will automatically change definitions in the *Medicare Levy Act 1986* (Cth).

Social Security Act 1991 (Cth)

‘de facto partner’ (insert new definition)

‘de facto relationship’ (insert new definition)

‘marriage-like relationship’ (s 4(2), (3), (3A) – replace with ‘de facto relationship’)

‘member of a couple’ (s 4(2)(b) – amend to include a ‘de facto partner’ and ‘de facto relationship’)

‘partner’ (s 4(1) – no need to amend if ‘member of a couple’ is amended)

Endnotes

- 1 Australian Coalition for Equality, Submission 228; Tasmanian Gay and Lesbian Rights Group, Submission 233; ACON, Submission 281; Action Reform Change Queensland and Queensland AIDS Council, Submission 270.
- 2 In addition, the federal government assesses fringe benefits tax on employers under the *Fringe Benefits Tax Assessment Act 1986* (Cth) and goods and services tax under *A New Tax System (Goods and Services Tax) Act 1999* (Cth) and related legislation.
- 3 *Income Tax Assessment Act 1997* (Cth), s 995-1(1).
- 4 *Income Tax Assessment Act 1936* (Cth), s 6(1).
- 5 *Gregory Brown v Commissioner for Superannuation* (1995) 21 AAR 378, para 62.
- 6 See for example the following: Australian Taxation Office, *Interpretative Decision 2002/211*; Australian Taxation Office, *Interpretative Decision 2002/826*.
- 7 *Income Tax Assessment Act 1997* (Cth), s 995-1(1).
- 8 *Income Tax Assessment Act 1936* (Cth), s 6(1).
- 9 For an explanation of these terms see the Glossary of Terms.
- 10 See further Chapter 5 on Recognising Children.
- 11 Melbourne Forum, 26 September 2006.
- 12 Jim Woulfe, Opening Statement, Sydney Hearing, 26 July 2006.
- 13 Dylan Deinert, Submission 242.
- 14 Name Withheld, Submission 83.
- 15 Lynne Martin, Submission 38.
- 16 Name Withheld, Submission 267.
- 17 Australian Taxation Office, *About tax offsets*, <http://www.ato.gov.au/individuals/content.asp?doc=/content/19605.htm>, viewed 20 February 2007. See also Tasmanian Gay and Lesbian Rights Group, Submission 233; Action Reform Change Queensland and Queensland AIDS Council, Submission 270; Young Lawyers Human Rights Committee, Submission 311; Victorian Gay and Lesbian Rights Lobby, Submission 256; Law Council of Australia, Submission 305; Australian Coalition for Equality, Submission 228; Anti-Discrimination Commission Queensland, Submission 264.
- 18 The Australian Tax Office's view is that a taxpayer will be maintaining a dependant if:
- they and their dependant lived in the same house
 - they gave their dependant food, clothing and lodging, or
 - they helped them to pay for their living, medical and educational costs.
- Australian Taxation Office, *Dependants and separate net income*, <http://www.ato.gov.au/individuals/content.asp?doc=/content/19187.htm&page=2&H2>, viewed 14 February 2007. 'Maintaining' is not defined in taxation legislation.
- 19 Australian Coalition for Equality, Submission 228. See also Law Council of Australia, Submission 305.
- 20 *Income Tax Assessment Act 1936* (Cth), s 159J(2). See also the Australian Taxation Office, *Dependants and separate net income*, <http://www.ato.gov.au/individuals/content.asp?doc=/content/19187.htm&page=1&H1>, viewed 14 February 2007.
- 21 *Income Tax Assessment Act 1936* (Cth), s 159J(6). This rebate is payable in addition to the housekeeper tax offset: *Income Tax Assessment Act 1936* (Cth), s 159L.
- 22 *Income Tax Assessment Act 1936* (Cth), s 159J(6).
- 23 Australian Taxation Office, *Dependent spouse tax offset*, <http://www.ato.gov.au/individuals/content.asp?doc=/content/19201.htm>, viewed 20 February 2007; Australian Taxation Office, *Family tax benefit (FTB) – introduction*, <http://www.ato.gov.au/individuals/content.asp?doc=/content/21556.htm&page=1&H1>, viewed 20 February 2007. See also Miranda Stewart, Submission 266; The Treasury, *Tax Expenditures Statement 2006*, Item A31, http://www.treasury.gov.au/documents/1211/PDF/06_Chapter6.pdf, viewed 14 February 2007.
- 24 *Income Tax Assessment Act 1936* (Cth), s 159J. Miranda Stewart, Submission 266.

- 25 See Australian Taxation Office, *Interpretative Decision 2002/211*. This decision applies the Administrative Appeal Tribunal's decision in *Gregory Brown v Commissioner for Superannuation* (1995) 21 AAR 378.
- 26 Australian Taxation Office, *Dependent spouse tax offset*, <http://www.ato.gov.au/print.asp?doc=/content/19201.htm>, viewed 14 February 2007. A spouse's separate net income (SNI) for the period(s) a taxpayer claims a spouse tax offset reduces the claim by \$1 for every \$4 by which their SNI exceeded \$282. A spouse tax offset cannot be claimed if a spouse's SNI was more than \$6721.
- 27 Brisbane Forum, 10 October 2006. See also Bryce Peterson, Opening Statement, Launceston Forum, 25 September 2006; Action Reform Change Queensland and Queensland AIDS Council, Submission 270; Lyn Holowaty, Submission 157; Cara Jones, Submission 118; Victorian Gay and Lesbian Rights Lobby, Submission 256.
- 28 Newcastle Forum, 24 October 2006.
- 29 Name Withheld, Submission 246.
- 30 Name Withheld, Submission 253. See also Alison Treanor and Liz Scott, Submission 136; Michael Wilson and Robert Kings, Submission 169.
- 31 Name Withheld, Submission 297.
- 32 The Hon Ian Hunter MLC, Submission 306.
- 33 *Income Tax Assessment Act 1936* (Cth), s 159J. Subsection 159J(1) states that where a taxpayer contributes to the maintenance of a dependant and the dependant is a resident, the taxpayer is entitled to a tax offset. Subsection 159J(2) specifies that a dependant includes the parent of the taxpayer or of the taxpayer's spouse.
- 34 This rebate is reduced where the spouse's parent's income was \$286 or more. Australian Taxation Office, *Parent or spouse's parent tax offset*, <http://www.ato.gov.au/individuals/content.asp?doc=/content/19362.htm&pc=001/002/005/011/003&mnu=&mf=&st=&cy=1>, viewed 14 February 2007.
- 35 Action Reform Change Queensland and Queensland AIDS Council, Submission 270.
- 36 *Income Tax Assessment Act 1936* (Cth), ss 159L(1), 159J; Australian Taxation Office, *Housekeeper tax offset*, <http://www.ato.gov.au/print.asp?doc=/content/19202.htm>, viewed 14 February 2007.
- 37 Australian Taxation Office, *Housekeeper tax offset*, <http://www.ato.gov.au/print.asp?doc=/content/19202.htm>, viewed 14 February 2007.
- 38 ACON, Submission 281. See also Law Council of Australia, Submission 305.
- 39 *Income Tax Assessment Act 1936* (Cth), s 159J. Subsection 159J(1) states that where a taxpayer contributes to the maintenance of a dependant and the dependant is a resident, the taxpayer is entitled to a tax offset. Subsection 159J(2) specifies that a dependant includes a taxpayer's child-housekeeper. Note that the child-housekeeper and dependent spouse tax offsets are mutually exclusive.
- 40 For definition of 'child' see: *Income Tax Assessment Act 1997* (Cth), s 995-1(1); *Income Tax Assessment Act 1936* (Cth), s 6(1).
- 41 Australian Taxation Office, *Child-housekeeper tax offset*, <http://www.ato.gov.au/print.asp?doc=/content/19211.htm>, viewed 14 February 2007.
- 42 *Income Tax Assessment Act 1936* (Cth), s 159J. Subsection 159J(1) states that where a taxpayer contributes to the maintenance of a dependant and the dependant is a resident, the taxpayer is entitled to a tax offset. Subsection 159J(2) specifies that a dependant includes a taxpayer's invalid relative.
- 43 For definition of 'child' see: *Income Tax Assessment Act 1997* (Cth), s 995-1(1); *Income Tax Assessment Act 1936* (Cth), s 6(1).
- 44 Australian Taxation Office, *Invalid relative tax offset*, <http://www.ato.gov.au/individuals/content.asp?doc=/content/19349.htm>, viewed 14 February 2007.
- 45 *Income Tax Assessment Act 1936* (Cth), s 23AB(7).
- 46 *Income Tax Assessment Act 1936* (Cth), s 79B. See also Australian Taxation Office, *What is the overseas forces tax offset?* <http://www.ato.gov.au/individuals/content.asp?doc=/content/40488.htm&page=1&H1>, viewed 20 February 2007.
- 47 Relevant rebates include those set out in *Income Tax Assessment Act 1936* (Cth), ss 159J, 159L and 159K (for the Australian Defence Force rebate only): *Income Tax Assessment Act 1936* (Cth), ss 23AB(7), 79B(6).

- 48 *Income Tax Assessment Act 1936* (Cth), ss 23AB(7), 79AB(4)-(4A). Australian Taxation Office, *Calculating the two components of your zone/overseas forces tax offset*, <http://www.ato.gov.au/individuals/content.asp?doc=/content/40485.htm>, viewed 19 February 2007; Australian Taxation Office, *Calculating the base amount of your zone/overseas forces tax offset*, <http://www.ato.gov.au/individuals/content.asp?doc=/content/40492.htm>, viewed 19 February 2007.
- 49 *Income Tax Assessment Act 1936* (Cth), s 79A. See also Australian Taxation Office, *What is the zone tax offset*, <http://www.ato.gov.au/individuals/content.asp?doc=/content/19529.htm>, viewed 20 February 2007.
- 50 Relevant rebates include those set out in *Income Tax Assessment Act 1936* (Cth), ss 159J-L; *Income Tax Assessment Act 1936* (Cth), s 79A(4).
- 51 *Income Tax Assessment Act 1936* (Cth), s 79A(2). Australian Taxation Office, *Calculating the two components of your zone/overseas forces tax offset*, <http://www.ato.gov.au/individuals/content.asp?doc=/content/40485.htm>, viewed 19 February 2007; Australian Taxation Office, *Calculating the base amount of your zone/overseas forces tax offset*, <http://www.ato.gov.au/individuals/content.asp?doc=/content/40492.htm>, viewed 19 February 2007.
- 52 *Income Tax Assessment Act 1936* (Cth), s 23AA. A 'dependant' is defined as a spouse, or a relative who is wholly or mainly dependent for support on the person, excluding certain spouses and dependent relatives who are ordinarily resident in Australia: *Income Tax Assessment Act 1936* (Cth), s 23AA(1). See also Australian Taxation Office, *Australia/United States Joint Space and Defence Projects*, <http://www.ato.gov.au/print.asp?doc=/content/22255.htm>, viewed 14 February 2007.
- 53 For definitions of 'spouse' and 'relative' see: *Income Tax Assessment Act 1997* (Cth), s 995-1(1); *Income Tax Assessment Act 1936* (Cth), s 6(1).
- 54 *Income Tax Assessment Act 1936* (Cth), s 160AAAA; Australian Taxation Office, *Senior Australians tax offset 2005-2006*, <http://www.ato.gov.au/print.asp?doc=/content/76928.htm>, viewed 14 February 2007.
- 55 Australian Taxation Office, *Senior Australians tax offset 2005-2006*, <http://www.ato.gov.au/print.asp?doc=/content/76928.htm>, viewed 14 February 2007. For example, for the Senior Australians tax offset, in 2005-2006, the income threshold for an individual was \$39 808 and for a couple was \$62 126.
- 56 The maximum offset payable to a member of a couple in 2005-2006 is \$1602; the maximum offset payable to an individual in 2005-2006 is \$2230: *Income Tax Regulations 1936* (Cth), reg 150AB(2).
- 57 \$1602 (maximum offset for a spouse) minus 12.5% of the difference between \$25 000 (income) and \$18 247 (lower taxable income threshold for a spouse). *Income Tax Regulations 1936* (Cth), reg 150AD.
- 58 The maximum offset available as her income is less than the lower taxable income threshold for a spouse. *Income Tax Regulations 1936* (Cth), reg 150AD.
- 59 \$2230 (maximum offset for an individual) minus 12.5% of the difference between \$25 000 (income) and \$21 698 (lower taxable income threshold for an individual). *Income Tax Regulations 1936* (Cth), reg 150AD.
- 60 The maximum offset available as her income is less than the lower taxable income threshold for an individual. *Income Tax Regulations 1936* (Cth), reg 150AD.
- 61 *Income Tax Regulations 1936* (Cth), reg 150AE. See also Australian Taxation Office, *Transferring unused tax offset entitlement from your spouse*, <http://www.ato.gov.au/individuals/content.asp?doc=/content/36498.htm>, viewed 20 February 2007.
- 62 This example is partially taken from Australian Taxation Office, *Transferring unused tax offset entitlement from your spouse*, <http://www.ato.gov.au/individuals/content.asp?doc=/content/36498.htm>, viewed 20 February 2007.
- 63 *Income Tax Assessment Act 1997* (Cth), ss 61-355, 61-360.
- 64 The legislation sets out who has a 'primary entitlement' to the offset: *Income Tax Assessment Act 1997* (Cth), ss 61-355, 61-375.
- 65 *Income Tax Assessment Act 1997* (Cth), ss 61-415-61-430. Australian Taxation Office, *Baby bonus instructions and claim 2006*, NAT 6580-6.2006, Canberra, May 2006. A minimum annual amount of \$500 per year is paid.
- 66 *Income Tax Assessment Act 1997* (Cth), s 61-355. Section 61-440 provides an additional tax offset for a child who is in the taxpayer's care prior to being adopted.

- 67 *Income Tax Assessment Act 1997* (Cth), s 995-1(1).
- 68 *Income Tax Assessment Act 1997* (Cth), ss 61-355, 61-360. Section 995-1(1) defines 'legally responsible' as meaning: 'legally responsible (whether alone or jointly with someone else) for the day-to-day care, welfare and development of the child'.
- 69 *Income Tax Assessment Act 1997* (Cth), s 61-375.
- 70 *Income Tax Assessment Act 1997* (Cth), s 61-385.
- 71 Australian Taxation Office, *Baby bonus instructions and claim 2006*, NAT 6580-6.2006, Canberra, May 2006.
- 72 This has been confirmed by Australian Taxation Office, *Interpretative Decision 2002/826*, which relied on the Administrative Appeal Tribunal decision in *Gregory Brown v Commissioner for Superannuation* (1995) 21 AAR 378.
- 73 *Income Tax Assessment Act 1997* (Cth), s 61-495.
- 74 Australian Taxation Office, *30% child care tax rebate*, <http://www.ato.gov.au/individuals/content.asp?doc=/content/52998.htm>, viewed 27 February 2007. To be eligible for the Child Care Rebate, a person must also be eligible for the Child Care Benefit: *Income Tax Assessment Act 1997* (Cth), ss 61-470, 61-480. For a discussion of Child Care Benefit see section 9.7 in Chapter 9 on Social Security.
- 75 *Income Tax Assessment Act 1997* (Cth), s 61-470. The entitlement to child care benefit is determined by the Family Assistance Office: s 61-480(2).
- 76 *A New Tax System (Family Assistance) Act 1999* (Cth), s 22(2)-(4).
- 77 *Income Tax Assessment Act 1997* (Cth), s 995-1(1).
- 78 *Income Tax Assessment Act 1997* (Cth), s 61-490.
- 79 The term 'partner' is defined as having the same meaning as in the *A New Tax System (Family Assistance) Act 1999*, which in section 3(1) defines 'partner' as having the same meaning as in the *Social Security Act 1991* (Cth). In subsection 4(2)(b), the *Social Security Act* defines 'partner' as meaning 'member of a couple' where the relationship is with a person of the opposite sex.
- 80 See Miranda Stewart, Submission 266.
- 81 *Income Tax Assessment Act 1997* (Cth), s 61-496.
- 82 Australian Taxation Office, *30% child care tax rebate case studies*, <http://www.ato.gov.au/print.asp?doc=/content/76853.htm>, viewed 14 February 2007.
- 83 This example is partially taken from Australian Taxation Office, *30% child care tax rebate case studies*, <http://www.ato.gov.au/print.asp?doc=/content/76853.htm>, viewed 14 February 2007.
- 84 Australian Taxation Office, *30% child care tax rebate*, <http://www.ato.gov.au/individuals/content.asp?doc=/content/52998.htm>, viewed 27 February 2007.
- 85 See also Action Reform Change Queensland and Queensland AIDS Council, Submission 270.
- 86 *Income Tax Assessment Act 1936* (Cth), s 159P(3A). See also, Australian Taxation Office, *Net medical expenses tax offset*, <http://www.ato.gov.au/individuals/content.asp?doc=/content/19181.htm>, viewed 27 February 2007. Net medical expenses are the medical expenses paid less any refunds from Medicare or private health funds.
- 87 *Income Tax Assessment Act 1936* (Cth), s 159P(1).
- 88 *Income Tax Assessment Act 1936* (Cth), s 159P(4). 'Dependant' also includes persons for whom the taxpayer is entitled to a rebate under section 159J, such as a parent or spouse's parent, a child-housekeeper, or an invalid relative: *Income Tax Assessment Act 1936* (Cth), s 159P(4)(c). See also Law Council of Australia, Submission 305.
- 89 Person A, Parents and Friends of Lesbians and Gays, Brisbane Hearing, 11 October 2006.
- 90 *Medicare Levy Act 1986* (Cth), s 6. See also Australian Taxation Office, *What is the Medicare levy?* <http://www.ato.gov.au/individuals/content.asp?doc=/content/17482.htm&pc=001/002/030/003/001&mnu=&mpf=&st=&cy=1>, viewed 27 February 2007.
- 91 *Medicare Levy Act 1986* (Cth), s 8.
- 92 For taxpayers entitled to a senior Australians tax offset, this amount is \$24 867. *Medicare Levy Act 1986* (Cth), ss 7(1), 3(1). See also Australian Taxation Office, *Medicare levy reduction for people on low incomes*, <http://www.ato.gov.au/print.asp?doc=/content/40500.htm>, viewed 14 February 2007.

- 93 *Medicare Levy Act 1986* (Cth), s 8(1), (5). The family income threshold is increased by \$2523 for each dependent child. See also Australian Taxation Office, *Medicare levy reduction for people on low incomes*, <http://www.ato.gov.au/print.asp?doc=/content/40500.htm>, viewed 14 February 2007.
- 94 *Income Tax Assessment Act 1936* (Cth), s 251T(a).
- 95 *Income Tax Assessment Act 1936* (Cth), s 251U(1), (2). A 'prescribed person' includes a person who is:
- a blind pensioner or a person who receives the sickness allowance from Centrelink
 - entitled to full free medical treatment under defence force arrangements or Veterans' Affairs Repatriation health card or repatriation arrangements
 - not an Australian resident for tax purposes
 - a resident of Norfolk Island
 - a member of a diplomatic mission or consular post in Australia, or a member of such a person's family and living with them (and who does not normally live in Australia)
 - in possession of a certificate Medicare Levy Exemption Certification Unit of Medicare Australia showing that he or she is not entitled to Medicare benefits.
- See Australian Taxation Office, *Medicare levy exemption*, <http://www.ato.gov.au/print.asp?doc=/content/40501.htm>, viewed 27 February 2007.
- 96 *Income Tax Assessment Act 1936* (Cth), s 251R(3), which relies on definitions of 'spouse' and 'child' in the *Income Tax Assessment Act 1997* (Cth), s 995-1(1) via the *Income Tax Assessment Act 1936* (Cth), s 6(1).
- 97 *Income Tax Assessment Act 1936* (Cth), s 251R(6D).
- 98 *Medicare Levy Act 1986* (Cth), s 8(1). See also Australian Taxation Office, *Medicare levy reduction for people on low incomes*, <http://www.ato.gov.au/print.asp?doc=/content/40500.htm>, viewed 14 February 2007.
- 99 *Medicare Levy Act 1986* (Cth), ss 8B, 8C, 8D refer to the *Income Tax Assessment Act 1936* (Cth), s 251R. The *Income Tax Assessment Act 1936* (Cth) refers to definitions contained in the *Income Tax Assessment Act 1997* (Cth), s 995-1(1).
- 100 See also Law Institute of Victoria, Submission 331; Young Lawyers Human Rights Committee, Submission 311.
- 101 Sarah and Suzey Whitby, Opening Statement, Townsville Forum, 12 October 2006. See also Wollongong Forum, 12 October 2006; Name Withheld, Submission 268; Action Reform Change Queensland and Queensland AIDS Council, Submission 270.
- 102 Law Institute of Victoria, Submission 331.
- 103 *Medicare Levy Act 1986* (Cth), ss 8B-8D.
- 104 *Medicare Levy Act 1986* (Cth), ss 3A, 8B(2).
- 105 *Medicare Levy Act 1986* (Cth), s 3A. See also Australian Taxation Office, *Medicare levy surcharge*, <http://www.ato.gov.au/print.asp?doc=/content/7128.htm>, viewed 14 February 2007.
- 106 *Medicare Levy Act 1986* (Cth), s 8D(3).
- 107 J Millbank, 'Areas of Federal Law that Exclude Same-Sex Couples and their Children', Inquiry Research Paper, September 2006, available at <http://www.humanrights.gov.au/samesex/index.html>, p43, footnote 219.
- 108 Action Reform Change Queensland and Queensland AIDS Council, Submission 270. See also Gay and Lesbian Rights Lobby (NSW), Submission 333.
- 109 Trish Kernahan, Submission 217.
- 110 Name Withheld, Submission 326.
- 111 Miranda Stewart, Submission 266.
- 112 *Income Tax Assessment Act 1997* (Cth), ss 126-5(1), 126-15(1). For example, a financial agreement made under Part VIIIA of the *Family Law Act 1975* (Cth) that is binding because of section 90G of that Act (s 126-5(1)(d)); or a written agreement that is binding because of a state law, territory law or foreign law relating to de facto marriage breakdowns (s 126-5(1)(f)).
- 113 *The Roll-over Relief Claimant and Commissioner of Taxation* [2006] AATA 728 (23 August 2006) paras 35-37. The term 'spouse' in s 995-1(1) of the *Income Tax Assessment Act 1997* (Cth), discussed in section 8.2.1 above, applies for the capital gains tax provisions, which are in that Act.

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- 114 *The Roll-over Relief Claimant and Commissioner of Taxation* [2006] AATA 728 (23 August 2006) para 5.
- 115 There is a 50% on capital gains tax payable by individuals. *Income Tax Assessment Act 1997* (Cth), div 115.
- 116 Victorian Gay and Lesbian Rights Lobby, Submission 256.
- 117 *A New Tax System (Goods and Services Tax) Act 1999* (Cth).
- 118 Commissioner of Taxation, *Goods and Services Tax Ruling 2003/6*, 'Goods and services tax: transfers of enterprise assets as a result of property distributions under the Family Law Act 1975 or in similar circumstances'.
- 119 Commissioner of Taxation, *Goods and Services Tax Ruling 2003/6*, 'Goods and services tax: transfers of enterprise assets as a result of property distributions under the Family Law Act 1975 or in similar circumstances', para 44.
- 120 *Income Tax Assessment Act 1936* (Cth), s 102AE(2)(b)(viii).
- 121 *Income Tax Assessment Act 1936* (Cth), s 102AGA(2).
- 122 *Income Tax Assessment Act 1936* (Cth), s 102AGA(2)(a).
- 123 *Income Tax Assessment Act 1997* (Cth), s 995-5(1).
- 124 *Income Tax Assessment Act 1936* (Cth), pt III, div 6AA. Commissioner of Taxation, *Taxation Ruling TR 98/4*, 18 March 1998, para 6.
- 125 Miranda Stewart, Submission 266.
- 126 *Income Tax Assessment Act 1997* (Cth), s 51-50.
- 127 Miranda Stewart, Submission 266; Victorian Gay and Lesbian Rights Lobby, Submission 256.
- 128 *Income Tax Assessment Act 1997* (Cth), s 118-205.
- 129 *Income Tax Assessment Act 1997* (Cth), s 118-110(1).
- 130 *Income Tax Assessment Act 1997* (Cth), s 118-170.
- 131 Law Council of Australia, Submission 305.
- 132 *Fringe Benefits Tax Assessment Act 1986* (Cth), s 136(1). 'Associate' has the meaning given by s 318 of the *Income Tax Assessment Act 1936* (Cth), where the category includes a 'relative' or 'partner', which in turn include a 'spouse' or 'child'.
- 133 *Fringe Benefits Tax Assessment Act 1986* (Cth), s 136(1); *Income Tax Assessment Act 1997* (Cth), s 995-1(1).
- 134 Australian Taxation Office, *Interpretative Decision 2003/7*. Same-sex partners are deemed to be associates under s 148(2) of the *Fringe Benefits Tax Assessment Act 1986* (Cth).
- 135 *Fringe Benefits Tax Assessment Act 1986* (Cth), ss 58, 58T, 58U. These benefits may be provided to the 'spouse' or 'child' of the employee.
- 136 *Fringe Benefits Tax Assessment Act 1986* (Cth), s 57. This benefit may be provided to the 'spouse' or 'child' of the employee.
- 137 *Fringe Benefits Tax Assessment Act 1986* (Cth), s 58LA. Section 136(1) defines a 'close relative' as including 'the spouse of the person', 'a child or parent of the person', or 'a parent of the person's spouse'.
- 138 Dr Jeremy Field, Submission 295. See also Gay and Lesbian Rights Lobby (NSW), Submission 333.
- 139 See for example, *Income Tax Assessment Act 1936* (Cth), ss 26AAC, 78A.
- 140 *Income Tax Assessment Act 1997* (Cth), ss 26-35. A 'relative' includes a taxpayer's spouse; a parent, grandparent, brother, sister, uncle, aunt, nephew, niece, lineal descent or adopted child of the person; or such a relative of the taxpayer's spouse; or the spouse of one of such specified relatives: *Income Tax Assessment Act 1997* (Cth), s 995-1(1).
- 141 *Income Tax Assessment Act 1936* (Cth), s 109D.
- 142 See for example, *Income Tax Assessment Act 1936* (Cth), ss 82KH(1), 159GE(1), 318(1), 491.
- 143 *Income Tax Assessment Act 1936* (Cth), pt IVA.
- 144 See for example, *Income Tax Assessment Act 1936* (Cth), s 100A(13), concerning trusts.



CHAPTER 9: *Social Security*

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9.1 What is this chapter about?

This chapter focuses on discrimination against same-sex couples and their families in the context of accessing social security payments.

Social security is an income support system that acts as a safety-net for people who, for some reason, are unable to financially support themselves. Entitlements to social security are largely governed by the *Social Security Act 1991* (Cth) (Social Security Act) and the *A New Tax System (Family Assistance) Act 1999* (Cth) (Family Assistance Act). The payments are usually administered by Centrelink.

Many aspects of the social security system in Australia relate to couples and families. Discrimination against same-sex couples occurs because the definitions of ‘member of a couple’ and ‘partner’ do not recognise same-sex relationships. And, in certain circumstances, the definition of ‘dependent child’ may exclude a child of a lesbian co-mother or gay co-father.

Since social security legislation does not recognise same-sex couples, a person who has a same-sex partner will be treated as a single person for social security purposes. This can have either a positive or negative impact on the type and rate of payments a person is eligible to receive because of the way income and assets tests are administered.

Thus, the exclusion of same-sex couples under social security law sometimes operates to the financial benefit of a same-sex family and other times to the financial detriment. Either way it is clear that same-sex couples are treated differently to opposite-sex couples.

This chapter explains how social security law applies to same-sex couples and their children and the financial impact it can have on a family. It makes findings about the human rights breaches caused by the exclusion of same-sex partners and their children in certain circumstances. It then makes recommendations about how to make sure that same-sex and opposite-sex couples are treated equally in the future.

Specifically, this chapter addresses the following questions:

- Are same-sex couples and their children recognised by social security legislation?
- Which social security benefits are available to a same-sex partner?
- How do income and assets tests impact on same-sex couples?
- How do partnered payment rates impact on same-sex couples?
- Can a young same-sex couple access Youth Allowance?
- How does the calculation of family payments impact on same-sex families?
- What do same-sex couples say about social security law?
- Does social security legislation breach human rights?
- How should social security legislation be amended to avoid future breaches?

9.2 Are same-sex couples and their children recognised by social security legislation?

The Social Security Act contains a range of definitions relating to a couple and the children in a family.

The effect of these definitions extends beyond social security, as a number of other acts adopt the definitions relating to couples in the Social Security Act. That legislation includes the Family Assistance Act and the *Veterans' Entitlements Act 1986* (Cth) (*Veterans' Entitlements Act*) (see Chapter 10 on *Veterans' Entitlements*).¹

9.2.1 A same-sex partner is not a 'partner' or a 'member of a couple'

Whether a person is a 'partner' is very important in determining entitlement to social security benefits.

Some payments are only made if a person has a 'partner'. For other payments, the amount will be determined (in part) by the financial status of a person's 'partner'. And some payments are paid at different rates for individuals and members of a couple.

The Social Security Act defines a 'partner' by reference to a person who is a 'member of a couple'.²

A person is a 'member of a couple' if, amongst other things, 'the person has a relationship with a person of the opposite sex'.³

The use of the words 'opposite sex' in this definition automatically excludes a member of a same-sex couple.⁴

The definition of 'member of a couple' also refers to a person being in a 'marriage-like relationship'.⁵

The criteria used to determine whether someone is in a 'marriage-like relationship' do not necessarily exclude a same-sex couple.⁶ However, being of the opposite-sex is a pre-requisite to being in a marriage-like relationship under the Social Security Act.

Thus, the definition of 'member of a couple' (and therefore the definition of 'partner') clearly excludes a person in a same-sex couple.

As noted above, these definitions are adopted by the Family Assistance Act, which governs some of the payments made to assist families.

9.2.2 A child of a lesbian co-mother or gay co-father may be recognised

There are many social security payments which depend on whether a person is recognised as the child of an adult.

Some social security payments are made only if a person or couple has a child.⁷ For other payments, the amount paid may depend on whether a person or couple has one or more children.⁸

Chapter 5 on Recognising Children notes that when children are born to a lesbian or gay couple their parents may include a birth mother, lesbian co-mother, birth father or gay co-father.⁹

There are many laws which focus only on the relationship between a child and his or her birth parent. When this occurs, the child of a same-sex couple may be at a disadvantage because the child's relationship with their lesbian co-mother or gay co-father is ignored.

The Social Security Act contains a number of different definitions to describe the parent-child relationship. Most of the relevant definitions seem to include the birth mother, birth father, lesbian co-mother and gay co-father.¹⁰ However, it may be more difficult for a lesbian co-mother or gay co-father to prove her or his relationship with their child than it would be for a birth mother or birth father.

(a) 'Dependent child' may include a child of a lesbian co-mother or gay co-father

A person is a 'young person' if they are under 16 years of age or they are a full-time student under the age of 22.¹¹

A 'young person' is considered the 'dependent child' of an adult under the Social Security Act if:

- (a) the adult is legally responsible (whether alone or jointly with another person) for the day-to-day care, welfare and development of the young person, and the young person is in the adult's care; or
- (b) the young person:
 - i. is not a dependent child of someone else under paragraph (a); and
 - ii. is wholly or substantially in the adult's care.¹²

As discussed in Chapter 5 on Recognising Children, a birth mother or birth father are considered the legal parents of a child. They are therefore generally *assumed* to be 'legally responsible' for a child. As long as the young person is in that parent's care he or she will be a 'dependent child'.

Chapter 5 also notes that a lesbian co-mother or gay co-father will generally only qualify as legal parents under federal law if they successfully adopt a child. And this is extremely unlikely.

So a lesbian co-mother and gay co-father will have to take additional steps to prove 'legal responsibility'.

While the legislation is not clear about how to prove that a person is 'legally responsible' for a child, it appears that an adult with a parenting order will qualify. Therefore, if a gay co-father or lesbian co-mother:

- has a parenting order in favour of a child
- the child is under his or her care

that child will be considered his or her 'dependent child'.

However, as Chapter 5 explains, parenting orders can be expensive and may involve lengthy court proceedings. A same-sex couple seeking to access social security benefits may not have the resources to go through this process. Therefore, a lesbian co-mother and gay co-father may not enjoy equality with the birth mother and birth father who do not need anything other than a birth certificate to prove that a child is a 'dependent child'.

(b) 'FTB child' may include a child of a lesbian co-mother or gay co-father

The definition of an 'FTB child' is discussed later in this chapter in the context of the Family Tax Benefit and Child Care Benefit. The definition is similar to 'dependent child' and may therefore incorporate the child of a lesbian co-mother or gay co-father in certain circumstances.

9.3 Which social security benefits are available to a same-sex family?

Eligibility for some social security benefits, and the rate at which they are paid, depends on whether a person has a 'partner'.

These benefits include:

- **Partner Allowance**, paid to a person whose partner is receiving particular benefits.
- **Bereavement benefits**, paid to a person whose partner (or in some cases whose dependent child) has died.
- **Widow Allowance**, paid to a woman who has been widowed, divorced or separated in later life.¹³
- **Youth Allowance**, paid at a higher rate if a person is deemed 'independent' – which may depend on the person being a 'member of a Youth Allowance couple'.

Same-sex couples are not eligible for the payments because a same-sex partner does not qualify as a 'partner' under social security legislation.

9.3.1 A same-sex partner cannot access the Partner Allowance

The Partner Allowance is designed to assist a couple when one partner is unable to work. The maximum rate of payment is \$382.80 per fortnight.¹⁴ The Partner Allowance has been phased out since September 2003, but applicants who were receiving the Allowance before this date will continue to receive it.¹⁵

The Partner Allowance is paid to a person, subject to an assets test, if:

- the person does not have recent workforce experience
- the person is a 'member of a couple'
- the person's 'partner' is receiving a particular qualifying benefit.¹⁶

A same-sex partner can never be a 'member of a couple' or a person's 'partner' under the Social Security Act, so will never be eligible for the Partner Allowance.¹⁷

9.3.2 A same-sex partner cannot access bereavement benefits

A person whose 'partner' has died (or in some circumstances their child or an adult in their care) may be entitled to a:

- **Bereavement Allowance**, payable to a person who does not have any dependent children and whose recognised partner has died. The allowance may be paid for up to 14 weeks and is subject to the Pension Income and Assets tests¹⁸

or

- **Bereavement Payment**, a lump sum payable to someone who has been receiving certain types of benefits and whose partner or child has died; or if an adult or child they have been caring for has died.¹⁹

The surviving member of a same-sex couple is not eligible for either the Bereavement Allowance or Bereavement Payment on the death of his or her same-sex partner (unless he or she qualifies separately as a carer), because a member of a same-sex couple is not considered a 'partner'.

Michael Burge told the Inquiry of the difficulties he faced in trying to access support after the sudden death of his long term partner:

...surviving spouses of same sex de facto relationships are NOT entitled to access bereavement support from Centrelink. Centrelink makes no acknowledgement of same sex relationships of any kind (since it is Federally governed)... Centrelink's approach, and the advice of others, is to "just go on the dole", but that would mean going onto Newstart which is basically a job search programme during which you must actively search for work to be eligible to receive your benefit...why should genuinely bereaved surviving same-sex spouses, particularly since they are in that situation due to a death, and are bound to be in a state of grief and genuine need of support have to go through this?²⁰

The impact of this discrimination is also described by the Australian Coalition for Equality:

A partner's death provides evidence of the greatest discrimination for same-sex couples in this area. For many Centrelink payments, a surviving heterosexual partner can be paid a lump sum or continuing bereavement payment of up to 14 weeks of benefit payments. In addition, because their relationships are not recognised, the surviving member of a same-sex couple does not qualify for a widow's pension or payments. The pain suffered from the loss of a same-sex partner is the same as that of a lost heterosexual partner – and bereavement benefits should be equal to those available to heterosexuals.²¹

This discrimination can impact heavily on people who are mourning the loss of a partner. As the Young Lawyers Human Rights Committee states:

...partner bereavement payments can mean the difference between being able to maintain an adequate standard of living and health while one accommodates and mourns the loss of another and sliding into economic deprivation and social isolation.²²

9.3.3 A lesbian co-mother or gay co-father may access bereavement benefits in relation to the Parenting Payment

The Bereavement Payment is made to parents who qualified for certain social security payments before their child died, including the Parenting Payment.²³ The Bereavement Payment is equivalent to 14 additional weeks of Parenting Payment.²⁴

A person will be eligible for the Parenting Payment if he or she is the 'principal carer' of a child.²⁵ And a person will be the 'principal carer' of a child if the child is a 'dependent child' of the person and the child has not turned 16.²⁶

Since the definition of 'dependent child' may include a child of a lesbian co-mother or gay co-father, it appears that both same-sex parents can qualify for the Bereavement Payment when applied to the Parenting Payment.

9.3.4 A same-sex partner cannot access the Widow Allowance

Centrelink currently pays two types of widow benefits:

- **Widow B Pension** – this pension has been phased out since 20 March 1997.²⁷
- **Widow Allowance** – since 1 July 2005, this pension will only be paid to a woman born on or before 1 July 1955 who has become widowed, divorced, or separated later in life and who has no recent workforce experience.²⁸

Both of these benefits rely on the definition of a 'widow' in the Social Security Act which states that a 'widow' is 'a woman who was the partner of a man immediately before he died'.²⁹ This definition will exclude the lesbian partner of a woman who dies.

ACON states:

Lesbians and other women in same-sex relationships are not entitled to either the Widow [Allowance] or Widow [B Pension] as this entitlement is only made available to women who were in a heterosexual relationship and have either been widowed, deserted or divorced.³⁰

9.3.5 A same-sex partner cannot access concession card benefits

Concession cards provide an important form of financial support to individuals who receive particular benefits including the Age Pension, Carer Payment, income support benefits and a range of allowances.³¹

Two concession cards provide health care concessions to the 'dependants' of the cardholder:

- Pensioner Concession Card³²
- Health Care Card.³³

(a) *A same-sex partner is not a 'dependant'*

In relation to a concession card, the Social Security Act defines 'dependant' to include a 'partner'.³⁴

Since a same-sex partner is not considered a 'partner', he or she will not qualify for any health care concessions.³⁵

(b) *The child of a same-sex parent may be a 'dependant'*

A 'dependant' also includes an 'FTB child' or 'dependent child'.³⁶

As discussed earlier in this chapter, the child of a birth mother or birth father will generally qualify under these definitions if the child is in her or his care.

The child of a lesbian co-mother or gay co-father may also qualify as a 'dependant' if there is a parenting order in his or her favour and/or the child lives with the co-mother or co-father and the child is not cared for by the birth parent.³⁷

Thus, a child of a same-sex parent may be a 'dependant' for the purposes of health care concessions.

(c) *Financial impact on a same-sex couple*

Concession card holders and any qualifying dependants can claim a number of medical and pharmaceutical benefits, including:

- concession rates on Pharmaceutical Benefits Scheme (PBS) prescription medicines³⁸
- an increase in benefits for out-of-pocket, out-of-hospital medical expenses above a certain threshold, through the Medicare Safety Net³⁹
- assistance with certain hearing services such as hearing tests and hearing aids⁴⁰
- in some cases, bulk-billed general practitioner appointments.⁴¹

All of these benefits will be denied to the same-sex partner of a health care concession card holder.

9.3.6 A same-sex partner cannot access a gaol partner's pension

If a social security pension recipient is in gaol or in psychiatric confinement on a criminal charge, his or her social security payment may be redirected to a dependent 'partner'.⁴² Further, the 'partner' will receive the social security pension at a higher rate (equivalent to a single rate).⁴³

A same-sex partner is not eligible to receive this payment because he or she is not considered a 'partner' in the Social Security Act.

9.4 How do income and assets tests impact on same-sex couples?

As discussed above, a same-sex partner is denied access to a range of benefits which are designed to assist the partner of a person in a couple.

However, there are also a range of social security benefits available to a person in his or her own right. A member of a same-sex couple will be eligible for those benefits in principle.

However, eligibility for, and the amount of, those benefits are subject to various income and assets tests. And those income and assets tests apply differently to same-sex couples than they do to opposite-sex couples. This is because those tests often assess the income and assets of both an individual and his or her ‘partner’.

Since a same-sex partner is excluded from the definition of ‘member of a couple’ and ‘partner’, Centrelink does not assess the finances of a person’s same-sex partner when deciding their eligibility for a payment or the rate at which it is paid.

This may have a number of consequences, depending on the financial circumstances of a same-sex couple, and the type of payment for which they are applying.⁴⁴

It could mean that a member of a same-sex couple is denied a payment available to a member of an opposite-sex couple in the same financial position.

It could also mean that a member of a same-sex couple is granted a payment not available to a member of an opposite-sex couple in the same financial position.

Or it could mean that a member of a same-sex couple receives a benefit at a different rate to a member of an opposite-sex couple in the same financial position (this is discussed in the section 9.5 on Partnered Payment Rates).

Two types of financial tests are used by Centrelink to assess people’s eligibility for payments: income and assets tests. There are two different income tests for different types of payments:

- Pension Income Test for social security pensions⁴⁵
- Allowance Income Test for social security allowances⁴⁶

Both the assets test and one of the income tests are applied to all payments. The test result conferring the lowest rate of payment (or no payment) is the test result used by Centrelink.⁴⁷

9.4.1 The Pension Income Test treats a same-sex couple as two individuals

The Pension Income Test assesses a person’s income and that of his or her partner. The Pension Income Test determines whether the person is entitled to a pension, and the rate of payment to which he or she is entitled. A person may be entitled to a full payment, part payment, reduced payment or no payment.⁴⁸

Because the Social Security Act does not recognise a same-sex partner, the combined value of a same-sex couple’s income is irrelevant to the Pension Income Test. A member of a same-sex couple applies as an individual for a pension, and has his or her income assessed at the individual level.

(a) *Different thresholds for individuals and couples*

The income threshold for a couple is less than twice the threshold for an individual. The amount of income that may be earned before a person loses an entitlement to a full payment is:

Individual income threshold:	\$128 per fortnight
Couple income threshold:	\$228 per fortnight ⁴⁹

It may be easier – or more difficult – for a member of a same-sex couple to qualify under the Pension Income Test, depending on the financial circumstances of a same-sex couple.

(b) *Income distribution between same-sex partners will affect eligibility for the pension*

It may be **more difficult** for a member of a same-sex couple to qualify for a full pension payment, than a member of an opposite-sex couple, if his or her partner does not earn a significant income. A member of a same-sex couple can only earn up to \$128 per fortnight to qualify under the test, even if his or her partner earns no income. However, a member of an opposite-sex couple can earn up to \$228 per fortnight and still qualify for a full pension payment if his or her partner earns no income.

The following example illustrates how a same-sex couple could be disadvantaged by the Pension Income Test:

Sue is applying for the Age Pension. She lives with her partner, Bill. Sue's income is assessed at \$150 per fortnight and Bill's income is assessed at \$70 per fortnight. Together their income is assessed at \$220 per fortnight. This income is lower than the threshold for a person in a couple (\$228 per fortnight). Sue is therefore eligible for the full Age Pension under the Pension Income Test.

Dawn is applying for the Age Pension. She lives with her partner, Sally. Dawn is treated as a single person under the Pension Income Test. Dawn's income of \$150 is higher than the threshold for a single person (\$128 per fortnight). Dawn cannot claim the full Age Pension.⁵⁰

It may also be **easier** for a member of a same-sex couple to qualify for a full pension payment than a member of an opposite-sex couple, if the partner in a same-sex couple who is not claiming the pension earns a higher income.

A member of a same-sex couple will qualify under the Pension Income Test if his or her personal income falls below the single rate threshold, regardless of his or her partner's income. A member of an opposite-sex couple will not qualify under the Pension Income Test if his or her income falls below the couple rate threshold but his or her partner earns a level of income that pushes their combined income over the couple threshold.

9.4.2 The Allowance Income Test treats a same-sex couple as two individuals

The Allowance Income Test assesses an individual's income and that of his or her partner. It determines whether the person is entitled to an allowance, and the rate of payment to which he or she is entitled.

Because the Social Security Act does not recognise a same-sex couple, a member of a same-sex couple applies as an individual for an allowance and has his or her income assessed at the individual level.

(a) *Same thresholds for individuals and couples to determine eligibility for full allowance*

An opposite-sex couple can earn up to \$62 each per fortnight and still receive a full allowance payment.

A same-sex couple, who are considered as individuals under the Act, can also earn up to \$62 each per fortnight.⁵¹ This means there is no difference in how the income test for a full allowance payment applies to members of same-sex couples and opposite-sex couples in terms of eligibility.⁵²

(b) *A same-sex partner's income is disregarded in determining the amount of the full allowance*

While there is no difference between a member of a same-sex and opposite-sex couple in whether they will qualify for a payment, there may be a difference in the amount of allowance paid.

The rate of allowance is progressively reduced for every dollar over the full allowance threshold a person earns.⁵³ A person's partner's income will be relevant for this test.⁵⁴ Since a same-sex partner's income will not be considered, a same-sex couple may financially benefit under this test.

(c) *Different thresholds for individuals and couples to determine eligibility for part allowance*

Same-sex and opposite-sex couples will be affected differently in relation to part allowances.

Under the Allowance Income Test a single person can earn up to \$800.50 per fortnight and still be entitled to a part allowance. A partnered person can only earn up to \$731.34 per fortnight and still receive the part allowance.⁵⁵

As a member of a same-sex couple is not recognised by social security legislation, he or she may earn more money than a member of an opposite-sex couple and still qualify for a payment under the Allowance Income Test.

9.4.3 The assets test treats a same-sex couple as two individuals

The same assets test is used to determine whether a single person or a couple qualify for all pensions and allowances.

If a person is a member of an opposite-sex couple the assets of both members of the couple will be assessed. As a member of a same-sex couple is considered a single person by social security legislation, only his or her assets will be assessed. The outcome of the assets test for a member of a same-sex couple will depend on how assets are divided between the members of the couple.

(a) *Different thresholds for individuals and couples*

There are two assets test limits: one for homeowners and one for non-homeowners. The principal place of residence is not included in the homeowner assets test.⁵⁶

The amounts of assets a person or couple can hold and still be eligible for a full payment are:⁵⁷

	Homeowner	Non-homeowner
Single	\$161 500	\$278 500
Couple	\$229 000	\$346 000

A single person or couple may still qualify for part payments if they exceed the threshold.⁵⁸

(b) Asset distribution between same-sex partners will affect the outcome

Where a same-sex partner with relatively few assets applies for a benefit, he or she may be eligible, even if the couple together holds more assets than the couple threshold. This is because the assets of the other same-sex partner will not be counted in the assets test.

As the Hon Penny Sharpe MLC explains:

if [each] member of a home owning same-sex couple [has] assets of \$150,000, [each] will meet the assets test for individuals [and be eligible for a payment], whereas a heterosexual couple would not meet the test on their combined assets.⁵⁹

On the other hand, if the same-sex partner applying for a benefit has substantially more assets than the other partner, he or she may be disqualified if those assets are worth more than the individual threshold, even if the couple together holds fewer assets than the couple threshold.

For an opposite-sex couple the asset distribution is irrelevant – the assets of both partners are added together and the couple threshold is applied.

The following example illustrates how a same-sex couple could be disadvantaged by the assets test:

Richard is applying for the Age Pension. He lives with his partner, Barbara. They are homeowners. The couple own a number of other assets which are in Richard's name. The assets are valued at \$200 000, which is lower than the assets test threshold for homeowners who are a member of a couple (\$229 000). Richard is therefore eligible for the full Age Pension, under the assets test.

Keith is applying for the Age Pension. He lives with his partner, Tom. They are homeowners. The couple own a number of assets which are in Keith's name. The assets are valued at \$200 000, which is higher than the threshold for a single person homeowner (\$161 500). Keith cannot claim the full Age Pension under the assets test.⁶⁰

9.5 How do partnered payment rates impact on same-sex couples?

Sometimes people who qualify for a benefit will receive a lower rate because they are in a couple and can therefore combine expenses.⁶¹ This lower rate is known as a 'partnered' rate.

9.5.1 The partnered rate does not apply to a same-sex couple

Generally speaking a same-sex couple will be better off than an opposite-sex couple where there is a provision for 'partnered' rates. This is because the same-sex couple is treated as

two individuals, not a couple. Therefore each member of a same-sex couple will be entitled to the individual rate.

9.5.2 Positive financial impact for same-sex couples

For example, a member of a same-sex couple who qualifies for the full Age Pension will receive the individual rate of \$512.10 per fortnight. A member of an opposite-sex couple will receive the partnered rate of \$427.70 per fortnight.⁶² This is a difference of \$84.40 per fortnight.⁶³

If both members of a same-sex couple qualify for a full Age Pension, they may legitimately claim two times \$512.20 (\$1024.40). An opposite-sex couple in the same situation can only claim two times \$427.70 (\$855.40). This is a difference of \$168.80 per couple per fortnight.

The Australian Federation of AIDS Organisations illustrates with another example:

Greg was making \$45,000 a year from his job in sales. His partner Vince worked in the public service for several years but was eventually forced to give up work because of poor health. Vince then received the Disability Support Pension. Vince claimed the Disability Support Pension at the single rate of \$499.70 a fortnight, with a pharmaceutical allowance of \$5.80 a fortnight. In fact this gave him a larger payment than it would have if he and Greg were assessed as a couple. Most of Vince's medical expenses were covered by his Pensioner Health Care Card.⁶⁴

9.6 Can a young same-sex couple access Youth Allowance?

The rate of, and eligibility for, Youth Allowance varies according to whether a young person is assessed as independent and he or she passes an activity test.⁶⁵

One of the criteria for 'independence' is that a person is or has been a 'member of a Youth Allowance couple'.⁶⁶ Another criterion for independence is that a young person is a parent of a natural or adoptive child.⁶⁷ There is discrimination against same-sex couples in both definitions.

Further, the activity test has exemptions for a person caring for a partner. These exemptions are not available to a same-sex partner.

9.6.1 A member of a same-sex couple is not a 'member of a Youth Allowance Couple'

A person is a 'member of a Youth Allowance couple' if he or she is aged 15–24 and is either married or in a marriage-like relationship with a person of the *opposite sex* for at least 12 months.⁶⁸

A member of a same-sex couple will never qualify as 'independent' under this criterion. An opposite-sex couple will almost always qualify.

9.6.2 A lesbian co-mother or gay co-father is not a parent for Youth Allowance purposes

Another way a person may be deemed 'independent' for Youth Allowance purposes is if he or she is the parent of a child.⁶⁹ A person can only be a parent of a 'natural child' or adoptive child. This will exclude the lesbian co-mother or gay co-father from qualifying as 'independent' for the purposes of Youth Allowance.

9.6.3 A young same-sex couple will have to pass more rigorous income tests

A person who is 'independent' will qualify for the Youth Allowance, subject to meeting an activity and a personal income test.⁷⁰

A person who is not 'independent' will have to pass a parental income test, family assets test, family means test and personal income test.⁷¹

It is far less likely that a same-sex couple will qualify for Youth Allowance if the income and assets of their parents are taken into account.

9.6.4 A young same-sex couple is more likely to fail the activity test

Whether or not a member of a couple is considered 'independent' a person must fulfil certain activity requirements to collect Youth Allowance.⁷²

Effectively a young person must be studying or seeking work.⁷³ But there are some exceptions to this rule.

One member of a couple will be exempt if they are unable to accept an offer of work if:

- his or her 'partner's' medical condition means he or she must stay home
- a 'partner' is pregnant
- accepting employment would jeopardise the current employment of a 'partner'.⁷⁴

However, a member of a same-sex couple will not qualify for these exemptions because his or her partner is not recognised under the legislation.

9.6.5 A young same-sex couple will be paid a lower rate of Youth Allowance

Even if a member of a same-sex couple passes the more stringent family means and assets test and the activity test, he or she will only be eligible for the 'dependent' Youth Allowance rate.

The 'dependent' rate is the 'independent' rate of \$348.10 per fortnight (for a person without a child) reduced according to how that person's parent(s) fare under the parental income test, family assets test, family actual means test and personal income test.⁷⁵

9.6.6 Negative impact on young same-sex couples seeking Youth Allowance

ACON states that the Youth Allowance criteria means that:

...many young GLBT people face a significant disadvantage in gaining government financial assistance when studying, undertaking an apprenticeship or seeking employment.⁷⁶

One person told the Inquiry of their experience as a young person:

At 19 years of age I was a university student. I had been living with my girlfriend for over a year. Youth allowance was my primary source of income. Because I was in a same sex relationship rather than in a heterosexual relationship I was unable to get the full amount of youth allowance.

A person has to qualify as independent by Centrelink standards if they are to be eligible for the full rate of youth allowance before they are twenty one. One way to qualify as independent is to have been living with your partner for over a year - (i.e legally a defacto relationship). But same sex relationships don't count.⁷⁷

9.7 How does the calculation of family payments impact on same-sex families?

The federal government funds a number of payments to families to alleviate the cost of raising and caring for children. These payments are based on the taxable income of the family. They are widely viewed as welfare payments even though they are governed by an act called the *A New Tax System (Family Assistance) Act 1999* (Cth) (the Family Assistance Act).⁷⁸ To qualify for these payments, a parent or family must care for an 'FTB child'.⁷⁹ There are three types of payments:

Family Tax Benefit A (FTB A) is an income-tested payment for recognised couples or sole parents who care for an 'FTB child' under 21 years, or a full-time student aged 21-24 years.⁸⁰

Family Tax Benefit B (FTB B) is an additional payment for families where there is one primary income earner. FTB B is paid to qualifying families who have an 'FTB child' under 16 years and/or a full-time student child under 18 years.⁸¹

Single parents automatically receive the maximum rate of FTB B.⁸² A two parent family where only one parent receives an income will receive FTB B at a rate determined by the age(s) of their FTB children. If both parents earn an income, only the lower income will be tested for the FTB B payment.⁸³

The **Child Care Benefit** aims to assist parents with the cost of child care. The rate at which the benefit is paid is determined by an income test and the type of child care a child receives. The benefit is available for either approved or registered child care.⁸⁴

Rent assistance and concession cards are also available in respect of an FTB child.⁸⁵

9.7.1 'Partner' excludes a same-sex partner

The Family Assistance Act uses the same definitions of 'member of a couple' and 'partner' as the Social Security Act, both of which exclude a same-sex partner.⁸⁶

9.7.2 'FTB child' may include the child of a lesbian co-mother or gay co-father

FTB A, FTB B and the Child Care Benefit are only available to an adult caring for an 'FTB child'.⁸⁷

The definition of 'FTB child' is similar to the definition of 'dependent child' in the Social Security Act, except that it explicitly recognises a parenting order from the Family Court of Australia. Further, a child can only ever be the 'FTB child' of one person at any time. This is to avoid more than one person making social security claims in respect of the same child.

A child who is under 18 years of age and in an adult's care will be considered an FTB child if:

- the adult is jointly or solely legally responsible for the child's day-to-day care, welfare and development⁸⁸
 - there is a family law order, a registered parenting plan or parenting plan under the *Family Law Act 1975* (Cth) in force in relation to them and they are in the care of the adult who is supposed to care for them⁸⁹
- or
- the child is in an adult's care and is not in the care of anyone else with the legal responsibility for their day-to-day care, welfare and development of the individual.⁹⁰

An individual aged 18-20 will be an 'FTB child' if he or she is in an adult's care.⁹¹ An individual aged 21-24 will be an 'FTB child' if he or she is in an adult's care and is undertaking full-time study.⁹²

A gay co-father or lesbian co-mother might be able prove legal responsibility for a child in his or her care without a parenting order. But the definition makes it clear that if he or she does have a parenting order then he or she will be considered legally responsible. Therefore, a child in the care of a gay co-father or lesbian co-mother with a parenting order will be his or her 'FTB child'.

The birth mother and birth father (or adoptive parents) will not need a parenting order to prove legal responsibility. To this extent, the female partner of a woman having an ART child is treated differently to the male partner of a woman having an ART child. This is because the male partner is presumed to be the birth father; but the female partner must get a parenting order to assert her rights (see further Chapter 5 on Recognising Children).

9.7.3 A same-sex couple may be at an advantage for FTB A

FTB A is subject to an income test. The threshold income is the same whether the child is being cared for by one or more parents. However the tested income will include the income of the person claiming the benefit and the person's 'partner'.⁹³

For example, a person claiming FTB A for one ‘FTB child’ under 18 must have an assessed income of less than \$94 718 to qualify for the benefit.⁹⁴ If the claimant is single, then his or her personal income must be less than \$94 718. If the claimant has a ‘partner’ then their combined income must be less than \$94 718.

(a) *A same-sex couple is more likely to qualify for FTB A*

A same-sex partner does not qualify as a ‘partner’. So a same-sex couple will be eligible for FTB A as long as the person claiming the benefit has a taxable income below the individual threshold.

This will be to the advantage of a double-income same-sex family where the combined income is higher than the threshold, but the individual income of the partner claiming the FTB A is below the threshold.

(b) *A same-sex couple is more likely to qualify for a higher amount of FTB A*

The amount of FTB A is progressively reduced for family income over \$40 000 and less than \$94 718.⁹⁵

In a double-income same-sex couple only the income of the claimant is assessed. So a same-sex couple is more likely to qualify for a higher benefit than an opposite-sex couple in similar financial circumstances.

9.7.4 A same-sex couple will be at an advantage for FTB B

Family Tax Benefit B (FTB B) is an additional payment made to sole parent families. It is also paid to a family where one member of the couple is earning an income and the other member of the couple is primarily a home-based carer for their children.⁹⁶

(a) *A same-sex parent is a sole parent for FTB B purposes*

A person who does not have a ‘partner’ but does have an ‘FTB child’ is a sole parent for the purposes of FTB B. Since the Social Security Act does not recognise a same-sex partner as a ‘partner’, a person in a same-sex couple will be treated as a sole parent.⁹⁷

(b) *A sole parent will qualify for FTB B regardless of income*

A sole parent will automatically receive the maximum rate of FTB B, regardless of their income.⁹⁸ A person with an ‘FTB child’ who does have a ‘partner’ must pass an income test to determine eligibility for and the amount of FTB B.⁹⁹

So a same-sex couple with an ‘FTB child’ will automatically receive the maximum FTB B rate, regardless of income. An opposite-sex couple in the same financial situation would only receive the maximum rate of FTB B if the partner who is not at home caring for the child earns less than the threshold.

The Hon Penny Sharpe MLC comments:

Because the [Family Assistance Office] treats a parent with a same-sex partner as a sole parent, they are also automatically eligible to receive the maximum rate of FTB Part B. In contrast, for

most couples with children, eligibility for FTB Part B is determined by a fairly stringent test on the income of the lower earner in the couple. Thus, in relation to FTB Part B, the benefits of non-recognition for a parent in a same-sex couple are likely to be greatest where the parent has a low income.¹⁰⁰

9.7.5 A same-sex couple may receive more Child Care Benefit

The **Child Care Benefit** aims to assist parents with the cost of child care paid for an ‘FTB child’. The rate at which the benefit is paid is determined by the type of child care a child receives, an income test and (for some benefits) an activity test.

There are two types of care approved for payment:

Approved child care is provided by a child care service that has been approved to receive Child Care Benefit payments. Most long day care, family day care, outside school hours care and vacation care are considered approved care. All families can receive the Child Care Benefit for up to 24 hours per ‘FTB child’ per week. Parents must fulfil a work/training/study test or have an approved exemption to receive the Child Care Benefit for up to 50 hours per ‘FTB child’ per week.¹⁰¹

Registered child care is provided by nannies, grandparents, relatives or friends who are registered as carers with the Family Assistance Office. A family can receive the Child Care Benefit for up to 50 hours of registered child care per ‘FTB child’ per week if parents fulfil a work/training/study test.¹⁰²

(a) *Fees paid by a same-sex partner will not qualify for Child Care Benefit*

Where a person with an ‘FTB child’ is in a couple, the Child Care Benefit is available irrespective of whether it is the claimant or his or her ‘partner’ who pays the child care fees.¹⁰³ But where a person with an ‘FTB child’ is treated as a sole parent, that sole parent must pay the fees to qualify for the benefit.

So a same-sex couple will only qualify for the Child Care Benefit if the fees are actually paid by the claimant. This may be a problem if the person with an ‘FTB child’ has a low income.

(b) *A same-sex couple will pass the income test more easily*

The following sets out the current income test for both a sole parent and a couple with one ‘FTB child’ in approved care.¹⁰⁴

Annual Income	Child Care Benefit for approved care
Up to \$34 310	Maximum rate
\$34 310-\$98 348	Progressively reduced rate
Over \$98 348	Minimum rate

The individual with an ‘FTB child’ in a same-sex couple will be treated as a sole parent for the purposes of the Child Care Benefit income test. This means that only the individual’s income will be assessed under the income test. In an opposite-sex couple, the income of the individual and his or her partner will be assessed.

Thus, a same-sex couple may receive the Child Care Benefit at a higher rate than an opposite-sex couple in similar financial circumstances.¹⁰⁵

(c) A same-sex couple will pass the work/training/study test more easily

A person claiming the Child Care Benefit, and his or her ‘partner’, must fulfil the work/training/study test to receive:

- Child Care Benefit for approved care for between 24 and 50 hours
- Child Care Benefit for registered care (up to 50 hours).¹⁰⁶

To fulfil the work/training/study test, the claimant and his or her ‘partner’ must:

- be working, looking for work, training, studying or doing voluntary work¹⁰⁷
- or
- be receiving a Carer Allowance or Carer Payment for a child or adult.¹⁰⁸

If the claimant is in a same-sex couple, only he or she will need to fulfil the work/training/study test because there is no recognised ‘partner’. If a claimant is in an opposite-sex couple, both members of an opposite-sex couple must fulfil the test to receive the relevant Child Care Benefit.

This could mean that a same-sex couple will receive Child Care Benefit where an opposite-sex couple will not.

9.8 What do same-sex couples say about social security law?

Many same-sex couples giving evidence to the Inquiry were acutely aware that social security laws sometimes worked in their favour. Almost all of those couples suggested that they would happily give up those advantages if they were treated equally throughout all federal laws.

9.8.1 There are advantages and disadvantages under social security law

One person talked about some of the advantages under social security laws:

Certainly there are some disadvantages to the lack of recognition of same-sex relationships by the Social Security Act: you can’t get a partner allowance in some cases. But I would guess that the current exclusion of same-sex couples from the definition of ‘partner’ and ‘member of a couple’ benefits more people than it disadvantages. Both members may qualify for the individual rate for payments such as Parenting Payment, Aged and Disability Support Pension. Similarly, the income or assets of same-sex partners are not taken into account in determining qualification and payability for Newstart, Parenting Payment, Sickness Allowance or the Health Care Concession Card.¹⁰⁹

Others suggested that the disadvantages outweigh the advantages. As one person commented at the Brisbane Forum:

There are benefits and we as a community need to acknowledge this...for example Social Security is not threatened. However, I don’t think the benefits in any way outweigh the negative aspects of being a gay or lesbian member of society and being diminished [by not having our relationships recognised].¹¹⁰

9.8.2 It is undignified to be treated as a sole parent when there are two parents

Many couples talked about how insulting it was to be treated as a 'single' or a 'sole parent' – even though it did work to their financial advantage. For example, one lesbian mother said the following:

When our child is born I will be considered to be a single mother, as same-sex partners are not recognised by the social welfare system. I have no intention of claiming a Single Parent benefit, as I will not be a single parent and don't think it is right to claim the benefit. As a good citizen I am responsibly not claiming benefits (even though Centrelink insist that I will be eligible), but I am excluded from accessing other legitimate benefits because I am in a same-sex relationship. Where is the justice in this?¹¹¹

9.8.3 Do not remove the advantages without removing the disadvantages

Many people expressed concern that the government might change social security laws to remove the benefits for same-sex couples, but leave other laws which discriminate against same-sex couples.¹¹²

At the Melbourne Public Hearing Eilis Hughes stated that:

This is the aspect of this [I]nquiry about which I had mixed feelings. I was worried about drawing attention to the apparent advantage we can enjoy in these circumstances. I know that there are people who don't want to lose these benefits, and there are cynics amongst us who think that this [I]nquiry might end up with Centrelink recognizing our relationships to reduce the welfare payments they need to make, but that other areas of disadvantage won't change as quickly.¹¹³

A number of submissions were especially concerned about the potential impact of changes to social security law on People living with HIV/AIDS (PLWHA). Geoff Holland provides an example:

Of greatest concern, however, is the financial impact on same sex couples where both are reliant on either a social security pension or benefit. For example, recognition of same sex relationships would mean that a couple, where both were living with HIV/AIDS and on a Disability Support Pension, would have their payments adjusted from receiving two payments at the rate paid to singles to payment at the rate paid to members of a couple, a reduction from \$499.70 per fortnight per person to \$417.20 per fortnight each, a loss of over \$80 per fortnight. Almost 60% of PLWHA who receive government pensions or benefits are currently living below the poverty line and financial pooling is done by over 25% PLWHA in same sex relationships as the only means of protection from extreme financial hardship.¹¹⁴

ACON reiterated this concern:

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 an 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 [People living with HIV/AIDS].¹¹⁵

Several people argued that reform to social security law should be gradual so as to mitigate the negative impact on those affected:

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.¹¹⁶

9.9 Does social security legislation breach human rights?

This chapter identifies the discrimination that can occur because the definitions of ‘member of couple’ and ‘partner’ in social security laws do not recognise same-sex relationships.

The chapter explains that the non-recognition of a same-sex partner can have both a positive and a negative financial impact on same-sex couples. The failure of the Social Security Act to recognise same-sex relationships can mean that a same-sex couple is denied benefits available to their opposite-sex counterpart. For example a same-sex partner cannot access the Partner Allowance, bereavement benefits, Widow Allowance and Concession Card benefits. To this extent the Inquiry finds that the Social Security Act breaches the right to non-discrimination under article 26 of the ICCPR.

Denying certain social security benefits to same-sex couples will also breach articles 9 and 2(2) of the *International Covenant on Economic, Social and Cultural Rights* (ICESCR). Together those provisions state that where Australia takes steps to provide social security benefits, it must do so without discrimination on the grounds of sexuality.

Further, to the extent that the children of a couple will be at a disadvantage because access to certain social security rights are denied, there may be a breach of articles 2 and 26(1) of the *Convention on the Rights of the Child* (CRC). Those provisions state that a child is entitled to *benefit from* social security without discrimination.

For further explanation of these principles see Chapter 3 on Human Rights Protections.

9.10 How should social security legislation be amended to avoid future breaches?

This chapter describes the treatment of same-sex couples and families regarding a range of entitlements available under the Social Security Act and the Family Assistance Act.

The narrow definitions in the Social Security Act mean that a same-sex partner is denied a range of social security entitlements. However, unlike many of the other laws discussed in this report, those definitions may also mean that a same-sex couple end up financially in front of an opposite-sex couple.

Whether same-sex couples end up financially in front or behind, it is clear that they are treated differently to opposite-sex couples.

The following sections summarise the cause of this differential treatment and how to remedy it.

9.10.1 Narrow definitions are the main cause of discrimination

Both the advantages and disadvantages flowing to a same-sex couple are connected to the fact that social security law does not recognise a same-sex partner as a 'partner'.

The child of a birth mother or birth father will almost always qualify as a 'dependent child' or 'FTB child' because the birth mother or birth father are presumed to have legal responsibility for a child. The child of a lesbian co-mother or gay co-father may also qualify as a 'dependent child' or 'FTB child', but they must find a way to prove 'legal responsibility'.

In the absence of a parenting presumption in favour of a lesbian co-mother or a successful adoption, a parenting order from the Family Court of Australia is the best way for a lesbian or gay co-parent to prove legal responsibility.

However, for many families seeking welfare support, the cost and time involved in seeking a parenting order may impose too high a burden. Thus a lesbian co-mother or gay co-father may face great uncertainty in accessing benefits which are readily available to a birth mother or birth father.

9.10.2 The solution is to amend the definitions and clearly recognise both same-sex parents of a child

Chapter 4 on Recognising Relationships presents two alternative approaches to amending discriminatory definitions within federal law regarding same-sex couples.

The Inquiry's preferred approach for bringing equality to same-sex couples is to:

- retain the current terminology used in Commonwealth legislation (for example retain the terms 'partner' and 'member of a couple' in the Social Security Act)
- redefine the terms in the legislation to include same-sex couples (for example, redefine 'partner' and 'member of a couple' to include a de facto partner)
- insert new definitions of 'de facto relationship' and 'de facto partner' which include same-sex couples.

Chapter 5 on Recognising Children sets out how to better protect the rights of both the *children of same-sex couples* and the parents of those children.

Chapter 5 recommends that the federal government implement parenting presumptions in favour of a lesbian co-mother of a child conceived through assisted reproductive technology (ART). This would mean that an ART child born to a lesbian couple would automatically be the 'dependent child' of both members of the lesbian couple (like he or she would be if born to an opposite-sex couple), without the need for parenting orders.

Chapter 5 also suggests that it should be easier for a lesbian co-mother and gay co-father to adopt a child for the same reasons.

Finally, Chapter 5 suggests that federal legislation should clearly recognise the status of a person who has a parenting order from the Family Court of Australia. This has already occurred in the case of the definition of 'FTB child' and should be extended to the definition

of 'dependent child'. However, the Inquiry reiterates that the cost of obtaining a parenting order may be prohibitive in the case of parents who are seeking welfare assistance.

The following list sets out the definitions which would need to be amended according to these suggested approaches.

The Inquiry notes that if the government were to adopt the alternative approach set out in Chapter 4, then different amendments would be required.

9.10.3 A list of legislation to be amended

The Inquiry recommends amendments to the following legislation discussed in this chapter:

A New Tax System (Family Assistance) Act 1999 (Cth)

'member of a couple' (s 3 – no need to amend if 'member of a couple' in the Social Security Act is amended)

'partner' (s 3 – no need to amend if 'member of a couple' in the Social Security Act is amended)

'FTB child' (s 22 – no need to amend if the child of a lesbian co-mother or gay co-father may also be recognised through reformed parenting presumptions or adoption laws)

Social Security Act 1991 (Cth)

'de facto partner' (insert new definition)

'de facto relationship' (insert new definition)

'dependant' (s 6A(1) – no need to amend if 'partner' and 'dependent child' are amended and 'FTB child' (in *A New Tax System (Family Assistance) Act 1999 (Cth)*) may also recognise the child of a lesbian co-mother or gay co-father through reformed parenting presumptions or adoption laws)

'dependent child' (s 5(2), (4) – amend to clarify the role of a parenting order; otherwise no need to amend if the child of a lesbian co-mother or gay co-father may also be recognised through reformed parenting presumptions or adoption laws)

'independent' (s 1067A – no need to amend if 'partner' and 'member of a Youth Allowance couple' is amended and the child of a lesbian co-mother or gay co-father may be recognised through reformed parenting presumptions or adoption laws)

'marriage-like relationship' (s 4(2), (3), (3A) – replace with 'de facto relationship')

'member of a couple' (s 4(2)(b) – amend to include a 'de facto partner' and 'de facto relationship')

'member of a Youth Allowance couple' (s 1067C – amend to include a 'de facto partner' and replace 'marriage-like relationship' with 'de facto relationship')

'parent' (s 5(1)(a) – amend to ensure that a lesbian co-mother or gay co-father may be recognised through reformed parenting presumptions or adoption laws)

'parent' (s 5(1)(b) – no need to amend if 'member of couple' is amended)

● Same-Sex: Same Entitlements

‘partner’ (s 4(1) – no need to amend if ‘member of a couple’ is amended)

‘principal carer’ (s 5(15) – no need to amend if ‘dependent child’ is amended)

‘widow’ (s 23 – amend to remove a reference to partner of ‘a man’, otherwise no need to amend if ‘member of a couple’ is amended)

‘young person’ (s 5(1B) – no need to amend)

Endnotes

- 1 See also *A New Tax System (Bonuses for Older Australian) Act 1999* (Cth), which takes its definition from the *Veterans' Entitlement Act 1986* (Cth); *Farm Household Support Act 1992* (Cth); *Student Assistance Act 1973* (Cth).
- 2 *Social Security Act 1991* (Cth), s 4(1).
- 3 *Social Security Act 1991* (Cth), s 4(2)(b)(i).
- 4 See also Anti-Discrimination Commission Queensland, Submission 264; Gay and Lesbian Rights Lobby (NSW), Submission 333; Law Council of Australia, Submission 305; Media, Entertainment and Arts Alliance, Submission 289; Victorian Gay and Lesbian Rights Lobby, Submission 256; Young Lawyers Human Rights Committee, Submission 311.
- 5 *Social Security Act 1991* (Cth), s 4(2)(b)(iii).
- 6 *Social Security Act 1991* (Cth), ss 4(3), 4(3A).
- 7 Such as the Parenting Payment: *Social Security Act 1991* (Cth), s 500.
- 8 Such as Youth Allowance: *Social Security Act 1991* (Cth), ch 2, pt 2.11 and ch 3, pt 3.5; Austudy: *Social Security Act 1991* (Cth), ch 2, pt 2.11A and ch 3, pt 3.5A.
- 9 For an explanation of these terms see the Glossary of Terms.
- 10 However, this is not always the case. For example, the definition of 'parent' in s 5(1)(a) of the *Social Security Act 1991* (Cth) appears to exclude a lesbian co-mother or gay co-father. A second definition of parent in s 5(1)(b) of the *Social Security Act 1991* (Cth) applies to pt 2.11 (Youth Allowance) and s 1067G (the Youth Allowance Rate Calculator). Although this definition is broader than the definition in s 5(1)(a), it may still exclude a lesbian co-mother or gay co-father.
- 11 *Social Security Act 1991* (Cth), s 5(1B). A student may not earn more than \$6403 within the relevant financial year to be considered a 'student child': *Social Security Act 1991* (Cth), s 5(1B).
- 12 *Social Security Act 1991* (Cth), s 5(2).
- 13 Note that the Widow B Pension has been phased out since 20 March 1997, and is only available to women who were receiving the Pension before this time: *Social Security Act 1991* (Cth), s 362A(1).
- 14 Australian Government, Centrelink, *Partner Allowance*, <http://www.centrelink.gov.au/internet/internet.nsf/payments/partner.htm>, viewed 11 April 2007.
- 15 The Partner Allowance has not been granted to new applicants since 20 September 2003: *Social Security Act 1991* (Cth), s 771(1).
- 16 The person's partner must be at least 21 years old and receiving Youth Allowance, Austudy payment, Newstart Allowance, Special Benefit, Rehabilitation Allowance, Age Pension, Disability Support Pension, Mature Age Allowance, Service Pension or Income Support Supplement, or receiving assistance under a Student Financial Supplement Scheme or an income-tested living allowance under an Aboriginal study assistance scheme: *Social Security Act 1991* (Cth), s 771HA(1).
- 17 *Social Security Act 1991* (Cth), s 4. See also Gay and Lesbian Rights Lobby (NSW), Submission 333; Young Lawyers Human Rights Committee, Submission 311.
- 18 *Social Security Act 1991* (Cth), s 1066. Australian Government, Centrelink, *Bereavement Allowance Payments Rate Factsheet, 1 January – 19 March 2007*, at [http://www.centrelink.gov.au/internet/internet.nsf/filestores/co039_0701/\\$file/co039_0701en.pdf](http://www.centrelink.gov.au/internet/internet.nsf/filestores/co039_0701/$file/co039_0701en.pdf), viewed 9 March 2007. The allowance can be extended if the surviving partner is pregnant: s 315(1)(e)(ii).
- 19 To receive Bereavement Payment upon the death of his or her partner, a person's partner must have been receiving a social security pension, a service pension or income support supplement or have been a long-term social security recipient: *Social Security Act 1991* (Cth), ss 82(1)(d). See also Australian Government, Centrelink, *How much Bereavement Payment do I get?*, at http://www.centrelink.gov.au/internet/internet.nsf/payments/pay_how_bereavepay.htm, viewed 11 December 2006.
- 20 Michael Burge, Submission 134.
- 21 Australian Coalition for Equality, Submission 228.
- 22 Young Lawyers Human Rights Committee, Submission 311.

- 23 Other relevant qualifying payments include: *Social Security Act 1991* (Cth), ss 235, 236 (Carer Payment), 567G (Youth Allowance), 660M (New Start Allowance); *A New Tax System (Family Assistance) Act 1999* (Cth), s 31 (Family Tax Benefit).
- 24 *Social Security Act 1991* (Cth), s 512.
- 25 *Social Security Act 1991* (Cth), ss 5(15), 500D.
- 26 *Social Security Act 1991* (Cth), 5(15).
- 27 *Social Security Act 1991* (Cth), s 362A(1).
- 28 *Social Security Act 1991* (Cth), ss 408AA, 408BA(2). Currently the rate of Widow Allowance is \$420.90 per fortnight for a single person with no children and \$455.30 per fortnight for a single person with children: Australian Government, Centrelink, *Mature Age Payment Rates Fact Sheet*, 1 January 2007 – 19 March 2007, at [http://www.centrelink.gov.au/internet/internet.nsf/filestores/co037_0701/\\$file/co037_0701en.pdf](http://www.centrelink.gov.au/internet/internet.nsf/filestores/co037_0701/$file/co037_0701en.pdf), viewed 9 March 2007.
- 29 *Social Security Act 1991* (Cth), s 23.
- 30 ACON, Submission 281. See also Australian Coalition for Equality, Submission 228; University of Western Australia, Submission 185.
- 31 The Pensioner Concession Card is available to people receiving a social security income support payment, in the following circumstances: people receiving a social security pension (such as the Age Pension, Disability Pension, Parenting Payment (Single) and Carer Payment); people receiving Mature Age Allowance; people over 60 years who have been in continuous receipt of one (or a combination) of the following payments for nine months or more: Newstart Allowance, Sickness Allowance, Widow Allowance, Parenting Payment (Partnered), Special Benefit, Partner Allowance, a social security pension; people with a partial work capacity who are receiving Newstart Allowance or Youth Allowance as a job seeker; single principal carers of dependent child/ren who are receiving Newstart Allowance or Youth Allowance as a job seeker; and certain people who are participating in the Pensions Loan Scheme, or Community Development Employment Projects: *Social Security Act 1991* (Cth), s 1061ZA. The Health Care Card is available to people receiving a qualifying income support benefit, or receiving certain income support supplementary payments; to people in specific circumstances, such as those receiving the fortnightly maximum rate of Family Tax Benefit Part A by instalment, a parent caring for children with disabilities and receiving Carer Allowance (child), or a Mobility Allowance customer who does not qualify for a Pensioner Concession Card: *Social Security Act 1991* (Cth), s 1061ZK.
- 32 Australian Government, Centrelink, *A Guide to Centrelink Concession Cards*, [http://www.centrelink.gov.au/internet/internet.nsf/filestores/co153_0610/\\$file/co153_0610en.pdf](http://www.centrelink.gov.au/internet/internet.nsf/filestores/co153_0610/$file/co153_0610en.pdf), viewed 19 March 2007.
- 33 Australian Government, Centrelink, *A Guide to Centrelink Concession Cards*, at [http://www.centrelink.gov.au/internet/internet.nsf/filestores/co153_0610/\\$file/co153_0610en.pdf](http://www.centrelink.gov.au/internet/internet.nsf/filestores/co153_0610/$file/co153_0610en.pdf), viewed 7 February 2007.
- 34 *Social Security Act 1991* (Cth), s 6A(1).
- 35 *Social Security Act 1991* (Cth), s 4.
- 36 *Social Security Act 1991* (Cth), s 6A(1).
- 37 The Health Care Card may be available to some adults who are entitled to receive Family Tax Benefit Part A at the maximum rate. That is, if a person or family's annual income is less than \$40 000: *Social Security Act 1991* (Cth), s 1061ZK(4).
- 38 Australian Government, Centrelink, *A Guide to Centrelink Concession Cards*, at [http://www.centrelink.gov.au/internet/internet.nsf/filestores/co153_0610/\\$file/co153_0610en.pdf](http://www.centrelink.gov.au/internet/internet.nsf/filestores/co153_0610/$file/co153_0610en.pdf), viewed 7 February 2007.
- 39 Australian Government, Centrelink, *A Guide to Centrelink Concession Cards*, at [http://www.centrelink.gov.au/internet/internet.nsf/filestores/co153_0610/\\$file/co153_0610en.pdf](http://www.centrelink.gov.au/internet/internet.nsf/filestores/co153_0610/$file/co153_0610en.pdf), viewed 7 February 2007.
- 40 Australian Government, Centrelink, *A Guide to Centrelink Concession Cards*, at [http://www.centrelink.gov.au/internet/internet.nsf/filestores/co153_0610/\\$file/co153_0610en.pdf](http://www.centrelink.gov.au/internet/internet.nsf/filestores/co153_0610/$file/co153_0610en.pdf), viewed 7 February 2007.
- 41 Australian Government, Centrelink, *A Guide to Centrelink Concession Cards*, at [http://www.centrelink.gov.au/internet/internet.nsf/filestores/co153_0610/\\$file/co153_0610en.pdf](http://www.centrelink.gov.au/internet/internet.nsf/filestores/co153_0610/$file/co153_0610en.pdf), viewed 7 February 2007.

- 42 *Social Security Act 1991* (Cth), s 1159(1).
- 43 A person is partnered if the person is a member of a couple and their partner is in gaol: *Social Security Act 1991* (Cth), s 4(11)(f). The higher rate of payment for partnered persons applies to other payments, for example the Parenting Payment: *Social Security Act 1991* (Cth), s 1068B-C2, Table C, item 4.
- 44 See ACON, Submission 281; Australian Coalition for Equality, Submission 228; Gay and Lesbian Rights Lobby (NSW), Submission 333; The Hon Penny Sharpe MLC, Submission 341; University of Western Australia, Submission 185.
- 45 Applies to the following payments: Age Pension, Disability Support Pension, Wife Pension, Bereavement Allowance, Widow 'B' Pension, Carer Payment (adult), Carer Payment (child), Mature Age Allowance granted before 1 July 1996, Parenting Payment (Sole Parents): Australian Government, Centrelink, *Income Test for Pensions*, at <http://www.centrelink.gov.au/internet/internet.nsf/payments/chartc.htm>, viewed 5 February 2007. See Pension Rate Calculators A and C and Parenting Payment Calculator: *Social Security Act 1991* (Cth), ss 1064, 1066, 1068A, 1068B.
- 46 Applies to the following payments: Newstart Allowance, Partner Allowance, Sickness Allowance, Widow Allowance, Mature Age Allowance granted after 1 July 1996: Australian Government, Centrelink, *Allowances Income Test*, at <http://www.centrelink.gov.au/internet/internet.nsf/payments/chartd.htm>, viewed 5 February 2007. These payments use Benefit Rate Calculator B, *Social Security Act 1991* (Cth), s 1068. Youth Allowance, Austudy and ABSTUDY use income tests that are similar to the Allowance Income test. They are dealt with in this chapter under the Allowance Income Test, although rates of thresholds are different. See *Social Security Act 1991* (Cth), pt 3.5 (Youth Allowance Rate Calculator), pt 3.5A (Austudy Rate Calculator).
- 47 Australian Government, Centrelink, Assets Test, at <http://www.centrelink.gov.au/internet/internet.nsf/payments/chartab.htm>, viewed 5 February 2007.
- 48 Income earned above the threshold levels will reduce the amount of pension payable by 40 cents in the dollar for single people and by 20 cents in the dollar each for couples: Australian Government, Centrelink, *Income Test for Pensions*, <http://www.centrelink.gov.au/internet/internet.nsf/payments/chartc.htm>, viewed 23 March 2007.
- 49 Australian Government, Centrelink, *Income Test for Pensions*, at <http://www.centrelink.gov.au/internet/internet.nsf/payments/chartc.html>, viewed 5 February 2007: to be eligible for a part pension payment a single person must earn less than \$1422.75 per fortnight; a couple less than \$2381.00. Different thresholds apply to the single and couple rate for full and part payments if a single or couple have a child or children.
- 50 See further, Australian Government, Centrelink, *Income Test for Pensions*, at <http://www.centrelink.gov.au/internet/internet.nsf/payments/chartc.htm>, viewed 5 February 2007.
- 51 Australian Government, Centrelink, *Allowances Income Test*, at <http://www.centrelink.gov.au/internet/internet.nsf/payments/chartd.htm>, viewed 5 February 2007.
- 52 Income tests for Youth Allowance, Austudy and ABSTUDY also apply the same income threshold for full payment to single and partnered people, so they will affect same-sex and opposite-sex couples in the same way: Single or partnered, away from home, students and Australian apprentices, may earn up to \$236 per fortnight. Single or partnered, away from home, job seekers, may earn up to \$62 per fortnight: Australian Government, Centrelink, *Personal Income Test*, at <http://www.centrelink.gov.au/internet/internet.nsf/payments/chartda.htm>, viewed 5 February 2007.
- 53 Australian Government, Centrelink, *Allowances Income Test*, <http://www.centrelink.gov.au/internet/internet.nsf/payments/chartd.htm>, viewed 23 March 2007.
- 54 See steps 6 and 11 of the 'Method Statement' at *Social Security Act 1991* (Cth), s 1068-G1. See also Australian Government, Centrelink, *Allowances Income Test*, <http://www.centrelink.gov.au/internet/internet.nsf/payments/chartd.htm>, viewed 23 March 2007.
- 55 Australian Government, Centrelink, *Allowances Income Test*, at <http://www.centrelink.gov.au/internet/internet.nsf/payments/chartd.htm>, viewed 23 March 2007. The income thresholds for part allowances of Youth Allowance, Austudy and ABSTUDY are also different for single and partnered people (with or without dependants) and allow a single person to earn more than a partnered person and still qualify for a part allowance. This again would make it easier for a member of a same-sex couple to qualify under this income test for a part payment, compared to a member of an opposite-sex couple with a similar income. For Austudy Rate Calculator see *Social Security Act 1991* (Cth), pt 3.5A; for Youth Allowance Rate Calculator see *Social Security Act 1991* (Cth), pt 3.5.

- 56 *Social Security Act 1991* (Cth), s 1118(1). See further Australian Government, Centrelink, *Exempt Assets*, at http://www.centrelink.gov.au/internet/internet.nsf/factors/assets_exempt.htm, viewed 5 February 2007.
- 57 Australian Government, Centrelink, *Assets Test*, at <http://www.centrelink.gov.au/internet/internet.nsf/payments/chartab.htm#a>, viewed 1 March 2007.
- 58 Australian Government, Centrelink, *Assets Tests*, at <http://www.centrelink.gov.au/internet/internet.nsf/payments/chartab.htm#a>, viewed 6 March 2007: For homeowners, a single person can hold assets up to \$334 250, a couple up to \$516 500, and still be eligible for a part payment. For non-homeowners, a single person can hold assets up to \$451 250 and a couple up to \$633 500, for a part payment.
- 59 The Hon Penny Sharpe MLC, Submission 341. See also Australian Coalition for Equality, Submission 228.
- 60 Australian Government, Centrelink, *Assets Test*, at <http://www.centrelink.gov.au/internet/internet.nsf/payments/chartab.htm#a>, viewed 28 February 2007.
- 61 Pensions paid at a partnered rate include Age Pension, Rent Assistance, Disability Support Pension, Carer Payment, Mature Age Allowance, Pension Bonus Scheme, Veterans' Entitlements Pension Bonus Scheme.
- 62 Australian Government, Centrelink, *How much Age Pension do I get?*, at http://www.centrelink.gov.au/internet/internet.nsf/payments/pay_how_agepens.htm, viewed 9 March 2007.
- 63 Australian Government, Centrelink, *How much Age Pension do I get?*, at http://www.centrelink.gov.au/internet/internet.nsf/payments/pay_how_agepens.htm, viewed 5 February 2007: Half the couple rate is payable to one member of a couple if their partner is not receiving a pension, benefit or allowance.
- 64 Australian Federation of AIDS Organisations, Submission 285.
- 65 *Social Security Act 1991* (Cth), s 1067G.
- 66 *Social Security Act 1991* (Cth), s 1067A(2): Other criteria include persons with a dependent child, persons aged 25 years or more, orphan, if parents cannot exercise responsibilities, refugees, persons in state care, unreasonable to live at home, people who are self-supporting, people who are disadvantaged, people with a partial capacity to work.
- 67 *Social Security Act 1991* (Cth), s 1067A(3).
- 68 *Social Security Act 1991* (Cth), s 1067C(1): Those 12 months must be while the person was over the age of consent as determined in the state or territory in which they live.
- 69 *Social Security Act 1991* (Cth), s 1067A(3).
- 70 *Social Security Act 1991* (Cth), ss 541, 1067G-B1.
- 71 *Social Security Act 1991* (Cth), s 1067G. For example, no Youth Allowance payments are made if the family's assets exceed \$535 750. Australian Government, Centrelink, *Income and Assets Tests for Youth Allowance*, at <http://www.centrelink.gov.au/internet/internet.nsf/ea3b9a1335df87bcc2569890008040e/df4be2480e2aa4aaca25728e00156df2!OpenDocument>, viewed 23 March 2007.
- 72 *Social Security Act 1991* (Cth), s 540.
- 73 *Social Security Act 1991* (Cth), s 541(1).
- 74 *Social Security Act 1991* (Cth), s 541D(1A).
- 75 For an 'independent', the rate for a partnered or single person without a child is \$348.10 per fortnight. Australian Government, Centrelink, *How much Youth Allowance do I get?*, at http://www.centrelink.gov.au/internet/internet.nsf/payments/pay_how_yal.htm, viewed 6 March 2007. This payment will be reduced for a person who is considered dependent according to how that person's parent(s) qualify under the parental income test, family assets test, family actual means test and personal income test. See *Social Security Act 1991* (Cth), s 1067G for these tests.
- 76 ACON, Submission 281. See also The Hon Penny Sharpe MLC, Submission 341; National Union of Students, Submission 224; Gay and Lesbian Rights Lobby (NSW), Submission 333; University of Western Australia, Submission 185.
- 77 Farida Iqbal, Submission 282.
- 78 These payments are governed by the *A New Tax System (Family Assistance) Act 1999* (Cth).
- 79 *A New Tax System (Family Assistance) Act* (Cth), ss 21, 42.

- 80 Australian Government, Family Assistance Office, *Factsheet – Family Tax Benefit Part A*, at <http://www.familyassist.gov.au/Internet/FAO/fao1.nsf/content/publications-factsheets-ftba.htm>, viewed 4 April 2007.
- 81 Australian Government, Family Assistance Office, *Factsheet – Family Benefit Part B*, at <http://www.familyassist.gov.au/Internet/FAO/fao1.nsf/content/publications-factsheets-ftbb.htm>, viewed 4 April 2007.
- 82 Australian Government, Family Assistance Office, *Can I get Family Tax Benefit Part B?*, http://www.familyassist.gov.au/Internet/FAO/fao1.nsf/content/payments-ftbb-get_ftbb.htm#4, viewed 4 April 2007.
- 83 Australian Government, Family Assistance Office, *Two Parent Families*, at http://www.familyassist.gov.au/Internet/FAO/fao1.nsf/content/payments-ftbb-how_much_two_parents, viewed 28 February 2007: The FTB B will stop if the parent earning the lesser amount earns above \$21 572, if the youngest child is under five; and it will stop at \$16 790 if the youngest child is between five and 18.
- 84 *A New Tax System (Family Assistance) Act 1999* (Cth), ss 42, 43, 44, 45. See also Australian Government, Family Assistance Office, *Factsheet – Child Care Benefit*, at <http://www.familyassist.gov.au/Internet/FAO/fao1.nsf/content/publications-factsheets-ccb.htm>, viewed 28 February 2007.
- 85 Rent Assistance is available to eligible people who receive FTB A and pay rent over a specified amount in the private rental market. Australian Government, Family Assistance Office, *Rent Assistance*, <http://www.familyassist.gov.au/Internet/FAO/fao1.nsf/content/payments-ra>, viewed 23 March 2007. Health Concession Cards are available to people receiving FTB A at the maximum rate in fortnightly instalments. Australian Government, Family Assistance Office, *Health Care Card*, <http://www.familyassist.gov.au/Internet/FAO/fao1.nsf/content/payments-hcc>, viewed 23 March 2007. See also Victorian Gay and Lesbian Rights Lobby, Submission 256.
- 86 *A New Tax System (Family Assistance) Act 1999* (Cth), s 3; *Social Security Act 1991* (Cth), ss 4(1), 4(2).
- 87 *A New Tax System (Family Assistance) Act 1999* (Cth), ss 21, 42, 44, 45.
- 88 *A New Tax System (Family Assistance) Act 1999* (Cth), s 22(2)(b).
- 89 *A New Tax System (Family Assistance) Act 1999* (Cth), s 22(3).
- 90 *A New Tax System (Family Assistance) Act 1999* (Cth), s 22(4).
- 91 *A New Tax System (Family Assistance) Act 1999* (Cth), s 22(5).
- 92 *A New Tax System (Family Assistance) Act 1999* (Cth), s 22(6).
- 93 *A New Tax System (Family Assistance) Act 1999* (Cth), sch 1.
- 94 Individual threshold is \$40 000 for the full benefit and up to \$94 718 for a reduced rate of benefit if there is one child under 18 years: Australian Government, Centrelink, *A Guide To Australian Government Payments, 1 January – 19 March 2007*, p3, at [http://www.centrelink.gov.au/internet/internet.nsf/filestores/co029_0702/\\$file/co029_0702en.pdf](http://www.centrelink.gov.au/internet/internet.nsf/filestores/co029_0702/$file/co029_0702en.pdf), viewed 28 February 2007.
- 95 Australian Government, Centrelink, *A Guide To Australian Government Payments, 1 January – 19 March 2007*, pp2-3, at [http://www.centrelink.gov.au/internet/internet.nsf/filestores/co029_0702/\\$file/co029_0702en.pdf](http://www.centrelink.gov.au/internet/internet.nsf/filestores/co029_0702/$file/co029_0702en.pdf), viewed 28 February 2007.
- 96 See *A New Tax System (Family Assistance) Act 1999* (Cth), sch 1, pt 4, div 1, subdiv B, cl 29A(3).
- 97 *A New Tax System (Family Assistance) Act 1999* (Cth), sch 1, cl 29(1)(a): provides the rate for a person receiving FTB B, who is ‘not a member of a couple’.
- 98 *A New Tax System (Family Assistance) Act 1999* (Cth), sch 1, cl 29. Australian Government, Family Assistance Office, *Can I get Family Benefit Part B?*, at http://www.familyassist.gov.au/Internet/FAO/fao1.nsf/content/payments-ftbb-get_ftbb.htm#4, viewed 28 February 2007.
- 99 See *A New Tax System (Family Assistance) Act 1999* (Cth), sch 1, pt 4, div 1, subdiv A, cl 29(2). Australian Government, Centrelink, *A Guide To Australian Government Payments, 1 January – 19 March 2007*, p3, at [http://www.centrelink.gov.au/internet/internet.nsf/filestores/co029_0702/\\$file/co029_0702en.pdf](http://www.centrelink.gov.au/internet/internet.nsf/filestores/co029_0702/$file/co029_0702en.pdf), viewed 28 February 2007: The parent earning the lesser amount can earn up to \$4234 of the 2006–07 financial year before it affects Family Tax Benefit Part B. The amount of FTB B will reduce by 20 cents for each dollar earned above \$4234. The FTB B will stop if the parent earning the lesser amount earns above \$21 572 if the youngest child is under five; and \$16 790 if the youngest child is between five and 18.

- 100 The Hon Penny Sharpe MLC, Submission 341. See also Law Council of Australia, Submission 305.
- 101 *A New Tax System (Family Assistance) Act 1999* (Cth), ss 42, 43, pt 3, div 4, subdivs F and G. Australian Government, Centrelink, *A Guide To Australian Government Payments*, 1 January – 19 March 2007, p5, at [http://www.centrelink.gov.au/internet/internet.nsf/filestores/co029_0702/\\$file/co029_0702en.pdf](http://www.centrelink.gov.au/internet/internet.nsf/filestores/co029_0702/$file/co029_0702en.pdf), viewed 28 February 2007.
- 102 *A New Tax System (A New Tax System) 1999* (Cth), ss 45(1)(e), 84. Australian Government, Family Assistance Office, *Guide to Payments*, 1 January – 19 March 2007, pp5-6, at [http://www.centrelink.gov.au/internet/internet.nsf/filestores/co029_0702/\\$file/co029_0702en.pdf](http://www.centrelink.gov.au/internet/internet.nsf/filestores/co029_0702/$file/co029_0702en.pdf), viewed 28 February 2007.
- 103 *A New Tax System (Family Assistance) Act 1999* (Cth), ss 43-45.
- 104 The income threshold for the minimum rate increases with the number of children, so a sole parent or couple with two children in care will receive the minimum rate if their income exceeds \$106 629; for three children the minimum rate applies after income of \$121 130. Add \$20 221 for each extra child: Australian Government, Family Assistance Office, *Child Care Benefit*, at http://www.familyassist.gov.au/Internet/FAO/FAO1.nsf/content/payments-ccb-how_much-more_32485.htm, for financial year 06-07, viewed 6 March 2007.
- 105 For one child in care the maximum benefit is \$148.00 per week (50 hours care) or \$2.96 per hour. The rate increases per child if there are more children in care. The minimum rate of Child Care Benefit applies to non-schooled children and is up to \$24.85 per week or \$0.497 per hour per child: Australian Government, Family Assistance Office, *Guide to Payments, Child Care Benefit*, http://www.familyassist.gov.au/Internet/FAO/FAO1.nsf/content/payments-ccb-how_much-less_32485.htm, viewed 23 February 2007.
- 106 *A New Tax System (Family Assistance) Act 1999* (Cth), ss 45(1)(e), 54. Australian Government, Family Assistance Office, *Work/Training/Study Test*, at http://www.familyassist.gov.au/Internet/FAO/FAO1.nsf/content/-work_study_test.htm, viewed 23 February 2007.
- 107 This is implied by *A New Tax System (Family Assistance) Act 1999* (Cth), ss 14-17A. For approved care, work or work-related commitments must be carried out for at least 15 hours per week: Australian Government, Family Assistance Office, *Work/Training/Study Test*, at http://www.familyassist.gov.au/Internet/FAO/FAO1.nsf/content/-work_study_test.htm, viewed 23 February 2007.
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CHAPTER 10: *Veterans' Entitlements*

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10.1 What is this chapter about?

This chapter focuses on discrimination regarding the entitlements available to veterans of the Australian Defence Forces who have a same-sex partner or children.

These entitlements are provided in the *Veterans' Entitlements Act 1986* (Cth) (Veterans' Entitlements Act) and the *Military Rehabilitation and Compensation Act 2004* (Cth) (Military Compensation Act).

A number of submissions to the Inquiry highlighted the discrimination against same-sex couples under this legislation.¹

The main cause of the discrimination lies in the definitions of 'partner' and 'member of a couple', which exclude a person in a same-sex relationship. The definitions of 'widow', 'war widow', 'widower' and 'war widower' also deny benefits to the same-sex partner of a deceased veteran.

The children of a veteran in a same-sex couple may be able to access some entitlements because of slightly broader definitions relating to children. However, those definitions do not always include the child of a lesbian co-mother or gay co-father.

This chapter explains which of the various entitlements available to veteran opposite-sex couples are denied to veteran same-sex couples and their children. The chapter discusses how discrimination against same-sex couples in the veterans' entitlements laws breaches Australia's human rights obligations. The chapter then makes recommendations on how to amend the law to avoid future discrimination.

Specifically, this chapter addresses:

- Are same-sex couples and their children recognised under veterans' entitlements legislation?
- Can the survivors of a deceased veteran access death benefits?
- Can the same-sex partner of a living veteran access entitlements?
- Do veterans' entitlements laws breach human rights?
- How should the law be changed to eliminate future breaches?

10.2 Are same-sex couples and their children recognised under veterans' entitlements legislation?

The Veterans' Entitlements Act gives entitlements to people who have rendered 'operational service'. This includes those who have seen active service in war-time or in peace-keeping missions or have been involved in eligible 'defence service' work and suffered an injury or death related to that service.²

The Military Compensation Act provides workers' compensation and other benefits for current and former members of the defence force who suffer disease or service injury. It also provides compensation for the dependants of some deceased members.³

Same-sex couples are ineligible for some payments because both the Veterans' Entitlements Act and the Military Compensation Act fail to recognise a same-sex partner in the same way as they recognise an opposite-sex partner.

The legislation may also exclude the child of a lesbian co-mother or gay co-father in some situations.

10.2.1 A same-sex partner is not recognised under veterans' entitlements legislation

The Veterans' Entitlements Act and the Military Compensation Act use slightly different terms to determine when a person's partner may be entitled to benefits. However, both of them exclude a same-sex partner.

(a) 'Partner' and 'member of a couple' exclude a same-sex partner

The Veterans' Entitlements Act defines a 'partner' as a person who is the other 'member of a couple'.⁴ A 'member of a couple' can only be a person of the 'opposite sex'.⁵

Similarly, the Military Compensation Act defines a 'partner' to be 'a person of the opposite sex to the member'.⁶

Thus, both these definitions exclude a same-sex partner.

The Veterans' Entitlements Act also requires that a 'member of a couple' be in a 'marriage-like relationship'.⁷ The criteria used to determine whether someone is in a 'marriage-like relationship' do not necessarily exclude a same-sex couple.⁸ However, as discussed in Chapter 4 on Recognising Relationships, these words also imply that the couple must be of the opposite sex. And in any event, under the legislation being an opposite-sex 'member of a couple' is a prerequisite to being in a 'marriage-like relationship'.

(b) 'Widow', 'war widow', 'widower' and 'war widower' in the Veterans' Entitlements Act exclude a same-sex partner

The terms 'widow', 'war widow', 'widower' and 'war widower' in the Veterans' Entitlements Act are all gender specific and refer to the 'partner' of the deceased person.⁹

Since a 'partner' must be of the opposite sex, a same-sex (war) widow or (war) widower will be excluded from these definitions.

(c) 'Dependant' in the Veterans' Entitlements Act excludes a same-sex partner

The Veterans' Entitlements Act defines a 'dependant' in relation to a veteran (including a veteran who has died) to include the 'partner', 'widow' and 'widower' of a veteran.¹⁰ All of those terms require that a person be of the opposite sex and will therefore exclude a same-sex partner.

A 'dependant' can also be a 'non-illness separated spouse'. But that term only includes a person who is or was married to the veteran.¹¹

(d) *'Dependant' in the Military Compensation Act excludes a same-sex partner*

A 'dependant' in the Military Compensation Act includes the 'member's partner'.¹² Since the term 'partner' refers exclusively to a member of an opposite-sex couple, a same-sex partner cannot be the 'dependant' of a veteran.

10.2.2 Children of a same-sex couple may be recognised under veterans' entitlements legislation

Chapter 5 on Recognising Children notes that when children are born to a lesbian or gay couple their parents may include a birth mother, lesbian co-mother, birth father or gay co-father(s).¹³

There are many laws which focus only on the relationship between a child and his or her birth parent. When this occurs, the child of a same-sex couple may be at a disadvantage because the child of the lesbian co-mother or gay co-father is ignored.

The relevant definitions in the Veterans' Entitlements Act and the Military Compensation Act seem to include all of the birth mother, birth father, lesbian co-mother and gay co-father. However, as discussed in Chapter 5, it may be more difficult for a lesbian co-mother or gay co-father to prove her or his entitlement to those benefits than it would be for a birth mother or birth father.

(a) *'Dependant' in the Veterans' Entitlements Act may include the child of a same-sex couple*

The definition of a 'dependant' in the Veterans' Entitlements Act includes a child of the veteran.¹⁴

The Veterans' Entitlements Act defines a 'child' to be a person who has not turned 16 or who is aged between 16 and 25 and is studying.¹⁵ This definition does not say anything about the relationship between the adult and the child, so could include any person up to the age of 25.

The Veterans' Entitlements Act defines a 'child of a veteran' to include a child of the veteran 'mother' or 'father', an adopted child and 'any other child who is, or was immediately before the death of the veteran, wholly or substantially dependent on the veteran'.¹⁶

As discussed in Chapter 5 on Recognising Children, it is likely that the reference to a 'mother' or 'father' includes only the birth mother or birth father. However, the child of a lesbian co-mother or gay co-father may be included if the child is 'wholly or substantially dependent' on them.

A child will be 'wholly or substantially dependent on a veteran' where that 'veteran is, under a law of the Commonwealth or of a State or Territory, liable to maintain a child'.¹⁷

Thus, if the child can prove that the veteran is liable to maintain him or her by law, then he or she may be considered a 'child of a veteran'.

In the Inquiry's view, where a veteran lesbian co-mother or gay co-father has a parenting order in relation to a child, that child will likely qualify as the 'child of a veteran'.¹⁸

(b) *'Dependant' in the Military Compensation Act may include the child of a same-sex couple*

In the Military Compensation Act, a 'dependant' is defined as a person who is 'wholly or partly dependent' on a member (or would be if the member had not been incapacitated) and includes:

- (a) any of the following persons
 - (i) the member's partner;
 - (ii) the member's father, mother, step-father or step-mother;
 - (iii) the father, mother, step-father or step-mother of the member's partner;
 - (iv) the member's grandfather or grandmother;
 - (v) the member's son, daughter, step-son or step-daughter;
 - (vi) the son, daughter, step-son or step-daughter of the member's partner;
 - (vii) the member's grandson or grand-daughter;
 - (viii) the member's brother, sister, half-brother or half-sister; or
- (b) a person in respect of whom the member stands in the position of a parent; or
- (c) a person who stands in the position of a parent to the member.¹⁹

As discussed in Chapter 5 on Recognising Children, the reference to a 'mother', 'father', 'daughter' or 'son' in clause (a) is likely to include only the birth mother, birth father, birth daughter or birth son or an adoptive parent or child.

Further, a person can only be a 'step-father', 'step-mother', 'step-son' or 'step-daughter' in a same-sex family if the lesbian co-mother or gay co-father marries the birth parent. This is not currently possible for a same-sex couple.

However, clauses (b) and (c) refer to a relationship where a person 'stands in the position of a parent'.

In the Inquiry's view, where a veteran lesbian co-mother or gay co-father has a parenting order in relation to a child, he or she will be 'standing in the position of a parent' in relation to that child.²⁰ However, in the absence of a parenting order, it is unclear what proof is required.

(c) *'Dependent child' in the Veterans' Entitlements Act may include the child of a same-sex couple*

In addition to the definition of 'child' and 'child of a veteran', the Veterans' Entitlements Act uses the term 'dependent child' in relation to some benefits and entitlements.

The definition of 'dependent child' in the Veterans' Entitlements Act adopts the definition used in the *Social Security Act 1991* (Cth) (Social Security Act).²¹

Chapter 9 on Social Security explains that a 'dependent child' may include the child of a lesbian co-mother or gay co-father, particularly if one or the other has a parenting order regarding that child. It will also include the child of a birth mother or birth father.²²

(d) *'Eligible young person' in the Military Compensation Act may include the child of a same-sex couple*

The Military Compensation Act confers some entitlements to an 'eligible young person' who is 'wholly dependent on a member'.

An 'eligible young person' is a person under 16, or between 16 and 25 and studying full time.²³ And an 'eligible young person' will be 'wholly dependent' on the member if the young person is living with the veteran.²⁴

These definitions may include a person up to the age of 25 who is living with any of a birth mother, birth father, lesbian co-mother or gay co-father.

10.3 Can the survivors of a deceased veteran access death benefits?

There are a large range of entitlements available to a veteran during his or her life, and to his or her surviving family after death.

A surviving same-sex partner of a veteran cannot access those entitlements because of the various definitions under the legislation.

However, the child of a veteran will generally be able to access those entitlements, even if the veteran is not the birth mother or birth father.

A same-sex partner cannot get the entitlements listed below:

- War Widow/Widower's Pension
- Income Support Supplement
- Bereavement Payments
- Funeral benefits
- Gold Repatriation Health Card
- Military compensation.

The following sections explain why this discrimination occurs, and the financial impact of that discrimination.

10.3.1 A veteran's surviving same-sex partner cannot access the War Widow/Widower's Pension

If a veteran dies as a result of war service or eligible defence service, the surviving 'partner', as a 'dependant', is entitled to the War Widow/Widower's Pension and a variety of other benefits under the Veterans' Entitlements Act.²⁵

(a) *A same-sex partner is not a 'dependant'*

As discussed in section 10.2.1 above, a same-sex partner is not a 'dependant' of a deceased veteran under the Veterans' Entitlements Act. Therefore, he or she will not be eligible to

receive the War Widow/Widower's Pension or other benefits available to an opposite-sex partner of a same-sex couple.

(b) *Negative financial impact on same-sex partners*

The War Widow/Widower's Pension amounts to a payment of \$537.10 per fortnight.²⁶ A same-sex partner is not eligible for this payment.

(c) *Negative personal impact on same-sex partners*

Mr Walter Lee states his view about discrimination against the surviving same-sex partner of a veteran as follows:

Partners of those who have served in the Australian Defence Forces are usually entitled to receive a war widow/er's pension when their partner dies.

However, this does not apply to same-sex partners...

Gay war veterans laid down their lives or were injured for our country. They protected us. We should protect them and their families. Why are their families less deserving of being afforded this protection?

They did not fight solely to protect those in same-sex relationships; they fought to protect all of us, regardless of our sexual preference. It is ironic that they fought to even protect those who would come to institute policies which would deliberately discriminate them and their families...

Many of them fought and gave their lives to make this world a better place. Let us not dishonour their memory by denying pensions to their families. Let us not dishonour and tarnish the world they fought to defend, by continuing to uphold bigotry and discrimination. Have we learned nothing from their sacrifice?²⁷

Mr Jiro Takamisawa also spoke of the impact of the discrimination he faced in accessing the War Widower's Pension:

I loved a man called John. He was an Australian veteran. We were in a relationship for over 20 years. John died of war-related injuries in 2004. I applied for a war widow's pension and had I been in a heterosexual relationship with John, I would have been eligible. Because I was in a same-sex relationship, the pension was refused.

I was recognised as John's carer in the last stages of his life. I received a carer's pension and because of my care for John, he did not need to be admitted to any veterans' hospice or medical facility. I took good care of him. Now that John has gone, of course, I no longer receive that pension. But without the financial support of the war widow's pension that I should be entitled to because of my long-term relationship with John, I am struggling financially.²⁸

(d) *The United Nations and discrimination in veterans' entitlements*

Mr Edward Young was denied a pension and bereavement payment after his veteran partner died. Mr Young took his complaint through all available legal channels in Australia but found no remedy. He eventually took his complaint to the UN Human Rights Committee.

As discussed further in Chapter 3 on Human Rights Protections, the UN Human Rights Committee concluded that:

...the author [Mr Young], as a victim of a violation of article 26 [of the *International Covenant on Civil and Political Rights*] is entitled to an effective remedy, including the reconsideration of his pension application without discrimination based on his sex or sexual orientation, if necessary through an amendment of the law. The State party [Australia] is under an obligation to ensure that similar violations of the Covenant do not occur in the future.²⁹

Mr Young told the Inquiry how he felt when he was told he was ineligible for payment:

I was told I was not eligible because I was not of the opposite sex. This directive shocked me. Was I not human? Would I not be grieving for my late partner? There was no consideration. I felt that I was being treated like some sub-human.³⁰

Mr Young has not received a War Widower's Pension or Bereavement Payment, and the relevant legislation has not been amended to remedy the discrimination.

10.3.2 A surviving child of a same-sex veteran parent may access the Orphan's Pension and other benefits

A 'dependant' of a veteran who has been orphaned is eligible for the Orphan's Pension under the Veterans' Entitlements Act.³¹

(a) *A child of a same-sex couple may be a 'dependant'*

As noted in section 10.2.2 above, a 'dependant' includes a 'child of a veteran' in the Veterans' Entitlements Act. A 'child of a veteran' can include the child of a lesbian co-mother or gay co-father, as well as the child of a birth mother and birth father, as long as the child was 'wholly or substantially dependent' on the veteran.³² A child will be 'wholly or substantially dependent' if the deceased veteran was, at the time of death, legally liable to maintain the child.³³

If the lesbian co-mother or gay co-father had a parenting order in favour of the child then there is little doubt that the child will qualify.

(b) *Benefits available to a child of a same-sex couple*

A qualifying child of a veteran will be entitled to a single Orphan's Pension payment of \$79.10 per fortnight or a double Orphan's Pension payment of \$158.20 per fortnight.³⁴

Further, the child may also be eligible for the following benefits:

- a Gold Repatriation Health Card (which entitles the holder to certain medical treatment and services)³⁵
- financial assistance and counselling from the Veterans' Children Education Scheme³⁶
- a funeral benefit.³⁷

10.3.3 A veteran's surviving same-sex partner cannot access the Income Support Supplement

The Income Support Supplement is payable under the Veterans' Entitlements Act to an eligible 'war widow' or 'war widower'.³⁸

However, as discussed in section 10.3.1 above, a same-sex partner cannot be a 'war widow' or 'war widower' under the Veterans' Entitlements Act. Therefore, a veteran's surviving same-sex partner will never qualify for this benefit under the Veterans' Entitlements Act.

The Income Support Supplement is an income support pension valued at a maximum of \$152.60 per fortnight.³⁹

10.3.4 A veteran's surviving same-sex partner cannot access the Bereavement Payment

A surviving partner may be entitled to a Bereavement Payment if he or she is receiving a veterans' pension and his or her deceased partner was also receiving a veterans' pension or a social security pension before death.⁴⁰

The Bereavement Payment under the Veterans' Entitlements Act is intended to:

...assist with the costs that may follow the death of a person and to help a surviving partner adjust their finances given that the pension of the deceased person will stop.⁴¹

A same-sex couple is excluded from these benefits because the surviving partner must be a 'member of a couple' as defined by the Veterans' Entitlements Act.

However, a Bereavement Payment may also be paid to a pensioner if his or her 'dependent child' dies.⁴² As discussed in section 10.2.2 above, a 'dependent child' may include a child of a lesbian co-mother or gay co-father (as well as birth parents). Accordingly, a same-sex veteran pensioner parent may be entitled to this payment irrespective of whether he or she is the birth parent.

10.3.5 There is no support for the funeral of a deceased veteran's indigent same-sex partner

The Veterans' Entitlements Act provides up to \$1000 towards the cost of the funeral of the 'dependant' of a deceased veteran, if that 'dependant' dies in impoverished circumstances.⁴³

Because a same-sex partner does not meet the definition of 'dependant', this benefit will not be paid for the funeral of an indigent same-sex partner of a deceased veteran.

However, a child of a deceased veteran may meet the definition of 'dependant'. So the funeral benefit may be available for the funeral of the child of the deceased veteran, even if the veteran was the child's lesbian co-mother or gay co-father.

10.3.6 A veteran's surviving same-sex partner cannot access the Gold Repatriation Health Card

The Veterans' Entitlements Act provides treatment for 'any injury suffered or disease contracted' by a 'dependant' or 'child of a deceased veteran' at the expense of the Department of Veterans' Affairs.⁴⁴ This is administered through the Gold Repatriation Health Card.

The Gold Repatriation Health Card is also available to a person who was the 'wholly dependent partner' of a deceased veteran and 'an eligible young person' who was 'wholly or mainly dependent' on the deceased veteran under the Military Compensation Act.⁴⁵

A same-sex partner is not entitled to the Gold Repatriation Health Card under these definitions, but the child of a same-sex veteran parent may be eligible for the Card whether or not he or she is the birth child or the child of a lesbian co-mother or gay co-father.

10.3.7 A veteran's surviving same-sex partner cannot access military compensation

A person who is a 'wholly dependent partner' of a deceased veteran under the Military Compensation Act may be entitled to the following military workers' compensation payments:⁴⁶

- a tax-free age-based death benefit where the veteran's death has been accepted as related to service. This can be provided via periodic payments or a lump sum equivalent. The maximum amount of the benefit is \$111 244.27⁴⁷
- a payment of up to \$1334.93 to assist with seeking financial advice when deciding between the pension or a lump sum⁴⁸
- a further lump sum payment where his or her partner was suffering continuing permanent impairment or incapacity before death.⁴⁹

A 'wholly dependent partner' may also be eligible for free medical treatment or compensation for treatment (covered by the Gold Repatriation Health Card),⁵⁰ a Pharmaceutical Allowance⁵¹ and a Telephone Allowance⁵² under the Military Compensation Act. These benefits and payments are the same as those offered in the Veterans' Entitlements Act.⁵³

However, the definition of 'wholly dependent partner' will exclude a same-sex partner.⁵⁴

10.3.8 A surviving child of a same-sex veteran parent may access military compensation

Additional military compensation is also available to an 'eligible young person' who is a 'dependant' of a deceased service member.⁵⁵

An 'eligible young person' will be a 'dependant' if he or she is 'wholly or *partly* dependent' on the service member prior to the service member's death. If the young person qualifies, he or she is eligible to receive:

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- a tax-free lump sum compensation payment of \$66 746.56⁵⁶
- education assistance under the Military Compensation Act Education and Training Scheme while they remain an eligible young person.⁵⁷

An 'eligible young person' who was 'wholly or *mainly* dependent' on a deceased service member may also receive:

- a weekly compensation payment of \$73.42 a week⁵⁸
- free medical treatment (covered by the Gold Repatriation Health Card)⁵⁹
- a Pharmaceutical Allowance.⁶⁰

A child of a birth mother, birth father, lesbian co-mother or gay co-father could qualify for these entitlements as long as he or she could establish the appropriate degree of dependency on the deceased veteran before death. As noted in section 10.2.2 above, it may be sufficient to prove that the child was living with the veteran.

10.4 Can the same-sex partner of a living veteran access entitlements?

There are a range of entitlements available to a veteran and his or her partner while a veteran is still living. These are:

- Partner Service Pension
- Utilities Allowance
- Telephone Allowance.

A same-sex partner of a veteran cannot access those entitlements because of the various definitions under the legislation.

However, the child of a veteran will generally be able to access those entitlements, even if the veteran is not a birth mother or birth father.

The following sections explain why a same-sex partner cannot get these entitlements and the financial impact of that discrimination.

10.4.1 A veteran's same-sex partner cannot access the Partner Service Pension

The Veterans' Entitlements Act provides for a Service Pension (also referred to as the Age Service Pension or Invalidity Service Pension) to a veteran with limited means.⁶¹ It also provides for a Partner Service Pension for the 'partner' of a veteran in certain circumstances.⁶²

However, a same-sex partner is not eligible for the Partner Service Pension because of the narrow definition of 'partner' in the legislation.

(a) A same-sex couple will only be eligible for the singles' rate of the Service Pension

The narrow definition of 'partner' also impacts on the amount of the primary Service Pension paid to the veteran him or herself.

The Service Pension is income and assets tested and paid at a singles' rate and a couples' rate.⁶³ The maximum singles' rate is \$512.10 per fortnight.⁶⁴ The maximum couples' rate is \$427.70 for each member of the couple per fortnight.⁶⁵

Where a veteran has a 'partner', the veteran would receive the Service Pension at the couples' rate and the veteran's partner would receive the Partner Service Pension at the couples' rate.⁶⁶

However, since the legislation does not recognise a same-sex partner as a 'partner', the veteran of the couple is only entitled to the Service Pension at the singles' rate, and his or her partner is not entitled to receive the Partner Service Pension at all. Put another way, a same-sex couple will only ever be eligible for the singles' rate of the Service Pension to be shared between the couple.

(b) Negative impact on a same-sex couple

A former member of the defence force, with a total and permanent injury (TPI) resulting from his time in the defence force, told the Inquiry:

Opposite-sex partners of TPI pensioners are entitled to a service pension themselves but a same-sex partner does not have that entitlement purely because of the fact the person is of the same-sex... My partner [name removed] has actually made an application to the department at one stage to attempt to get the pension and was refused purely on the ground that he was the same sex as me.⁶⁷

The following example illustrates that a same-sex couple will generally be worse off than an opposite-sex couple in the same situation because the same-sex couple cannot access the Partner Service Pension.

Ben and Lisa have been together for 30 years. During that time Ben has been employed by the Australian Defence Force. He has been involved in a number of international conflicts. Ben reaches pension age and claims the service pension. His partner Lisa has also retired. Lisa decides to apply for the Partner Service Pension. Her application is accepted and Ben and Lisa are paid the maximum rate of \$427.70 each per fortnight, totalling \$855.40 per fortnight.

Ben and John have been together for 30 years. During that time Ben has been employed by the Australian Defence Force. He has been involved in a number of international conflicts. Ben reaches pension age and claims the Service Pension. His partner John has also retired. However, John's application for a Partner Service Pension is denied because he is not recognised as Ben's partner. Ben and John have to rely on John's single rate pension of \$512.10 per fortnight.

Ben and John are \$343.30 worse off per fortnight than Ben and Lisa despite identical circumstances.⁶⁸

10.4.2 A veteran's same-sex partner cannot access the Utilities Allowance

The Utilities Allowance is payable to a veteran, and his or her 'partner', who is of veteran pension age and is entitled to receive:

- the Invalidity or Age Service Pension
- a Partner Service Pension
- the Income Support Supplement.⁶⁹

As discussed above, the same-sex partner of a veteran will not qualify for any of these payments, so the only person entitled to the Utilities Allowance in a same-sex couple will be the veteran him or herself.

The Utilities Allowance is paid in two instalments a year at a singles' rate of \$52.60 and a couples' rate of \$26.30 paid to each member of the couple.⁷⁰

Since the singles' rate is exactly twice that of the couples' rate paid to each member of a couple, it makes no financial difference whether the couples' rate is paid to both members of the couple, or the singles' rate is paid to one member of the couple.

However, where a couple is separated due to illness or respite care, each member of a couple is entitled to the singles' rate.⁷¹ So an opposite-sex couple separated by illness receives \$52.60 each (a total of \$105.20) per fortnight, whereas a same-sex couple separated by illness only receives \$52.60 in total.

10.4.3 A veteran's same-sex partner cannot usually access the Telephone Allowance

The Telephone Allowance may be payable to a partner of a veteran if the partner:

- receives the Partner Service Pension⁷²
- receives the War Widow/Widower's Pension⁷³
- is a 'wholly dependent partner' of a deceased member under the Military Compensation Act⁷⁴
- receives a pension or allowance under the *Social Security Act 1991* (Cth).⁷⁵

For the reasons outlined earlier, the same-sex partner of a veteran will not qualify for the Partner Service Pension or War Widow/Widower's Pension or be eligible for compensation as a 'wholly dependent partner' under the Military Compensation Act. This means that, unlike an opposite-sex partner, a same-sex partner will only qualify for the Telephone Allowance if he or she is eligible to receive a pension or allowance under the Social Security Act.⁷⁶

The Telephone Allowance is paid quarterly at a base rate of \$21.40 and a half base rate of \$10.70.⁷⁷

10.5 Do veterans' entitlements laws breach human rights?

This chapter shows that both the Veterans' Entitlements Act and the Military Compensation Act deny a veteran's same-sex partner the entitlements available to a veteran's opposite-sex partner. The cause of this discrimination lies in the narrow definitions used in the legislation.

This discrimination breaches the right to non-discrimination under article 26 of the *International Covenant on Civil and Political Rights* (ICCPR). It also breaches Australia's obligations under the *International Covenant on Economic Social and Cultural Rights* (ICESCR), which require Australia to provide social security (including invalidity and survivor's benefits) without discrimination (articles 9, 2(2)).

The Inquiry notes that in 1999 the United Nations Human Rights Committee found that the Veterans' Entitlements Act breached article 26 of the ICCPR in the case of *Young v Australia*.⁷⁸ The Committee recommended amendment to the legislation to remedy the breach, but there has been no change since that case.

The children of a same-sex couple may have more difficulty in proving their right to veterans' entitlements on the death or injury of a lesbian co-mother or gay co-father. However, the legislation does not deny them access to those benefits so the Inquiry makes no finding of breach insofar as the laws apply to the children of same-sex couples.

Nevertheless, to the extent that a same-sex family may be financially worse-off because of discrimination, the best interests of any child of that family may be compromised.

Chapter 3 on Human Rights Protections discusses these issues in more detail.

10.6 How should the law be changed to eliminate future breaches?

This chapter describes discrimination against same-sex couples regarding a range of entitlements available under the Veterans' Entitlements Act and the Military Compensation Act.

The Inquiry recommends amending the legislation to avoid future breaches of the human rights of people in same-sex couples.

The following sections summarise the cause of the problems and how to fix them.

10.6.1 Narrow definitions are the main cause of discrimination

Most of the entitlements under the Veterans' Entitlements Act and the Military Compensation Act are available to the 'dependant' of a veteran.

Under both acts, a 'dependant' includes a 'partner'. Under the Veterans' Entitlements Act a 'partner' is defined by reference to a 'member of a couple'. A person can only be a 'member of a couple' if he or she is of the *opposite sex* to the other member. Similarly, under the Military Compensation Act a 'partner' is defined to include someone of the *opposite sex*.

As a result of these narrow definitions, the same-sex partner of a veteran is denied a whole range of benefits available to an opposite-sex partner during the life, and after the death, of the veteran.

A 'dependant' also includes a child of a veteran. The Veterans' Entitlements Act and the Military Compensation Act describe a child in a variety of ways. All of those definitions are sufficiently flexible to take account of a birth mother and birth father as well as a lesbian co-mother or gay co-father.

However, the child of a birth mother or birth father will automatically be included within that definition, whereas a child of a lesbian co-mother or gay co-father will generally have to prove the parent-child relationship.

In the absence of a parenting presumption in favour of a lesbian co-mother or a successful adoption, a parenting order from the Family Court of Australia is the most effective way for a lesbian or gay co-parent to prove a child-parent relationship.

However, for some families seeking veterans' support, the cost and time involved in seeking a parenting order may impose too high a burden. Thus, the child of a veteran lesbian co-mother or gay co-father may face greater uncertainty in accessing benefits which are automatically available to the child of a veteran birth mother or birth father.

10.6.2 The solution is to amend the definitions and clearly recognise both same-sex parents of a child

Chapter 4 on Recognising Relationships presents two alternative approaches to amending discriminatory definitions within federal law regarding same-sex couples.

The Inquiry's preferred approach for bringing equality to same-sex couples is to:

- retain the current terminology used in federal legislation (for example, retain the term 'partner' and 'member of a couple' in the legislation)
- redefine the terms in the legislation to include same-sex couples (for example, redefine 'member of a couple' to include a 'de facto partner')
- insert new definitions of 'de facto relationship' and 'de facto partner' which include same-sex couples.

Chapter 5 on Recognising Children sets out how to better protect the rights of the *children of same-sex couples*.

Chapter 5 recommends that the federal government implement parenting presumptions in favour of a lesbian co-mother of a child conceived through assisted reproductive technology (ART). This would mean that a lesbian co-mother of an ART child would automatically be the 'mother' of the child (in the same way as the father in an opposite-sex couple is automatically the 'father') and the child would automatically be a 'dependant'.

Chapter 5 also suggests that it should be easier for a lesbian co-mother and gay co-father to adopt a child.

Chapter 5 further recommends the insertion of a new definition of 'step-child' (or 'step-parent') which would include a child under the care of a 'de facto partner' of the birth parent. This would make it easier for the child of a lesbian co-mother or gay co-father to qualify under the definition of 'dependant' in the Military Compensation Act.

Finally, Chapter 5 suggests that federal legislation should clearly recognise the status of a person who has a parenting order from the Family Court of Australia. This would mean that gay and lesbian parents with parenting orders could more confidently assert their rights as a person 'who stands in the position of a parent' of a person who is 'liable to maintain' a child.

The following list sets out the definitions which would need to be amended according to these suggested approaches.

The Inquiry notes that if the government were to adopt the alternative approach set out in Chapter 4, then different amendments would be required.

10.6.3 A list of legislation to be amended

The Inquiry recommends amendments to the following legislation discussed in this chapter:

Military Rehabilitation and Compensation Act 2004 (Cth)

'de facto partner' (insert new definition)

'de facto relationship' (insert new definition)

'dependant' (s 15(2) – amend to clarify the role of a parenting order and to change the reference to a 'step-son', 'step-daughter', 'step-mother' and 'step-father' to 'step-child' and 'step-parent' respectively. Otherwise no need to amend if 'partner' is amended and a lesbian co-mother or gay co-father and their children may also be recognised through reformed parenting presumptions, adoption laws or a new definition of 'step-child' and 'step-parent')

'eligible young person' (s 5 – no need to amend)

'partner' (s 5 – amend to include a 'de facto partner')

'step-child' (insert new definition)

'step-parent' (insert new definition)

'wholly dependent partner' (s 5 – no need to amend if 'partner' is amended)

Social Security Act 1991 (Cth)

'de facto partner' (insert new definition)

'de facto relationship' (insert new definition)

'dependent child' (s 5(2), (4) – amend to clarify the role of a parenting order; otherwise no need to amend if the child of a lesbian co-mother or gay co-father may also be recognised through reformed parenting presumptions or adoption laws)

'marriage-like relationship' (s 4(2), (3), (3A) – replace with 'de facto relationship')

'member of a couple' (s 4(2)(b) – amend to include a 'de facto partner' and 'de facto relationship')

'partner' (s 4(1) – no need to amend if 'member of a couple' is amended)

Veterans' Entitlements Act 1986 (Cth)

'child' (s 5F(1) – no need to amend)

'child of a veteran' (s 10 – amend to clarify the role of a parenting order; otherwise no need to amend if the child of a lesbian co-mother or gay co-father may also be recognised through reformed parenting presumptions or adoption laws)

'de facto partner' (insert new definition)

'de facto relationship' (insert new definition)

'dependant' (s 11(1) – no need to amend if 'member of a couple', 'widow', 'widower', 'non-illness separated spouse' are amended)

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'dependent child' (s 5F – no need to amend if s 5(2), (4) of the *Social Security Act 1991* (Cth) is amended)

'marriage-like relationship' (s 11A – replace with 'de facto relationship')

'member of a couple' (s 5E(2)(b) – amend to include a 'de facto partner' and replace 'marriage-like relationship' with 'de facto relationship')

'non-illness separated spouse' (s 5E(1) – amend to include a 'de facto partner')

'partner' (s 5E(1) – no need to amend if 'member of a couple' is amended)

'war widow' (s 5E(1) – no need to amend if 'member of a couple' is amended)

'war widower' (s 5E(1) – no need to amend if 'member of a couple' is amended)

'widow' (s 5E(1) – amend to remove a reference to partner of 'a man', otherwise no need to amend if 'member of a couple' is amended)

'widower' (s 5E(1) – amend to remove a reference to partner of 'a woman', otherwise no need to amend if 'member of a couple' is amended)

Endnotes

- 1 See the following submissions for a discussion on the issue of discrimination in veterans' entitlements: Action Reform Change Queensland and Queensland AIDS Council, Submission 270; Anti-Discrimination Commission of Queensland, Submission 264; Australian Coalition for Equality, Submission 228; Australian Federation of AIDS Organisations, Submission 285; Equal Opportunity Commission of Victoria, Submission 327; Human Rights Law Resource Centre, Submission 160; Law Institute of Victoria, Submission 331; Tasmanian Gay and Lesbian Lobby Group, Submission 233; University of Western Australia, Submission 185.
- 2 *Veterans' Entitlements Act 1986* (Cth), ss 6-6F.
- 3 *Military Rehabilitation and Compensation Act 2004* (Cth), s 3.
- 4 *Veterans' Entitlements Act 1986* (Cth), s 5E(1).
- 5 *Veterans' Entitlements Act 1986* (Cth), s 5E(2).
- 6 *Military Rehabilitation and Compensation Act 2004* (Cth), s 5.
- 7 *Veterans' Entitlements Act 1986* (Cth), s 5E(2)(b)(iii).
- 8 *Veterans' Entitlements Act 1986* (Cth), s 11A.
- 9 *Veterans' Entitlements Act 1986* (Cth), s 5E(1).
- 10 *Veterans' Entitlements Act 1986* (Cth), s 11(1).
- 11 *Veterans' Entitlements Act 1986* (Cth), s 5E(1).
- 12 *Military Rehabilitation and Compensation Act 2004* (Cth), s 15.
- 13 For an explanation of these terms see the Glossary of Terms.
- 14 *Veterans' Entitlements Act 1986* (Cth), s 11(1)(d).
- 15 *Veterans' Entitlements Act 1986* (Cth), s 5F(1).
- 16 *Veterans' Entitlements Act 1986* (Cth), s 10(1)-(2).
- 17 *Veterans' Entitlements Act 1986* (Cth), s 10(3).
- 18 For further background on parenting orders, see Chapter 5 on Recognising Children.
- 19 *Military Rehabilitation and Compensation Act 2004* (Cth), s 15.
- 20 For further background on parenting orders, see Chapter 5 on Recognising Children.
- 21 *Veterans' Entitlements Act 1986* (Cth), s 5F(1).
- 22 Chapter 9 on Social Security, section 9.2.2.
- 23 *Military Rehabilitation and Compensation Act 2004* (Cth), s 5.
- 24 *Military Rehabilitation and Compensation Act 2004* (Cth), s 17(a).
- 25 *Veterans' Entitlements Act 1986* (Cth), s 13(1)-(2A).
- 26 The *Veterans' Entitlements Act 1986* (Cth), s 30 sets the rates for pensions; s 198 sets out the variation of rates of certain pensions. See also Australian Government, Department of Veterans' Affairs, *DVA Facts DP60, War Widows/Widower's and Orphan's Pensions*, <http://www.dva.gov.au/factsheets/>, viewed 6 March 2007.
- 27 Walter Lee, Submission 250(I).
- 28 Jiro Takamisawa, Sydney Hearing, 26 July 2006.
- 29 *Young v Australia*, (941/2000) UN Doc. CCPR/C/78/D/941/2000, para 12.
- 30 Edward Young, Submission 330.
- 31 *Veterans' Entitlements Act 1986* (Cth), s 13(1)-(2A), (4), (6), (7).
- 32 *Veterans' Entitlements Act 1986* (Cth), s 10(1)-(2).
- 33 *Veterans' Entitlements Act 1986* (Cth), s 10(3).
- 34 *Veterans' Entitlements Act 1986* (Cth), s 198A sets out the variation of rates of Orphan's Pension. See also Australian Government, Department of Veterans' Affairs, *DVA Facts DP60, War Widows/Widower's and Orphan's Pension*, <http://www.dva.gov.au/factsheets/>, viewed 5 March 2007.
- 35 *Veterans' Entitlements Act 1986* (Cth), s 86(3)-(4).

- 36 *Veterans' Entitlements Act 1986* (Cth), pt VII. This payment is available to a child who is, or was, the child of a veteran.
- 37 *Veterans' Entitlements Act 1986* (Cth), s 100. See also Australian Government, Department of Veterans' Affairs, *DVA Facts DP60, War Widow's/Widower's and Orphan's Pensions*, <http://www.dva.gov.au/factsheets/default.htm>, viewed 6 March 2007, for further information on the above benefits.
- 38 *Veterans' Entitlements Act 1986* (Cth), s 45A.
- 39 *Veterans' Entitlements Act 1986* (Cth), s 45S. The rate is adjusted in March and September: Australian Government, Department of Veterans' Affairs, *DVA Facts IS22, Income Support Supplement Rates*, <http://www.dva.gov.au/factsheets/>, viewed 20 February 2007, for payment amounts current as at 20 February 2007.
- 40 *Veterans' Entitlements Act 1986* (Cth), ss 53J-53NA, 98A.
- 41 Australian Government, Department of Veterans' Affairs, *DVA Facts BR02, Payments After Bereavement*, <http://www.dva.gov.au/factsheets/default.htm>, viewed 13 February 2007.
- 42 *Veterans' Entitlements Act 1986* (Cth), ss 53R-53T.
- 43 *Veterans' Entitlements Act 1986* (Cth), s 100.
- 44 *Veterans' Entitlements Act 1986* (Cth), s 86(1)-(4). However, the Repatriation Commission can alter the Treatment Principles that set out what kinds and classes of treatment will or will not be provided for and what conditions are covered: see *Veterans' Entitlements Act 1986* (Cth), ss 90-90A.
- 45 *Military Rehabilitation and Compensation Act 2004* (Cth), ss 5, 17, 284. See also Australian Government, Department of Veterans' Affairs, *DVA Facts HSV60, Repatriation Health Card – For All Conditions (Gold)*, <http://www.dva.gov.au/factsheets/default.htm>, viewed 5 March 2007.
- 46 The person may also be eligible to claim payments and allowances available under the *Veterans' Entitlements Act 1986* (Cth).
- 47 *Military Rehabilitation and Compensation Act 2004* (Cth), ss 233-238. The amount is indexed under the *Military Rehabilitation and Compensation Act 2004* (Cth), s 404. See also Australian Government, Department of Veterans' Affairs, *DVA Facts MRC14, Compensation for Dependants – Wholly Dependant Partners of Deceased Members and Former Members*, <http://www.dva.gov.au/factsheets/default.htm>, viewed 26 March 2007.
- 48 *Military Rehabilitation and Compensation Act 2004* (Cth), ss 239-241. The amount is indexed under the *Military Rehabilitation and Compensation Act 2004* (Cth), s 404. See also Australian Government, Department of Veterans' Affairs, *DVA Facts MRC14, Compensation for Dependants – Wholly Dependant Partners of Deceased Members and Former Members*, <http://www.dva.gov.au/factsheets/default.htm>, viewed 26 March 2007.
- 49 *Military Rehabilitation and Compensation Act 2004* (Cth), ss 242-244.
- 50 *Military Rehabilitation and Compensation Act 2004* (Cth), s 284(1).
- 51 *Military Rehabilitation and Compensation Act 2004* (Cth), ss 300-303.
- 52 *Military Rehabilitation and Compensation Act 2004* (Cth), ss 245-249.
- 53 See Australian Government, Department of Veterans' Affairs, *DVA Facts MRC14, Compensation for Dependants – Wholly Dependant Partners of Deceased Members and Former Members*, <http://www.dva.gov.au/factsheets/default.htm>, viewed 26 March 2007.
- 54 *Military Rehabilitation and Compensation Act 2004* (Cth), s 5.
- 55 *Military Rehabilitation and Compensation Act 2004* (Cth), ch 5, pt 3.
- 56 *Military Rehabilitation and Compensation Act 2004* (Cth), ss 251-252. The amount is indexed under the *Military Rehabilitation and Compensation Act 2004* (Cth), s 404. Australian Government, Department of Veterans' Affairs, *DVA Facts MRC15, Compensation for Dependants – Eligible Young Persons*, <http://www.dva.gov.au/factsheets/default.htm>, viewed 16 February 2007. This rate was current as at 31 October 2006.
- 57 *Military Rehabilitation and Compensation Act 2004* (Cth), ss 258-259. Australian Government, Department of Veterans' Affairs, *DVA Facts MRC15, Compensation for Dependants – Eligible Young Persons*, <http://www.dva.gov.au/factsheets/default.htm>, viewed 16 February 2007. This rate was current as at 31 October 2006.

- 58 *Military Rehabilitation and Compensation Act 2004* (Cth), ss 253-254. See also Australian Government, Department of Veterans' Affairs, *DVA Facts MRC15, Compensation for Dependants – Eligible Young Persons*, <http://www.dva.gov.au/factsheets/default.htm>, viewed 16 February 2007.
- 59 *Military Rehabilitation and Compensation Act 2004* (Cth), s 284(2). See also Australian Government, Department of Veterans' Affairs, *DVA Facts MRC15, Compensation for Dependants – Eligible Young Persons*, <http://www.dva.gov.au/factsheets/default.htm>, viewed 16 February 2007.
- 60 *Military Rehabilitation and Compensation Act 2004* (Cth), ss 300-303. See also Australian Government, Department of Veterans' Affairs, *DVA Facts MRC15, Compensation for Dependants – Eligible Young Persons*, <http://www.dva.gov.au/factsheets/default.htm>, viewed 16 February 2007.
- 61 *Veterans' Entitlements Act 1986* (Cth), ss 36-37.
- 62 *Veterans' Entitlements Act 1986* (Cth), s 38(1).
- 63 *Veterans' Entitlements Act 1986* (Cth), s 38N. See also Australian Government, Department of Veterans' Affairs, *DVA Facts IS01, Service Pension Overview*, <http://www.dva.gov.au/factsheets/default.htm>, viewed 6 March 2007.
- 64 *Veterans' Entitlements Act 1986* (Cth), sch 6. See also Australian Government, Department of Veterans' Affairs, *DVA Facts IS45, Partner Service Pension*, <http://www.dva.gov.au/factsheets/default.htm>, viewed 6 March 2007.
- 65 *Veterans' Entitlements Act 1986* (Cth), sch 6. See also Australian Government, Department of Veterans' Affairs, *DVA Facts IS45, Partner Service Pension*, <http://www.dva.gov.au/factsheets/default.htm>, viewed 6 March 2007.
- 66 *Veterans' Entitlements Act 1986* (Cth), sch 6, ss A2, C10, C11, E3, F2. See also Australian Government, Department of Veterans' Affairs, *DVA Facts IS01, Service Pension Overview*, <http://www.dva.gov.au/factsheets/default.htm>, viewed 16 February 2007.
- 67 Speaker, Daylesford Forum, 28 September 2006.
- 68 Once John turns 65 he may be eligible for the Age Pension at the singles' rate. At this point Ben and John will be \$168.80 better off per fortnight than Ben and Lisa.
- 69 *Veterans' Entitlements Act 1986* (Cth), s 118OA.
- 70 *Veterans' Entitlements Act 1986* (Cth), s 118OC. See also Australian Government, Department of Veterans' Affairs, *DVA Facts IS16, Utilities Allowance*, <http://www.dva.gov.au/factsheets/default.htm>, viewed 6 March 2007.
- 71 *Veterans' Entitlements Act 1986* (Cth), s 118OC. See also Australian Government, Department of Veterans' Affairs, *DVA Facts IS16, Utilities Allowance*, <http://www.dva.gov.au/factsheets/default.htm>, viewed 6 March 2007.
- 72 *Veterans' Entitlements Act 1986* (Cth), s 118Q(1).
- 73 *Veterans' Entitlements Act 1986* (Cth), s 118Q(2).
- 74 *Military Rehabilitation and Compensation Act 2004* (Cth), ss 245-249.
- 75 *Social Security Act 1991* (Cth), s 1061Q.
- 76 Note that a partner may also be eligible if they themselves are a veteran and in receipt of the Service Pension.
- 77 *Veterans' Entitlements Act 1986* (Cth), s 118S. The rate of Allowance payable depends on which entitlements the person and their partner are receiving. For a full list of Telephone Allowance rates and eligibility for each amount see Australian Government, Department of Veterans' Affairs, *DVA Facts IS13, Income Support Allowances – Telephone Allowance*, <http://www.dva.gov.au/factsheets/default.htm>, viewed 6 March 2007.
- 78 *Young v Australia*, (941/2000) UN Doc. CCPR/C/78/D/941/2000, para 10.4.



CHAPTER 11: *Health Care Costs*

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11.1 What is this chapter about?

This chapter focuses on discrimination against same-sex couples and their families in the context of access to the Medicare and Pharmaceutical Benefits Scheme (PBS) Safety Nets.

The Medicare and PBS Safety Nets are designed to provide extra subsidies to people with high medical costs. Same-sex couples and families miss out on these additional subsidies because the legislation governing these two schemes – the *Health Insurance Act 1973* (Cth) and *National Health Act 1953* (Cth) – do not recognise a same-sex couple as a genuine couple. The legislation also fails, in certain circumstances, to recognise a same-sex couple with children as a family.

So while an opposite-sex couple can combine their medical expenses (and the medical expenses of their children), to reach the threshold amount, a same-sex couple cannot. This means a same-sex couple will have to spend much more than an opposite-sex couple to qualify for the same benefits.

The discrimination arises in the definitions used in the legislation. The definition of ‘spouse’ excludes a person in a same-sex couple, which means that a same-sex couple cannot register as a family for safety net purposes. The definition of ‘dependent child’ may also exclude the child of a lesbian co-mother or gay co-father in the absence of a parenting order from the Family Court of Australia.

This chapter explains how the Medicare Safety Net and the PBS Safety Net currently apply to same-sex couples and notes the problems faced by some same-sex couples in accessing family coverage in private health funds. The chapter also discusses additional health care concerns raised by submissions to this Inquiry. The chapter then explains how the relevant legislation breaches Australia’s human rights obligations and what should be done to stop discrimination against same-sex families.

Specifically, this chapter addresses the following questions:

- Does Medicare and PBS legislation recognise same-sex families?
- Can a same-sex family access Medicare Safety Net benefits?
- Can same-sex families access the PBS Safety Net?
- Do same-sex families face problems in accessing private health insurance discounts?
- What other health care issues concern same-sex families?
- Do the Medicare and PBS laws breach human rights?
- How should the law change to avoid breaches in the future?

11.2 Does Medicare and PBS legislation recognise same-sex families?

The Medicare and PBS Safety Nets provide that when the medical or pharmaceutical expenses of the ‘members of a person’s family’ exceed the relevant threshold, government subsidies will increase.

Same-sex couples miss out on these additional savings because the *Health Insurance Act 1973* (Cth) (Health Insurance Act) and the *National Health Act 1953* (Cth) (National Health Act) do not recognise a same-sex partner as a 'member of a person's family'.

The medical expenses of a lesbian co-mother's child or gay co-father's child may be considered as part of his or her threshold account (particularly if the co-mother or co-father has a parenting order from the Family Court).

However, same-sex parents cannot combine their expenses and the expenses of their children to reach the threshold because they are not all considered part of the same family.

So while an opposite-sex couple can combine their medical expenses, and the medical expenses of their children, to reach the threshold amount, a same-sex couple cannot. Instead, one member of the same-sex couple must meet each threshold only on his or her own expenses.

11.2.1 A 'member of a person's family' must be the person's 'spouse', 'dependent child' or spouse's dependent child

For the purposes of the Medicare and PBS Safety Nets, a 'member of a person's family' includes:

- the person's 'spouse'
- any 'dependent child' of the person
- any 'dependent child' of the person's 'spouse'.¹

11.2.2 'Spouse' does not include a same-sex partner

The Health Insurance Act and the National Health Act define a person's 'spouse' to be a person who is legally married or a 'de facto spouse'.²

The definition of 'de facto spouse' requires that there be a genuine relationship with a person of the opposite sex.³ Thus, a same-sex partner cannot qualify as a 'spouse' for the purposes of the PBS or Medicare Safety Nets.

Correspondence from the Department of Health and Ageing confirms that a same-sex couple is not considered a couple for the PBS Safety Net:

The *National Health Act 1953* does not allow for same sex couples to work toward the same Safety Net threshold.⁴

11.2.3 'Dependent child' may include the child of a same-sex parent

The Health Insurance Act and the National Health Act define a 'dependent child' to be:

- (a) a child under 16 who is:
 - (i) in the custody, care and control of that person; or
 - (ii) where no other person has the custody, care and control of the child--is wholly or substantially in the care and control of the first-mentioned person; or
- (b) a student child who is wholly or substantially dependent on the person.⁵

Chapter 5 on Recognising Children notes that when children are born to a lesbian or gay couple their parents may include a birth mother, lesbian co-mother, birth father or gay co-father(s).⁶

The definition of ‘dependent child’ potentially includes the child of all of these parents. However, it may be more difficult for a lesbian co-mother or gay co-father to prove her or his entitlement to the Medicare and PBS benefits than it would be for a birth mother or birth father.

The legislation does not specify what is required to prove that a child is in ‘the custody, care and control’ of a person. However, a birth mother or birth father are generally the legal parents of a child and therefore *assumed* to have custody of a child.

On the other hand, a lesbian co-mother and gay co-father may have to take additional steps to prove that a child is in his or her custody. A parenting order in favour of the lesbian co-mother or gay co-father should be sufficient. However, as Chapter 5 explains, parenting orders can be expensive and may involve lengthy court proceedings.

If a same-sex couple does not have the resources to go through this process, a lesbian co-mother and gay co-father may be in a more tenuous position than a birth mother and birth father (who just need a birth certificate to prove that a child is a ‘dependent child’).

In any event, it remains the case that two same-sex parents and a child cannot register together as one family because the two parents are not considered each other’s ‘spouse’.

The Department of Health and Ageing informed the Inquiry:

Under the current legislation, the PBS safety net arrangements are not able to be applied to a family unit comprising a same sex couple.⁷

11.2.4 The dependent child of a same-sex partner is not the spouse’s dependent child

In an opposite-sex family a child only needs to be the ‘dependent child’ of one member of the couple to be ‘a member of a person’s family’. This is because a ‘member of the person’s family’ includes:

- any ‘dependent child’ of the person registering for the Safety Net or
- any ‘dependent child’ of that person’s ‘spouse’.⁸

The ‘dependent child’ of a person’s same-sex partner will not qualify as a member of the person’s family because the same-sex partner is not a ‘spouse’.⁹

11.3 Can a same-sex family access Medicare Safety Net benefits?

The Health Insurance Act includes two different safety net schemes to help cover the cost of out-of-hospital medical expenses. One is a general Safety Net and the other an Extended Safety Net.

Eligible families who reach the threshold amount with their combined out-of-hospital medical expenses may qualify for the general Safety Net¹⁰ and the Extended Safety Net in any one year.¹¹

Individuals can also qualify for the general Safety Net¹² and the Extended Safety Net¹³ by adding up their individual expenses.

The general Safety Net existed long before the Extended Safety Net was introduced. However, the Extended Safety Net grants greater savings than the general Safety Net.

11.3.1 A same-sex family cannot register as a family

A family must be registered with Medicare in order to obtain a family benefit under the general Safety Net or the Extended Safety Net.¹⁴ However, only a 'member of a person's family' can register as part of a family.¹⁵

As discussed in section 11.2 above, the narrow definition of 'spouse' means that a same-sex partner cannot register as a 'member of a person's family'.

In a same-sex family with one child, it seems that either member of the couple can register with the child, but the other member of a couple will be treated as an individual.

In an opposite-sex family, both members of the couple and the child can be registered. This means that each person's medical expenditure counts towards the thresholds.

The Tasmanian Gay and Lesbian Rights Lobby note that:

...this creates an anomaly where a couple, with or without children, cannot register as a complete family unit and renders one of the same-sex couple as an individual.¹⁶

This means that same-sex couples and families must effectively spend twice as much before the government starts to subsidise their out-of-pocket payments.¹⁷

Vicki Harding comments in her submission:

Our family consists of two women and one child. As my partner and I have no access to marriage and our status as a couple living in a de facto relationship is not recognised federally, we were not eligible to register as a family. I registered with my daughter as a family and my partner didn't register because 'single people without a dependant child or children do not need to register'.¹⁸

A speaker at the Sydney forum also told the Inquiry that:

The exclusion of same-sex couples financially disadvantages an already marginalised group, has a negative impact on dependent children of same-sex couples and is out of touch with community values. Every couple living together in a domestic relationship should have access to the Safety Net, regardless of their sexuality.¹⁹

11.3.2 Glossary of Safety Net terms

The following terms help to understand the application of the Medicare Safety Nets to same-sex couples.

The schedule fee is the standard service fee set by the Australian Government.²⁰ It can either be for a GP service or another medical service, such as blood tests, CT scans, ultrasounds, x-rays or pap smears.²¹

The doctor's fee is the amount charged by the doctor for the service. It is usually higher than the schedule fee.

The Medicare rebate usually refunds 85% of the schedule fee for out-of-hospital services.²² However, from 1 January 2005, the Medicare rebate refunds 100% of the schedule fee for GP services.²³

Out-of-pocket costs are the difference between the Medicare rebate and what the doctor charges the patient.²⁴ Out-of-pocket costs are added together to reach the Safety Net thresholds. For example, if a GP's fee is \$58.00 and Medicare rebates \$32.10, the difference of \$25.90 will count towards the threshold. This term applies to the \$1039 general and the \$519.50 concessional Safety Net thresholds.²⁵

Gap amount refers to the difference between the Medicare rebate and the schedule fee. For example, if the schedule fee for a specialist medical service is \$150 but the doctor charges \$200, Medicare will rebate 85% of \$150 (\$127.50). The 'gap' amount is \$22.50 – the difference between the schedule fee (\$150) and the Medicare rebate (\$127.50). This term is relevant for the \$358.90 'gap' threshold.²⁶

11.3.3 A same-sex family must spend more to access general Safety Net subsidies

When a couple, family or individual reaches the relevant general Safety Net threshold of \$358.90 in any one year, Medicare reimburses 100% of the schedule fee for out-of-hospital medical services for the rest of that year.²⁷

The amount that counts towards this threshold is the difference, or 'gap', between the schedule fees for services and the amount Medicare rebates. This is called the 'gap' threshold.²⁸

For an opposite-sex couple with one child, the 'gap' amounts for the medical expenses of all three members of the family can be added together to meet the \$358.90 threshold. For a same-sex couple with one child, one member of the couple will have to reach the \$358.90 threshold on his or her own, and the other will have to meet the \$358.90 threshold with his or her own expenses and the child's expenses.

Thus, a same-sex family must accumulate two times \$358.90 (\$717.80) in 'gap' expenses before Medicare reimburses 100% of the schedule fee for all family members. An opposite-sex family only has to accumulate \$358.90 in 'gap' expenses.

11.3.4 A same-sex family must spend more to access Extended Safety Net subsidies

Under the Extended Safety Net, when a family or individual reaches the relevant threshold, Medicare pays 80% of out-of-pocket costs.²⁹

There are two different thresholds for the Extended Safety Net.

The **general threshold** of \$1039 applies to all families and individuals who are not eligible for a concession rate and who do not receive the Family Tax Benefit A.³⁰

The **concessional threshold** of \$519.50 applies to concession card holders and families receiving the Family Tax Benefit A.³¹ Chapter 9 on Social Security explains when a family is eligible for Family Tax Benefit A.³²

Each member of a same-sex couple must reach the relevant threshold on his or her own. This is because the legislation does not recognise a same-sex partner as a member of the family.

For example, if the general threshold applies, a same-sex couple will have to spend \$2078 in out-of-pocket expenses before the government subsidies apply to both members of the couple. An opposite-sex couple will only have to spend \$1039 in out-of-pocket expenses before the subsidies apply to both members of the couple.

John Goldbaum notes:

We are now getting old. My husband's sister and her husband are allowed to combine their expenditure in order to reach their PBS and Medicare safety net thresholds. My husband and I need to pay out twice as much because we have to reach our safety nets individually. It's not the money that concerns us; it's the principle. It makes us second-class citizens despite the fact that we are first-class taxpayers.³³

11.3.5 Example comparing same-sex and opposite-sex couples seeking the Extended Safety Net subsidies

Opposite-Sex Couple

Jenny and Robert have a 10 year old son, Ben. They are eligible for the concessional Extended Safety Net threshold of \$519.50. Between January and June, Jenny, Robert and Ben have a number of medical visits.

JANUARY–JUNE	MEDICAL EXPENSES	MEDICARE REBATE	OUT-OF-POCKET EXPENSES
Jenny	\$456.00	\$218.05	\$237.95
Robert	\$566.00	\$381.80	\$184.20
Ben	\$308.10	\$210.75	\$97.35
Total	<i>\$1330.10</i>	<i>\$810.60</i>	\$519.50

As Jenny, Robert and Ben are an opposite-sex family, their out-of-pocket expenses can be combined. This means that in June they reached the concessional safety net threshold of \$519.50. From July onwards, Medicare will reimburse them an additional 80% of any future out-of-pocket expenses.

Between July and December, Jenny, Robert and Ben have another series of medical visits.

JULY–DECEMBER	MEDICAL EXPENSES	MEDICARE REBATE	80% ADDITIONAL MEDICARE REBATE	OUT-OF-POCKET EXPENSES
Jenny	\$552.00	\$355.85	\$156.92	\$39.23
Robert	\$250.00	\$110.00	\$112.00	\$28.00
Ben	\$106.00	\$60.95	\$36.04	\$9.01
Total	\$908.00	\$526.80	\$304.96	\$76.24

Because of the Extended Safety Net, Jenny, Robert and Ben will only pay \$76.24 in out-of-pocket expenses for \$908 worth of medical costs in the second half of the year.

Same-Sex Couple

Sarah and Lilly have a 10 year old daughter, Karen. Lilly is Karen's birth mother. They are eligible for the concessional threshold of \$519.50. Between January and June, Sarah, Lilly and Karen have a number of medical visits.

JANUARY–JUNE	MEDICAL EXPENSES	MEDICARE REBATE	OUT-OF-POCKET EXPENSES
Sarah	\$456.00	\$218.05	\$237.95
Lilly	\$566.00	\$381.80	\$184.20
Karen	\$308.10	\$210.75	\$97.35
Total	\$1330.10	\$810.60	\$519.50

As Sarah, Lilly and Karen are a same-sex family, their out-of-pocket expenses cannot be combined. This means that Sarah and Lilly have to reach the concessional threshold individually. Sarah's out-of-pocket expenses are \$237.95, which does not meet the \$519.50 threshold. Lilly can include Karen's medical costs with her own. Lilly and Karen's out-of-pocket expenses are \$281.55. Again this does not meet the concessional threshold of \$519.50.

Sarah, Lilly and Karen are therefore not eligible for the additional 80% rebate for any future medical expenses.

Over the next 6 months Sarah, Lilly and Karen have another series of medical visits.

JULY–DECEMBER	MEDICAL EXPENSES	MEDICARE REBATE	80% ADDITIONAL MEDICARE REBATE	OUT-OF-POCKET EXPENSES
Sarah	\$552.00	\$355.85	\$0	\$196.15
Lilly	\$250.00	\$110.00	\$0	\$140.00
Karen	\$106.00	\$60.95	\$0	\$45.05
Total	\$908.00	\$526.80	\$0	\$381.20

Sarah, Lilly and Karen have paid \$381.20 in out-of-pocket expenses for \$908 worth of medical expenses in the second half of the year.

The medical services accessed by each family were identical. However, Sarah, Lilly and Karen are \$304.96 worse off than Jenny, Robert and Ben, just because they are a same-sex family.³⁴

11.3.6 Lesbian couples will pay more to access assisted reproductive technology

As discussed in Chapter 5 on Recognising Children, many same-sex couples use assisted reproductive technology (ART) to create a family.

ART treatments can be very expensive.³⁵ Qualifying for the Medicare Safety Net can help greatly in meeting the costs. As a 2006 study notes:

The most significant change to funding of ART in the past decade has been the introduction of the Medicare Plus Safety Net [the Extended Safety Net] in January 2004...[t]his policy has effectively reduced patient expenses for ART services by up to half...³⁶

Couples who access ART treatments will almost always reach the Medicare Safety Net thresholds due to the high costs of these treatments. However, women in lesbian relationships will have to pay much more in out-of-pocket expenses than an opposite-sex couple before they can access those added benefits.

The impact of the cost of ART was raised in a number of consultations and in several submissions to the Inquiry. Sharon Isle and Natasha Miller comment in their submission:

Given we are undergoing further Assisted Reproductive Technology (ART) to try and conceive again, and that the amount of the rebate we receive is dependent on where we are in relation to our threshold (for both the procedures and the medication), we will end up being significantly financially out-of-pocket (less so if we were on the couples safety net).³⁷

Similarly, Kelly and Samantha Pilgrim-Byrne note in their submission to the Inquiry:

We have been in a de facto relationship for 12.5 years and for the past 2.5 years we have been trying to conceive our first child through a fertility clinic in Perth. Without going into great detail, I have been diagnosed with medical infertility and have needed to resort to IVF treatments. Last year alone we spent \$20,000 on treatment and medications. Because we are not recognised as a couple for the Medicare Safety Net, we are required to meet out-of-pocket expenses as two single people. In 2006 this figure will be \$1,000 each (effectively \$2,000 combined). If we were a heterosexual couple we would be considered a family and this figure would be \$1,000 combined (\$500 each). The variance in this Safety Net would allow us to be able to claim a higher rebate much earlier if we were considered a couple, thereby enabling us to access more treatment than we currently can afford.³⁸

The same couple in their opening statement to the Inquiry's Perth hearing stated that:

Often we sit in the waiting room of our fertility clinic and look around us at the many other couples struggling with infertility. What isn't lost on us, however, is that we pay more for our treatment than they do and that their struggle is legitimised by the Government with financial support that we don't receive.³⁹

Felicity Martin and Sarah Lowe write about similar problems in their submission:

Throughout the process, which included lengthy treatment for Sarah's PCOS condition, Sarah was classified as a single person. The biggest financial burden we faced during this often emotional and distressing time was [the] Medicare Safety Net. During the process if we had been able to be declared a couple under federal law, the safety net threshold for receiving the rebate would have been only \$350 [\$519.50 as of 1 January 2007]. Instead we had to wait until Sarah alone had reached the safety net threshold of \$700 [\$1039 as of 1 January 2007] in a calendar year to access the 80% rebate.⁴⁰

11.4 Can same-sex families access the PBS Safety Net?

The PBS is administered under the *National Health Act 1953* (Cth) and the National Health (Pharmaceutical Benefits) Regulations 1960 (Cth).

The PBS Safety Net is very similar to the Medicare Safety Net, except that it focuses on pharmaceutical costs rather than doctor's costs.

Once an individual or family has spent a certain amount on prescription medications in one year, the cost of further medications is reduced for the remainder of the calendar year.⁴¹

Like the Medicare Safety Net, a same-sex couple will have to spend much more than an opposite-sex couple before receiving PBS Safety Net subsidies.

The Gay and Lesbian Rights Lobby (NSW) notes:

A same-sex parent family would need to reach two thresholds in order for all members of the family to be covered under the PBS, as opposed to opposite-sex parent families which only need to spend \$960.10 [\$1059 in 2007]. This legislative discrimination can cost up to \$755 a year – the difference between the full price that the second same-sex partner must pay for 32 prescriptions in order to reach the threshold, and the concession price that they would pay if they were in a heterosexual couple.⁴²

11.4.1 A same-sex family spends more to access general Safety Net subsidies

There are two different thresholds for the PBS Safety Net:

- general patients
- concessional patients (concession card holders).⁴³

A general patient (and a family), has a PBS Safety Net threshold of \$1059 per calendar year. General patients pay up to \$30.70 for prescription medications. Once the individual or family has spent more than \$1059 on those medications, each member of the family will pay only \$4.90 per prescription for PBS medicines for the remainder of the calendar year.⁴⁴

A concession card holder (and a family) has a PBS Safety Net threshold of \$274.40 per calendar year. Concession card holders pay \$4.90 for each prescription. Once the individual or family has spent more than \$274.40 on those medications (56 prescriptions), each member of the family will receive PBS medicines free of charge for the remainder of the calendar year.⁴⁵

For either threshold amount, a same-sex couple will have to spend twice as much on PBS medications in any one year than an opposite-sex couple, before they can purchase PBS medications at a significantly reduced rate for the remainder of the calendar year. This is because the legislation does not recognise a same-sex partner as a member of a person's family.

Doug Pollard writes in his submission to the Inquiry:

My partner has a heart condition, high cholesterol and is borderline diabetic, conditions which will only worsen as he ages, and I will no doubt be subject to the usual problems of ageing. Yet we will not be entitled to full pharmaceutical benefits as a couple.⁴⁶

Similarly, Eva Battaglini discusses how the PBS Safety Net affects her and her partner:

My partner and I are both suffering from medical conditions which will require us to be taking prescription medicines, possibly for the rest of our lives. Currently, the PBS and Medicare safety net schemes do not recognise us as being a family.

Apart from finding their definition of the word 'family' to be rather narrow and insulting, we feel that it is unfair that simply because we are not a heterosexual couple we are not counted as a couple by the PBS safety net scheme. This means that we must each reach the safety net limit individually, which puts us at the financial disadvantage of having to pay twice as much as a heterosexual couple would before receiving the same benefits.⁴⁷

Another submission to the Inquiry states that:

I am...eligible for a pharmaceutical benefit[s] entitlement card. Again my partner and child are excluded. As a result, we pay more as a family for medical expenses and medicines. This is an unfair strain on our family. It is difficult enough coping with the burden of cost associated with having a disability, let alone having to pay extra because of outdated discriminatory attitudes.⁴⁸

11.4.2 People living with chronic health conditions pay more if they are in a same-sex couple

The discrimination against same-sex couples in the PBS Safety Net particularly affects same-sex couples where one or both of the couple are living with HIV/AIDS or another chronic health condition.

In these cases, the cumulative costs of prescribed medications in any one year may be particularly high. ACON explains this impact as follows:

By excluding same-sex couples from the definition of 'de facto spouse', and thus 'family' under the National Health Act 1973, PLWHA [people living with HIV/AIDS] in same-sex relationships are required to reach the individual safety-net threshold of \$960.10 (\$253.80 for concession card holders) [\$1059 and \$274.40 respectively in 2007], 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.⁴⁹

Similarly the Australian Federation of AIDS Organisations states that:

The Medicare Safety Net and the Pharmaceutical Benefits Scheme (PBS) Safety Net are designed to assist people with meeting high medical expenses. This initiative is particularly important for people living with HIV/AIDS, who typically have high medical and pharmaceutical costs. Under current legislation, however, different thresholds apply to single people and families. The definitions of 'spouse' and 'de facto spouse' do not include people in same-sex relationships. This can have a discriminatory effect on people seeking to access healthcare.⁵⁰

11.5 Do same-sex families face problems in accessing private health insurance discounts?

During the Inquiry's consultations, some same-sex couples said they had no problems, while others said they had great problems, in obtaining family coverage in private health funds.

For example, a woman from the Blue Mountains forum noted that when she was in a same-sex relationship, she and her partner and their three children found it easy to be covered under a family policy for private health insurance.⁵¹ In another submission a member of a same-sex couple explained:

My partner and I have been together for eight years, we have six children between us. We have private health benefits which recognise us as a family.⁵²

However, another same-sex couple stated:

I have had a number of health insurance companies that would not recognise my partner and I as a couple and therefore we would have had to both pay the single rate.⁵³

The Gay and Lesbian Rights Lobby (NSW) submission highlights that uncertainty is the main problem:

My health insurance offers a couple-rate to a same-sex partner but not all of them do and they don't have to... I want legislation making some clear kind of decision about this, because a lot of the anxiety comes from not knowing where you are going. If I walk through a door can I know that my relationship will be recognised?⁵⁴

Similarly, Eilis Hughes writes in her submission:

Recently when seeking to change my health insurance, I discovered that we could not take out family insurance as a couple. The concept didn't seem to make sense to the staff at the insurance companies.⁵⁵

11.6 What other health care issues concern same-sex families?

A number of additional health care issues were raised in the oral and written submissions to the Inquiry. While the following issues are not strictly within the Inquiry's Terms of Reference, they are briefly mentioned here to highlight some of the health care issues concerning the community.

11.6.1 Treatment of a same-sex partner by hospital staff

A number of oral and written submissions to the Inquiry expressed concern about the way they had been treated in hospitals.

Some people said that hospital staff prevented them from giving medical consent in relation to their same-sex partner.⁵⁶ This is despite the fact that same-sex couples appear to have that right in some state and territory laws.⁵⁷

In Murray Bridge, South Australia, the Inquiry's forum heard from a woman who was hospitalised last year:

My partner rode in the ambulance with me and stayed with me while I received treatment. However, when consent for further treatment was needed the hospital had to find my sister. Everything goes fine until the laws kick in and then the same sex partner is excluded.⁵⁸

A woman told a story about a lesbian woman being denied the right to farewell her dying partner:

One of our lesbian friends lay ill and dying in her hospital bed. When it came time for her to die the hospital staff prevented her partner from entering her hospital room and sitting with her at the end of her life because she was not the 'spouse'.

Our friend died, alone. Her partner sat outside in the corridor prevented from being with her. She continues to suffer great distress that her life-time partner died without her comfort and without knowing she was there with her.⁵⁹

One man spoke at the Launceston Forum and described the experiences of his two daughters when accessing medical care. One is in a same-sex relationship and the other is an opposite-sex relationship:

Recently while visiting my daughter [Sacha], Anna came home from work in pain and distressed with a bad ear infection, before departing to go to the emergency room, I couldn't but notice sadly that Sacha gathered all these papers that states their relationship. Yet when we got there, that was one of the first questions asked - their relationship status - to be able to tick the right category, to which my daughter replied they are a couple and it was up to them to which category they thought was applicable.

My other daughter only has to be there with her [male] partner, no further questions are needed, and the Medicare card says it all.⁶⁰

In Newcastle a woman told a more positive story:

Another woman comments that she didn't have one scrap of trouble through months of cancer treatment for her partner. She says she was the one who was consulted by hospital staff throughout the whole process.⁶¹

Dr Samantha Hardy, Dr Sarah Middleton and Dr Lisa Butler talk about the findings of the Tasmanian Parliament's *Report on the Legal Recognition of Significant Personal Relationships*.⁶² Some of the relevant findings of the report include:

- Limitations are imposed on same-sex partners in situations involving the illness or death of their partner.
- Same-sex partners are sometimes denied visitation rights to their partner in times of medical emergencies because hospital policy generally restricts access to 'close family' and this is often determined on the basis of marital or blood ties.

- Same-sex partners are not always given the right to make decisions for their incapacitated partner, and could be excluded from the right to make decisions on behalf of a deceased partner in matters concerning organ donation and autopsies.⁶³

11.6.2 Connections between homophobia and mental health

A number of organisations wrote to the Inquiry about the link between poor mental health and the existence of homophobia and discriminatory laws. ACON put it thus:

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 depression⁶⁴ and there is significant evidence to suggest a strong correlation between homophobia and higher levels of drug and alcohol abuse.⁶⁵ 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 stigmatisation, discrimination and social exclusion experienced by GLBT Australians.⁶⁶

11.7 Do the Medicare and PBS laws breach human rights?

This chapter explains that because the definition of ‘spouse’ in Medicare and PBS legislation excludes a same-sex partner, same-sex couples miss out on additional medical subsidies which are available to opposite-sex couples.

The main finding of this chapter is that Medicare and PBS laws breach the right to non-discrimination under article 26 of the *International Covenant on Civil and Political Rights* (ICCPR).

The *Convention on the Rights of the Child* (CRC) and the *International Covenant on Economic, Social and Cultural Rights* (ICESCR) also seek to ensure that all adults and their children have equal access to health care facilities and enjoy the highest attainable standard of physical and mental health, without discrimination (CRC, articles 24, 2; ICESCR, articles 12, 2).

Further, ICESCR prohibits discrimination in the provision of the right to social security, which includes social support for medical costs (article 9, 2(2)).

Denying same-sex couples and families access to medical subsidies available to opposite-sex couples breaches all of these rights. It may also compromise the best interests of a child, if the child and his or her parents have significant medical needs (CRC, article 3(1); article 2(1)).

Chapter 3 on Human Rights Protections explains these principles in more detail.

11.8 How should the law change to avoid breaches in the future?

It is clear that same-sex couples are financially worse off than opposite-sex couples when it comes to claiming benefits under the Medicare and PBS Safety Nets. Simply put, same-sex couples have to pay much more than opposite-sex couples to get the same benefits.

The following sections summarise the cause of the problems and how to fix them.

11.8.1 Narrow definitions are the main cause of discrimination

The reason that same-sex couples are worse off than opposite-sex couples is because a 'member of a person's family' does not include a member of a same-sex family. That definition refers to a person's 'spouse'. The definition of 'spouse' refers to the definition of 'de facto spouse'. And the definition of 'de facto spouse' excludes a same-sex partner. This means that a same-sex family cannot accumulate expenses in the same way as an opposite-sex family.

The definition of 'dependent child' may include the child of a lesbian co-mother and gay co-father as well as the child of the birth parents. But in the absence of parenting presumptions or adoption, the lesbian co-mother or gay co-father may need to get a parenting order to prove the relationship. This can be expensive and complicated.

11.8.2 The solution is to amend the definitions

Chapter 4 on Recognising Relationships presents two alternative approaches to amending discriminatory definitions within federal law regarding same-sex couples.

The Inquiry's preferred approach for bringing equality to same-sex couples is to:

- retain the current terminology used in federal legislation (for example retain the term 'spouse' in the Medicare and PBS legislation)
- redefine the terms in the legislation to include same-sex couples (for example, redefine 'spouse' to include a 'de facto partner')
- insert new definitions of 'de facto relationship' and 'de facto partner' which include same-sex couples.

Chapter 5 on Recognising Children sets out how to better protect the rights of both the *children of same-sex couples* and the parents of those children.

The Inquiry recommends that the federal government implement parenting presumptions in favour of a lesbian co-mother of a child conceived through assisted reproductive technology (ART). This would mean that an ART child of a lesbian co-mother would generally qualify as a 'dependent child' (in the same way as the ART child of a father in an opposite-sex couple would qualify).

Chapter 5 also suggests that it should be easier for a lesbian co-mother and gay co-father to adopt a child. Again, if this occurred then their children would generally qualify as a 'dependent child'.

Finally, Chapter 5 suggests that federal legislation should clearly recognise the status of a person who has a parenting order from the Family Court of Australia. This would mean that a child of a gay co-father or lesbian co-mother with parenting orders would more clearly qualify as a 'dependent child'.

The following list sets out the definitions which would need to be amended according to these suggested approaches.

The Inquiry notes that if the government were to adopt the alternative approach set out in Chapter 4, then different amendments would be required.

11.8.3 A list of legislation to be amended

The Inquiry recommends amendments to the following legislation discussed in this chapter:

Health Insurance Act 1973 (Cth)

‘de facto partner’ (insert new definition)

‘de facto relationship’ (insert new definition)

‘dependent child’ (s 10AA(7) – amend to clarify the role of a parenting order; otherwise no need to amend if the child of a lesbian co-mother or gay co-father may also be recognised through reformed parenting presumptions or adoption laws)

‘member of a person’s family’ (s 10AA(1) – no need to amend if ‘spouse’ is amended and ‘dependent child’ recognises the child of a lesbian co-mother or gay co-father through reformed parenting presumptions or adoption laws)

‘spouse’ (s 10AA(7) – amend to refer to a ‘de facto partner’)

National Health Act 1953 (Cth)

‘de facto relationship’ (insert new definition)

‘de facto spouse’ (s 4 – replace with new definition of ‘de facto partner’)

‘dependent child’ (s 84B(4) – amend to clarify the role of a parenting order; otherwise no need to amend if the child of a lesbian co-mother or gay co-father may also be recognised through reformed parenting presumptions or adoption laws)

‘member of a person’s family’ (s 84B(1) – no need to amend if ‘spouse’ is amended and ‘dependent child’ recognises the child of a lesbian co-mother or gay co-father through reformed parenting presumptions or adoption laws)

‘spouse’ (s 84B(4) - replace the term ‘de facto spouse’ with the term ‘de facto partner’)

Endnotes

- 1 *Health Insurance Act 1973* (Cth), s 10AA(1); *National Health Act 1953* (Cth), s 84B(1).
- 2 *Health Insurance Act 1973* (Cth), s 10AA(7); *National Health Act 1953* (Cth), s 84B(4).
- 3 *National Health Act 1953* (Cth), s 4(1). Note that as a result of section 3(1A) of the *Health Insurance Act 1973* (Cth), the definition of 'de facto spouse' in the *National Health Act 1953* (Cth) also applies to the *Health Insurance Act 1973* (Cth).
- 4 Extract from Information Manual for call centre staff in the PBS Information Line, in D Kalisch, Deputy Secretary, Department of Health and Ageing, Correspondence to the President, Human Rights and Equal Opportunity Commission, 6 November 2006.
- 5 *Health Insurance Act 1973* (Cth), s 10AA(7); *National Health Act 1953* (Cth), s 84B(4).
- 6 For an explanation of these terms see the Glossary of Terms.
- 7 Standard words for use by departmental staff in responding to correspondence or queries regarding the PBS Safety Net Scheme, in D Kalisch, Deputy Secretary, Department of Health and Ageing, Correspondence to the President, Human Rights and Equal Opportunity Commission, 6 November 2006.
- 8 *Health Insurance Act 1973* (Cth), s 10AA(1)(b); *National Health Act 1953* (Cth), s 84B(1).
- 9 *National Health Act 1953* (Cth), s 4(1). Note that as a result of section 3(1A) of the *Health Insurance Act 1973* (Cth), the definition of 'de facto spouse' in the *National Health Act 1953* (Cth) also applies to the *Health Insurance Act 1973* (Cth).
- 10 *Health Insurance Act 1973* (Cth), s 10AC.
- 11 *Health Insurance Act 1973* (Cth), s 10ACA.
- 12 *Health Insurance Act 1973* (Cth), s 10AD.
- 13 *Health Insurance Act 1973* (Cth), s 10ADA.
- 14 *Health Insurance Act 1973* (Cth), ss 10AA, 10AC, 10ACA.
- 15 *Health Insurance Act 1973* (Cth), s 10AA.
- 16 Tasmanian Gay and Lesbian Rights Lobby, Submission 233.
- 17 Medicare Australia, *How does the Medicare safety net work?*, <http://www.medicare.gov.au/resources/medicare/1747-how-does-the-medicare-safety-net-work.pdf>, viewed 10 January 2006.
- 18 Vicki Harding, Submission 29.
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- 44 This information is current as at 1 January 2007. See Medicare Australia, *PBS Safety Net*, http://www.medicareaustralia.gov.au/yourhealth/our_services/pbs_safety_net.htm#what_to_do, viewed 23 March 2007.
- 45 This information is current as at 1 January 2007. See Medicare Australia, *PBS Safety Net*, http://www.medicareaustralia.gov.au/yourhealth/our_services/pbs_safety_net.htm#what_to_do, viewed 10 January 2007. Concession card holders include people who receive the Age Pension, Disability Support Pension, the Parenting Payment (single) and the Family Tax Benefit A amongst others. For a more detailed explanation of concession cards and various pensions and benefits, see Chapter 9 on Social Security.
- 46 Doug Pollard, Submission 1.

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- 47 Eva Battaglini, Submission 95.
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- 49 ACON, Submission 281. Note that the figures quoted in the submission were correct as of 2006. The PBS Safety Net thresholds have increased to \$1059 and \$274.40 in 2007 for general and concessional patients respectively.
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- 59 Name Withheld, Submission 150.
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CHAPTER 12: *Family Law*

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12.1 What is this chapter about?

This chapter addresses the problems facing a same-sex couple on the breakdown of their relationship.

The issue of divorce never arises for same-sex couples, since they cannot legally marry. However, a same-sex couple, like an opposite-sex de facto couple, may need the assistance of a court to resolve property and child-related issues if their relationship breaks down.

Married, opposite-sex de facto and same-sex couples can all access the federal Family Court to resolve child-related matters. But some same-sex couples will be at a disadvantage when it comes to the determination of parental responsibility and child support after a relationship breaks down.

Only married couples can access the federal Family Court to determine how to divide the property of a relationship. Same-sex and opposite-sex de facto couples must currently go to the relevant state or territory jurisdictions to decide property-related matters. Accessing two different jurisdictions creates additional costs. In addition, state and territory jurisdictions cannot consider the same range of assets when making a property settlement. Thus, de facto couples may end up with less comprehensive property settlements than those available to married couples.

New legislation proposed by the federal government should allow opposite-sex de facto couples to access the federal Family Court for property matters. However, the government has indicated that this new legislation will not assist same-sex couples. If this occurs there will be discrimination against same-sex couples as compared to opposite-sex de facto couples.

Further, discrimination regarding the care of children after relationship breakdown arises because the lesbian co-mother and gay co-father of a child is not considered a 'parent' for the purposes of determining parental responsibility or child support liability.

This chapter outlines in more detail how family law discriminates against same-sex couples when a relationship breaks down. The chapter examines the human rights breaches caused by this discrimination and recommends changes to the law in order to address those breaches.

Specifically, this chapter addresses the following questions:

- Why can't same-sex couples access the federal Family Court for property settlements?
- How are same-sex couples worse off in property settlements?
- Do both same-sex parents have access to child support?
- How is parental responsibility divided between same-sex parents on separation?
- Does family law legislation regarding separation breach human rights?
- How should family law legislation be amended to avoid future breaches?

For a discussion about the recognition of same-sex relationships, see Chapter 4 on Recognising Relationships. For a discussion about the recognition of the relationship of same-sex parents and their children, see Chapter 5 on Recognising Children.

12.2 Why can't same-sex couples access the federal Family Court for property settlements?

If a married couple separates, they can go to the federal Family Court of Australia to dissolve their marriage and resolve all their property and child-related issues. However, for constitutional reasons, de facto couples are denied access to the federal Family Court for property matters.

The effect of this constitutional anomaly is that, other than in Western Australia, a separating de facto couple with children must initiate proceedings in two different jurisdictions if their relationship breaks down.¹ They must go to the relevant state or territory court to resolve property issues, and the federal Family Court to resolve child-related issues.

12.2.1 Some states and territories have referred power to the federal government

Over the past few years NSW, Queensland, Victoria and the Northern Territory have agreed to refer their constitutional power regarding property division to the federal government.²

In other words those jurisdictions will give up their power to deal with property division for de facto couples so that all separating couples can have their property and child-related matters dealt with in one court. It is envisaged that as a result of these referrals separating de facto couples will have the same access to the federal Family Court as separating married couples.

So far, all of the constitutional referrals signed by the state and territory governments have specified that de facto same-sex relationships are to be included.³

12.2.2 The federal government will not accept referrals regarding same-sex couples

The federal government has indicated that while it intends to accept the constitutional referral regarding opposite-sex de facto couples, it does not intend to accept the referral of power regarding same-sex couples.⁴

12.3 How are same-sex couples worse off in property settlements?

At the moment, the federal Family Court can only deal with property settlements between two 'spouses'. A 'spouse' is defined as a party to a marriage.⁵

If the federal government accepts constitutional referrals of state power over property division for opposite-sex couples, separating same-sex de facto couples will be the only group of people denied access to the federal property division regime.

Instead, same-sex couples will have to use the state and territory property division regimes, which all include same-sex couples within their jurisdiction.⁶

12.3.1 The federal property division regime has many benefits

The federal property division regime has the following advantages over the state regimes. The federal property division regime:

- covers a larger pool of the couple's shared assets, including superannuation assets⁷
- tends to attribute a higher value to non-financial homemaking contributions⁸
- has broader powers to make property orders or issue injunctions against third parties, including creditors and family companies which are not in the legal control of one partner⁹
- includes broad consideration of future needs as well as past contributions when making property adjustments¹⁰
- uses informal dispute resolution systems which are cheaper and faster than the state regimes¹¹
- contains provision for periodic or lump sum spousal maintenance payments where appropriate (such as in cases where one party has a very limited earning capacity or where a party has extensive financial resources but few assets available for division).¹²

In short, the federal property division regime covers a larger pool of the couple's shared assets, can divide such assets with a far greater degree of flexibility, and takes into account a wider range of factors and circumstances of the parties during and after the relationship in making any adjustments.

12.3.2 Same-sex couples cannot access these benefits

Since it appears that same-sex couples will continue to be excluded from accessing the federal Family Court, they will remain at a disadvantage regarding property settlement.¹³ Same-sex couples with children will also face the additional cost and inconvenience of having to access two jurisdictions.

The Equal Opportunity Commission of Victoria describes the additional hurdles faced by same-sex couples as follows:

Once the Commonwealth legislates to act upon the referral of de facto spouse property matters pursuant to the Commonwealth Powers (De Facto Relationships) Act 2004 under the Family Law Act heterosexual de facto couples will be able to access the convenience of one jurisdiction to resolve their property and child matters on the event of relationship breakdown; significantly this will include access to primary dispute resolution procedures. This will result in a significant advantage to heterosexual de facto couples and the exclusion of same-sex de facto couples will cause significant detriment to them and their children.¹⁴

12.4 Do both same-sex parents have access to child support?

Generally, when a couple with children separates, one member of the couple will have primary responsibility for caring for the child and the other member of the couple will provide financial assistance to help carry out that responsibility (child support).

The *Child Support (Assessment) Act 1989* (Cth) (Child Support (Assessment) Act) provides a formula for assessing the amount of child support payable by a 'parent'.

Chapter 5 on Recognising Children notes that when children are born to a lesbian or gay couple their parents may include a birth mother, lesbian co-mother, birth father or gay co-father.¹⁵

The narrow definition of 'parent' in the Child Support (Assessment) Act means that a birth mother or birth father cannot pursue child support from the lesbian co-mother or gay co-father of a child – even if the co-parent had a parenting order to look after the child.

12.4.1 Only a birth or adoptive parent is a 'parent' for child support purposes

A 'parent' is defined under the Child Support (Assessment) Act as follows:

'parent' means:

- (a) when used in relation to a child who has been adopted--an adoptive parent of the child; and
- (b) when used in relation to a child born because of the carrying out of an artificial conception procedure--a person who is a parent of the child under section 60H of the Family Law Act 1975.¹⁶

Section 60H of the *Family Law Act 1975* (Cth) (Family Law Act) makes presumptions about who are the 'parents' of a child conceived through assisted reproductive technology (an ART child).

As discussed further in Chapter 5 on Recognising Children, section 60H of the Family Law Act presumes that the woman giving birth to the child (the birth mother) is always a 'parent' of an ART child, irrespective of whether it is her egg involved in conception.

Section 60H of the Family Law Act also presumes that the *male partner* of the birth mother (the birth father) will be the parent of the ART child if he consents to the process, irrespective of whether it is his sperm involved in conception.

However, the Family Law Act does not presume that the *female partner* of the birth mother (lesbian co-mother) is a parent of the ART child if she consents to the process.

Thus, the lesbian co-mother of an ART child will not be a 'parent' for the purposes of child support, even though the birth father of an ART child born to an opposite-sex couple will be a 'parent'.

Further, the male partner of a birth father (a gay co-father), and any other person who takes on a parenting role (social parent), will also be excluded from the definition of 'parent'. This is the case even if the social parent had a parenting order in respect of the child before the couple separated. Chapter 5 on Recognising Children explains why this may be important for many same-sex couples caring for children.

12.4.2 A lesbian co-mother and gay co-father may be an 'eligible carer'

A person will be an 'eligible carer' if he or she is:

- (a) a person who is the sole or principal provider of ongoing daily care for the child
 - (b) a person who has major care of the child
 - (c) a person who shares ongoing daily care of the child substantially equally with another person
- or
- (d) a person who has substantial care of the child.¹⁷

Therefore, a person in a same-sex couple need not be a 'parent' to qualify as an 'eligible carer'. This gives scope for any of the birth mother, birth father, lesbian co-mother, gay co-father(s) or social parent(s) with a parenting order to be an 'eligible carer'.

However, a 'parent' or 'legal guardian' (a person with a parenting order) has some control over who else may qualify as an 'eligible carer'.¹⁸ People other than a 'parent' or 'legal guardian' can only be an 'eligible carer' if:

- the child is in the person's care with the consent of the parent or legal guardian¹⁹
- or
- the child is in the care of the person without the consent of the parent or legal guardian, and the Family Court Registrar believes that it would be unreasonable for the child to be in the care of the parent or legal guardian.²⁰

12.4.3 Only a 'parent' is liable for child support

To pursue child support a person must be an 'eligible carer'.²¹ But the only person liable to pay child support is a 'parent'. Under the Child Support (Assessment) Act, there can only be one 'parent' in a same-sex couple.

Therefore, if a same-sex couple separates and the child ends up with the lesbian co-mother or gay co-father with a parenting order ('eligible carer'), that eligible carer can pursue child support from the birth mother or birth father ('parent').

But if the child ends up with a birth mother or birth father ('parent'), that parent cannot pursue the lesbian co-mother or gay co-father for child support.²²

A parent of a lesbian mother told the Inquiry that:

If separation occurs, my daughter could be left to totally supporting herself and her daughter... Ironically even fathers who don't pay maintenance are still recognised as parents.²³

A mother told the Inquiry:

I have two daughters one is four months old and one is two years old. The four month is my biological daughter and the two year old is the biological daughter of my partner. ACT law allows us both to be considered parents. But this does not help us with issues covered by Commonwealth law, for example child support on separation.²⁴

12.5 How is parental responsibility divided between same-sex parents on separation?

The division of parental responsibility after separation can have flow-on effects for the purposes of child support and other financial benefits throughout a child's life.

Some submissions to the Inquiry expressed concern about how parental responsibility is divided between same-sex parents on separation.²⁵ Changes to the Family Law Act on 1 July 2006 enhanced the rights of the people recognised as a 'parent' under that legislation.²⁶ This may disadvantage the lesbian co-mother and gay co-father who may have been caring for a child since birth.

12.5.1 Only a birth or adoptive parent is a 'parent' for family law purposes

The Family Law Act defines a parent to *include* an adoptive parent.²⁷ The definition assumes that a birth mother and birth father will be a parent. This will include the male partner (birth father) of a woman having an ART child, but exclude the female partner (lesbian co-mother).²⁸

The definition of parent will also exclude the gay co-father and any other same-sex parent who has a parenting order in his or her favour. A person with a parenting order will be one of the 'other people significant to [the child's] care, welfare and development', but not a 'parent'.²⁹

12.5.2 Spending time with a 'parent' is a primary consideration on separation

When deciding custody arrangements on separation, the Family Court must focus on a child's best interests. Under the new amendments, the child's best interests are divided into 'primary' and 'additional' considerations.³⁰

The Family Court must consider the 'benefit to the child of having a meaningful relationship with both of the child's parents' as a primary factor.³¹

The relationship between a child and any other person, including a lesbian co-mother and gay co-father, will be an 'additional' consideration for the Family Court, but not a primary consideration.³²

Therefore, the lesbian co-mother and gay co-father will be at a disadvantage when trying to gain custody of a child after separation – even if he or she has a parenting order in favour of the child, and has otherwise cared for the child since birth.

12.5.3 The narrow definition of 'parent' creates uncertainty for a child on separation

The Inquiry heard from a number of people who are concerned that the children of a same-sex couple are not adequately protected following separation.

The Action Reform Change Queensland (ARCQ) and Queensland AIDS Council comment:

[We] are aware of some same sex couples for whom ongoing contact with children is difficult for the non-biological partner following a break down of the relationship. This is exacerbated by the lack of protection at family law and in federal legislation. While the [HREOC] research paper acknowledges that some people may be recognised if they have a parenting order through the Family Court, it is understood that this is an expensive way to gain parenthood status and in practical terms may not be widely used.³³

One parent told the Inquiry of the uncertainty that can be created when a biological parent dies:

In a same-sex relationship where there's children concerned, if the biological mother does pass away, the child does not automatically get to stay with the non-biological parent...If one member of the biological mother's family comes forth to take that child out of that house, that child is gone. You would have to fight it in the Family Court – it is not a right of ours for the child to stay where it has grown up.³⁴

12.6 Does family law legislation regarding separation breach human rights?

This chapter sets out the difficulties facing same-sex families on separation.

The first problem is that same-sex (and opposite-sex) de facto couples cannot access the federal Family Court property division regime, which has significant advantages over state property regimes. New legislation proposed by the federal government would allow opposite-sex de facto couples to access the federal regime but not same-sex couples.

If this new legislation comes into force in its intended form, it will breach the right of same-sex couples to non-discrimination under article 26 of the *International Covenant on Civil and Political Rights* (ICCPR).

The second problem is that a narrow definition of 'parent' in the Family Law Act and the Child Support (Assessment) Act puts some same-sex couples at a disadvantage when it comes to the determination of parental responsibility and liability for child support. In particular, a birth mother or birth father is unable to pursue child support from a lesbian co-mother or gay co-father.

Thus, the main finding of this chapter is that the exclusionary definition of 'parent' in the Child Support (Assessment) Act and the Family Law Act breaches the right to non-discrimination under article 26 of the ICCPR.

This discrimination against same-sex parents may also result in a breach of Australia's obligations under the *Convention on the Rights of the Child* (CRC). This is because:

- the *best interests of a child* being raised in a same-sex family do not appear to be a primary consideration – if they were, a same-sex parent could pursue child support from his or her former partner and the child's relationship with both his or her same-sex parents would be a 'primary' consideration in determining custody arrangements (CRC, articles 2(1), 3(1))
- the narrow definition of 'parent' in the Child Support (Assessment) Act and the Family Law Act does not *recognise and support the common responsibilities of both* same-sex parents to fulfil child-rearing responsibilities (CRC, article 18(1), article 2(1))

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- a same-sex parent who is unable to pursue child support from his or her former partner may be at a financial disadvantage when compared to an opposite-sex parent in the same position. This amounts to *discrimination* against the child on the basis of the status of his or her parents (CRC, article 2(2))
- the narrow definition of ‘parent’ in the Family Law Act creates uncertainty for the child of a same-sex couple when their parents separate. This may amount to *discrimination* against the child on the basis of the status of his or her parents (CRC, article 2(2)).

There may also be a breach of the right to protection of the family without discrimination under the ICCPR (articles 23(1), 2(1)) and the *International Covenant on Economic, Social and Cultural Rights* (articles 10, 2(2)).

Australia’s human rights obligations to same-sex couples and families are set out in more detail in Chapter 3 on Human Rights Protections.

12.7 How should family law legislation be amended to avoid future breaches?

Same-sex families face a range of hurdles on relationship breakdown.

Same-sex and opposite-sex de facto couples are denied access to a range of property settlement mechanisms, which are available to married couples, because of constitutional limitations.

The birth parents of a child cannot pursue child support against the lesbian co-mother or gay co-father. And the lesbian co-mother and gay co-father do not have equal consideration as the birth parents in determining custody arrangements.

The following sections summarise the cause of the problems and how to fix them.

12.7.1 Narrow definitions of ‘parent’ are the main problem in child support and family law on separation

The narrow definition of ‘parent’ in the Child Support (Assessment) Act and the failure to recognise the lesbian co-mother of an ART child as a ‘parent’ under the Family Law Act creates discrimination against same-sex parents and children. These definitions should change.

The problem of denying same-sex (and opposite-sex de facto) couples access to the federal property division regime is caused by constitutional issues. But it can be rectified if the federal government accepts the referral of constitutional power being offered by state governments.

12.7.2 The solution is to amend the definitions and recognise both same-sex parents

Chapter 5 on Recognising Children sets out how to better protect the rights of both the *children of same-sex couples* and the parents of those children.

The Inquiry recommends that the federal government implement parenting presumptions in favour of a lesbian co-mother of an ART child. This would mean that a lesbian co-mother would automatically be a ‘parent’ (in the same way as a father of an ART child is a ‘parent’).

Chapter 5 also suggests that it should be easier for a lesbian co-mother and gay co-father to adopt a child. Again, if this occurred then they would automatically qualify as a ‘parent’.

The Inquiry also recommends that the federal government pass legislation accepting the referral of state power regarding property division between opposite-sex *and* same-sex separating couples.

The following list sets out the definitions which would need to be amended according to these suggested approaches.

12.7.3 A list of legislation to be amended

The Inquiry recommends amendments to the following legislation discussed in this chapter:

Family Law Act 1975 (Cth)

Parenting presumptions for an ART child (s 60H – amend to include a parenting presumption in favour of a lesbian co-mother)

‘parent’ (s 4 – no need to amend if s 60H is amended and a gay co-father or lesbian co-mother may be recognised through reformed adoption laws)

Child Support (Assessment) Act 1989 (Cth)

‘eligible carer’ (s 7B – no need to amend if ‘parent’ recognises a gay co-father or lesbian co-mother through reformed parenting presumptions or adoption laws)

‘parent’ (s 5 – no need to amend if section 60H of the Family Law Act is amended and a gay co-father or lesbian co-mother may be recognised through reformed adoption laws)

12.7.4 New legislation should accept constitutional referrals regarding property division for separating same-sex couples

Same-sex and opposite-sex de facto couples should both have access to the federal Family Court for property and child-related matters. This requires:

- all states to refer their constitutional powers to the federal government regarding same-sex and opposite-sex de facto couples
- the federal government to accept those referrals.

Once those referrals are accepted there may need to be following consequential amendments:

Family Law Act 1975 (Cth)

‘spouse’ (s 90MD – amend to include a person in a ‘de facto relationship’)

‘de facto relationship’ (insert new definition)³⁵

Endnotes

- 1 Western Australia administers its own Family Court. Since the introduction of the *Family Court Amendment Act 2002* (WA), the Western Australian Family Court administers child-related matters and property settlements for married and de facto (including same-sex) couples.
- 2 *Commonwealth Powers (De Facto Relationships) Act 2003* (NSW); *Commonwealth Powers (De Facto Relationships) Act 2003* (Qld); *Commonwealth Powers (De Facto Relationships) Act 2004* (Vic); *De Facto Relationships (Northern Territory Request) Act 2003* (NT).
- 3 *Commonwealth Powers (De Facto Relationships) Act 2003* (NSW), ss 3-4; *Commonwealth Powers (De Facto Relationships) Act 2003* (Qld), ss 3-4; *Commonwealth Powers (De Facto Relationships) Act 2004* (Vic), ss 3-4; *De Facto Relationships (Northern Territory Request) Act 2003* (NT), ss 3-4.
- 4 Gabrielle Mackey, A/g Assistant Secretary, Human Rights Branch, Attorney-General's Department, to Vanessa Lesnie, Director, Human Rights Unit, Human Rights and Equal Opportunity Commission, 16 November 2006.
- 5 *Family Law Act 1975* (Cth), s 90MD.
- 6 See J Millbank, 'Recognition of Lesbian and Gay Families in Australian Law – Part One: Couples', *Federal Law Review*, vol 34, no 1, 2006, p39. Note that the *Statutes Amendment (Domestic Partners) Act 2006* (SA) had not commenced as at 10 April 2007. When the Act does commence, the SA property division regime will apply to same-sex couples.
- 7 State regimes are unable to divide superannuation assets, which often make up a significant portion of a couples' asset pool. Since 2002 the *Family Law Act 1975* (Cth) grants the power under pt VIII B to deal with superannuation funds of the parties to a marriage. Some state superannuation legislation specifies that state public superannuation benefits are an asset for the purposes of federal family law property division schemes. A same-sex partner is thereby explicitly excluded from accessing this benefit on separation: J Millbank, 'Recognition of Lesbian and Gay Families in Australian Law – Part One: Couples', *Federal Law Review*, vol 34, no 1, 2006, pp39-40. See also *Judges Pensions Act 1971* (SA), pt 2A; *Parliamentary Superannuation Act 1974* (SA), pt 4A; *Police Superannuation Act 1990* (SA), pt 5B; *Southern State Superannuation Act 1994* (SA), pt 5A; *Superannuation Act 1988* (SA), pt 5A; *Solicitor-General Act 1983* (Tas), sch 1; *Administrators Pensions Act* (NT), s 9; *Superannuation Act* (NT), pt 3, Division 3; *Superannuation Guarantee (Safety Net)* (NT) s 7.
- 8 See J Millbank, 'Recognition of Lesbian and Gay Families in Australian Law – Part One: Couples', *Federal Law Review*, vol 34, no 1, 2006, p39. See also L Willmott, B Matthews and G Shoebridge, 'De facto Relationships Property Adjustment Law – A National Direction', *Australian Journal of Family Law*, vol 17, January 2003; *In the Marriage of Waters and Jurek*, (1995) 19 FamLR 190; B Fehlberg, 'With all my Worldly Goods I Thee Endow?: The Partnership Theme in Australian Matrimonial Property Law', *International Journal of Law, Policy and the Family*, vol 19, no 2, 2005, pp176 -193.
- 9 J Millbank, 'Areas of Federal Law that Exclude Same-Sex Couples and their Children', Inquiry Research Paper, September 2006, available at <http://www.humanrights.gov.au/samesex/index.html>, p49. See *Family Law Act 1975* (Cth), ss 90AC-AF.
- 10 *Family Law Act 1975* (Cth), ss 75(2), 79. Only half of the state and territory regimes consider any form of future needs, and not all do so as broadly as the federal regime. Tasmania and the ACT are the broadest: see *Domestic Relationships Act 1994* (ACT), s 15(1)(e); *Relationships Act 2003* (Tas), ss 40(1)(e), 47.
- 11 For example, family dispute resolution and family arbitration are available at the federal Family Court: *Family Law Act 1975* (Cth), ss 10F, 10L.
- 12 *Family Law Act 1975* (Cth), s 75(2). Spousal maintenance provisions vary between states and territories and in some cases can be more restrictive than the federal *Family Law Act 1975* (Cth). See *Property (Relationships) Act 1984* (NSW), ss 26-27; *Evans v Marmont* (1997) 42 NSWLR 70 at 78-79; *De Facto Relationships Act 1991* (NT), ss 24, 26; *Domestic Relationships Act 1994* (ACT), ss 18-19. In Tasmania see *Relationships Act 2003* (Tas), s 47. Queensland, South Australia and Victoria have no maintenance provisions for de facto couples at all: *Property Law Act 1958* (Vic); *De Facto Relationships Act 1996* (SA); and *Property Law Act 1974* (Qld).

- 13 See also Associate Professor Jenni Millbank, Submission 27a; Australian Lawyers for Human Rights, Submission 286; Dr Samantha Hardy, Dr Sarah Middleton and Dr Lisa Butler, Submission 125; Gay and Lesbian Rights Lobby (NSW), Submission 333; Human Rights Law Resource Centre, Submission 160; Kingsford Legal Centre, Submission 309; Law Institute of Victoria, Submission 331.
- 14 Equal Opportunity Commission of Victoria, Submission 327.
- 15 For an explanation of these terms see the Glossary of Terms.
- 16 *Child Support (Assessment) Act 1989* (Cth), s 5.
- 17 *Child Support (Assessment) Act 1989* (Cth), s 7B(1).
- 18 There is no definition of 'legal guardian' in the *Child Support (Assessment) Act 1989* (Cth). 'Guardianship' is a term that has not been used for some years in the *Family Law Act 1975* (Cth), where it was replaced by the concept of 'parental responsibility'. By implication, it seems likely that a person with parenting orders granting them sole or shared parental responsibility under the *Family Law Act 1975* (Cth) would be taken as a 'legal guardian' for the purposes of the *Child Support (Assessment) Act 1989* (Cth). See *Family Law Act 1975* (Cth), ss 61B, 61D, 64B(1).
- 19 *Child Support (Assessment) Act 1989* (Cth), s 7B(2).
- 20 *Child Support (Assessment) Act 1989* (Cth), s 7B(3).
- 21 *Child Support (Assessment) Act 1989* (Cth), s 25.
- 22 The only avenues available would be to pursue a promissory estoppel claim or a limited maintenance claim under state property law – both avenues are expensive and uncertain. See *W v G* (1996) 20 Fam LR 49. Under the *Property (Relationships) Act 1984* (NSW), s 27, maintenance is only available on very limited grounds.
- 23 Speaker, Launceston Public Forum, 25 September 2006.
- 24 Liz, Canberra Hearing, 20 November 2006. See also Inner City Legal Centre, Submission 292; The Hon. Penny Sharpe MLC, Submission 341.
- 25 See also Australian Lawyers for Human Rights, Submission 286; Coalition of Activist Lesbians, Submission 171; Good Process, Submission 284; The Hon. Penny Sharpe MLC, Submission 341.
- 26 *Family Law Amendment (Shared Parental Responsibility) Act 2006* (Cth).
- 27 *Family Law Act 1975* (Cth), s 4. See further Chapter 5 on Recognising Children.
- 28 *Family Law Act 1975* (Cth), s 60H.
- 29 *Family Law Act 1975* (Cth), s 60B(2).
- 30 *Family Law Act 1975* (Cth), s 60CC.
- 31 *Family Law Act 1975* (Cth), s 60CC(2)(a).
- 32 *Family Law Act 1975* (Cth), s 60CC.
- 33 Action Reform Change Queensland and Queensland AIDS Council, Submission 270a.
- 34 Adelaide Public Forum, 28 August 2006.
- 35 See Chapter 4 on Recognising Relationships.



CHAPTER 13:

Superannuation

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13.1 What is this chapter about?

This chapter focuses on discrimination against same-sex couples and their families in the context of superannuation.

Superannuation is one of the main ways of saving for retirement. It is designed to provide financial security for individuals and their families in retirement; or when a person dies unexpectedly.

Superannuation is often a person's largest asset apart from the family home. Most people expect that their superannuation entitlements will be inherited by a partner, children or other dependants. But for people in same-sex couples and families, this is not always the case.

The same-sex partner of a member of a private superannuation fund may receive superannuation death benefits if he or she can establish an 'interdependency relationship' with, or financial dependence on, the deceased member of the fund. However, the 'interdependency' and financial dependence categories impose more onerous qualifying criteria than for an opposite-sex de facto couple in the same position.

The same-sex partner of a federal government public servant will not get any direct access to superannuation death benefits, unless his or her partner joined the public service after 1 July 2005. This is because a same-sex partner does not qualify as a 'spouse' under the relevant legislation.

Further, a same-sex partner may not get the same tax benefits for superannuation contributions and earnings as an opposite-sex partner (in either private or federal government funds).¹ Some tax concessions flow onto 'dependants' who inherit superannuation death benefits and this may include a same-sex partner in some circumstances. However, other tax concessions are only available to a 'spouse'. The definition of 'spouse' under the relevant tax legislation and federal government superannuation schemes excludes a same-sex partner.

Finally, the child of a same-sex couple may not be entitled to the same superannuation benefits and tax concessions as a child of an opposite-sex couple. This is because of the definition of 'child' in the relevant legislation.

This chapter explains how private, federal and state superannuation schemes distribute benefits to same-sex couples and families. The chapter commences with a discussion of superannuation death benefits as this was the issue most frequently raised in submissions to the Inquiry. It also addresses a range of other superannuation entitlements and tax concessions which put same-sex couples at a significant financial disadvantage before and after retirement.

The chapter finds that the discrimination against same-sex couples in superannuation laws amounts to a breach of human rights. It then goes on to recommend amendments to the laws in order to avoid future discrimination.

Specifically the chapter addresses the following questions:

- Can the surviving same-sex partner of a federal public servant access superannuation death benefits?

- Can the surviving same-sex partner of a member of a state public sector superannuation scheme access member death benefits?
- Can the surviving same-sex partner of a private superannuation scheme member access superannuation death benefits?
- Can a surviving same-sex partner access death benefit tax concessions?
- Can a same-sex couple take advantage of superannuation contributions splitting?
- Can a same-sex couple access the superannuation spouse tax offset?
- Can the surviving same-sex partner of a judge access a judicial pension?
- Can the surviving same-sex partner of a Governor-General access an allowance?
- Do superannuation laws breach human rights?
- How should the law be changed to avoid future human rights breaches?

13.2 Can the surviving same-sex partner of a federal public servant access superannuation death benefits?

One of the main purposes of superannuation schemes is to encourage savings during life which will support a person's family after he or she dies. Superannuation law ensures this support by providing for the payment of death benefits directly to the deceased's dependants.²

However, the same-sex partner of a federal government public servant is not entitled to death benefits, unless the deceased joined the public service after 1 July 2005. This is because they do not qualify as a 'spouse' or a person in a 'marital relationship' under any of the various statutes which govern the relevant federal government superannuation schemes. In comparison, an opposite-sex de facto partner will qualify under all relevant legislation.

Further, because of the definition of 'child', a person born to a same-sex couple will generally only qualify for death benefits if the child's birth mother or birth father dies. The child will usually not qualify for death benefits on the death of his or her lesbian co-mother or gay co-father.

13.2.1 All but one federal superannuation scheme discriminates against same-sex families

The following Commonwealth government superannuation schemes exclude the surviving partners of a same-sex couple from receiving death benefits. They may also exclude the child of a lesbian co-mother and gay co-father:

- Commonwealth Superannuation Scheme (CSS)
- Public Sector Superannuation Scheme (PSS)
- Defence Forces Retirement and Death Benefits Scheme (DFRDB)
- Military Superannuation and Benefits Scheme (MSBS)

- Parliamentary Contributory Superannuation Scheme (PCSS)
- Judges' Pension Scheme

Table 1 at the end of this chapter summarises the legislation governing each federal superannuation scheme, the definitions which exclude a surviving same-sex partner or child, and the benefits for which same-sex couples are ineligible because of those definitions.

The only federal superannuation scheme which does not discriminate against a surviving same-sex partner is the Public Sector Superannuation Accumulation Plan (PSSap).³ This federal scheme covers employees hired on or after 1 July 2005. The PSSap Trust Deed has adopted the 'interdependency relationship' category, which is discussed in the context of private superannuation schemes in the following sections.⁴

13.2.2 'Spouse' and 'marital relationship' exclude a same-sex couple

The cause of the discrimination against a surviving same-sex partner lies in the various legislative provisions which define a 'spouse' or a person in a 'marital relationship'.

By way of example, these terms are examined in the context of the definitions in the *Superannuation Act 1976* (Cth) (Superannuation Act 1976) which governs the Commonwealth Superannuation Scheme (CSS).

Under that legislation, a person will be entitled to death benefits if the person is a 'spouse who survives a deceased person'. This means that the person must have had a 'marital relationship' with the deceased.⁵

A person will have had a 'marital relationship' if:

...the person ordinarily lived with that other person as that other person's husband or wife on a permanent and *bona fide* domestic basis at that time.⁶

In 1994, Mr Gregory Brown applied for the spouse benefit when his same-sex partner died. When he was denied the benefit he appealed to the Administrative Appeals Tribunal. In considering whether this definition could include a surviving same-sex partner, the Tribunal held that:

There is no doubt that the applicant and [his same-sex partner] had a close marriage-like relationship and that they conformed to the requirements of sections 8A *in all respects except for their gender*.⁷ (emphasis added)

Thus the definitions of 'spouse' and 'marital relationship' under the various federal superannuation schemes require the couple to be of the opposite-sex.

13.2.3 Only a 'spouse' can access a reversionary pension

Many federal government superannuation schemes offer death benefits to the surviving 'spouse' or 'child' either as a reversionary pension or a lump sum payment. A reversionary pension is usually worth much more to the survivors than a lump sum.

However, if there is no qualifying spouse or child, a lump sum payment can be made to an estate.

A same-sex partner can only ever inherit a death benefit through the estate of his or her partner. So a same-sex partner will only ever qualify for an amount equal to the lump sum. And a superannuation lump sum payment made to a non-dependant through an estate is taxed more heavily than a lump sum payment made directly to a dependant (see further section 13.5 below).

Gary Fan and Wayne Lodge clearly realised this predicament:

...we are both members of the PSS (a Comsuper administered defined benefit fund), which expressly denies recognition of each other as significant dependents for the purposes of pensions, death benefits etc. by defining a spouse as a member of the opposite sex. Should one of us die, then we would only be able to inherit the death benefit via our wills/estate, with a much higher taxation treatment of that benefit.⁸

13.2.4 Negative financial consequences for federal public servants

Good Process provide an example demonstrating that a lump sum paid to an estate is less valuable to a dependant than a reversionary pension:

If there are no other eligible beneficiaries, a lump sum can be paid to the estate and distributed to the same-sex partner. However, the lump sum is worth far less than a ComSuper pension.

For example, a \$500,000 lump sum could buy a commercial pension of \$23,697 (male 55 year old). However, investing a lump sum would mean taking on an investment risk and would involve management of the investment and payment of all associated investment fees.

In contrast, as a surviving 'eligible spouse' of a ComSuper PSS member, a notional \$500,000 lump sum would entitle the person to a guaranteed pension of \$30,454 *fully indexed for their entire life* (67% of the original member's pension if they stayed in the scheme until age 60). No fees are charged by ComSuper to manage the pension.⁹

The Association of Superannuation Funds of Australia outline the impact of discrimination in the CSS both when a member dies in service and when the member dies in the pension phase.

[If a]... member dies in service, their spouse... would receive an indexed pension and the option of a lump-sum or a non-indexed pension. The same-sex partner ... of a member who dies in service does not receive a pension in the event of the death of their partner. If there is no eligible beneficiary a lump sum will be paid to the estate of the deceased person... The lump sum paid from an estate may be taxed unless the recipient can prove financial dependency under the [*Income Tax Assessment Act 1936* (Cth)]. The lump sum may not be sufficient to purchase [the equivalent of a pension] with annual payments, security and fees comparable to the CSS.

A 55 year old CSS member (with a spouse aged 55), dies in service after 20 years service. The member has a member financed benefit of \$100,000 and a Superannuation Guarantee component of \$20,000 and was on a salary of \$70,000 at date of death. The member's spouse may have the option of an indexed pension of \$23,450 and a lump sum of \$100,000 or a pension of \$32,830 (\$23,450 indexed and \$9,830 non-indexed). If the member instead had a same-sex partner there would have been no benefit entitlement but a lump sum of \$120,000 would be payable to the member's estate. This lump sum would purchase a lifetime indexed pension/annuity of approximately \$5690 from a commercial provider.¹⁰

In other words, the surviving partner of a same-sex couple might receive approximately \$27,000 per year less than the member of an opposite-sex couple.

Where the... member dies [after retirement while receiving a pension], their spouse would receive a reversionary pension equivalent to 67% of the deceased member's pension. If there is no spouse or eligible child reversionary beneficiary, there is no benefit payable to any other person or to the estate.

On retirement, a CSS pensioner member aged 65, with 30 years service and on a final salary of \$70,000 took their whole entitlement to a lifetime pension as a part indexed and part non-indexed pension. The annual pension is \$49,000 (\$35,000 indexed pension plus \$14,000 non-indexed pension). On their death, their spouse would receive a lifetime pension of \$32,830 (part indexed and part non-indexed pension), or 67% of the entitlement the pensioner was receiving at their death. If the pensioner has a same-sex partner, that partner would receive no entitlement and no residual benefit would be payable to the pensioner's estate.¹¹

So the surviving partner of a same-sex couple would receive nothing, while the surviving partner of an opposite-sex couple would receive \$32 830 per year.

13.2.5 Negative personal impact on federal public servants

A considerable number of submissions to the Inquiry expressed concern about the discriminatory treatment of same-sex couples by federal government superannuation funds. For example, the Gay and Lesbian Rights Lobby (NSW) told the Inquiry that:

Despite a commitment from the Government, public sector funds have not incorporated the category of 'interdependency', meaning that public sector and military employees who are in a same-sex relationship cannot nominate their same-sex partner of their beneficiary for any super death benefits. Instead they must distribute their benefit to their partner through their estate, which attracts a higher rate of tax.¹²

People still working for the federal government expressed concern that they could not name their partner as a beneficiary, that the only way their partner could receive their superannuation benefit was as a lump sum payment through their estate. For example:

[I] soon discovered that I was unable to join another superannuation scheme, and after contacting the PSS, it was confirmed that I could not put my same-sex partner down as a beneficiary. I was left with no choice but to contribute to the PSS and put my mother as my beneficiary. I write to you to highlight the real consequences that the Commonwealth's active discrimination of people in same-sex relationships have had in my life. I felt sick when I realised that once again the loving and supportive relationship I had with my same-sex partner, was not supported by the legal and social systems under which I conduct my daily life. It is extremely unnerving to not feel the protection of the state, and subsequently the approval of society.¹³

Retired fund members were also acutely aware of their predicament. For example Barbara Guthrie and Maureen Kingshott said:

In recent years, we have each commuted our Commonwealth PSS superannuation to a pension. We are thus directly affected by the Commonwealth's failure to extend the 2004 amendment broadening the definition of 'dependant' to its own superannuants in same-sex relationships. We understand that this means that when one of us dies, the other will not be entitled to receive a reversionary pension.¹⁴

Another federal government retiree said:

I retired six years ago after [many] years in the Commonwealth Public Service. The Commonwealth Superannuation Scheme provides for a death benefit to be paid to a spouse if he/she has had a 'marital relationship' at the time of the superannuant's death. I understand that the benefit would be a pension based on 67% of my 'potential invalidity entitlement'. Unfortunately for my male partner, a marital relationship is restricted to two people of the opposite sex. If my partner was female and we were married or had lived together in a permanent and bona fide relationship for at least 3 years, he'd qualify. The criteria that is used to determine that a marital relationship exists covers the length of the relationship, financial dependence, children, and joint property ownership. We would have no trouble meeting these criteria if the definition of spouse was extended to a same-sex partner. Apart from children, our lives are very similar to our heterosexual neighbours. The main difference is that we have no children. We have had a loving, committed, supportive relationship for [a substantial period of time]. It's simply unfair and discriminatory that we don't have equality with my straight retired colleagues.¹⁵

Other submissions expressed a similar degree of frustration at the manner in which federal government superannuation funds discriminated against them:

As a federal public servant, I [name withheld] am required [to] pay superannuation into either PSS or CSS (I am with PSS), but I am unable to nominate my partner as beneficiary as these schemes do not recognise same sex relationships. I have willed my superannuation to my partner [name withheld] in the event of my death, but whether that occurs will only be seen should I die. Why do Comsuper schemes not allow same sex couples to nominate their partners as beneficiaries? If I had personal superannuation (I am entitled to, but don't see the point in splitting super across multiple funds – particularly when the Comsuper schemes have a guarantee of no negative returns) I could nominate [my partner], but not so in the scheme I am forced by law to be part of. The law says I must pay into the scheme and also says – “your same sex partner will not be getting any of it”. How unfair is that?¹⁶

Given the age of my partner and myself, the possibility of one of us dying in the next ten years is not insignificant. If that happens, the surviving partner will not receive any death benefit payments from the deceased partner's superannuation. I could accept that if other members of those schemes faced the same dilemma, but of course they do not. Former military or public service members who have a partner of the opposite sex automatically receive death benefit entitlements... Granting me and my partner superannuation death benefits will not bring about the collapse of my neighbours' marriages, nor lower their income, nor make their roses wilt. There is no logical reason to maintain this discrimination; it is being maintained out of ideological spite... We are all citizens and there should not be one superannuation law for my brother and a different superannuation law for me.¹⁷

13.2.6 Federal government budget concerns

Several submissions to the Inquiry reported correspondence with the Minister for Finance regarding discriminatory federal government superannuation funds.¹⁸

However, correspondence provided to the Inquiry by the Superannuated Commonwealth Officers Association, indicates that budgetary implications need to be examined before any decision is made:

The issue of extending eligibility for death benefits in [the CSS and the PSS] to persons in an interdependency relationship with a scheme member is being examined. However, because of the design of these schemes a number of technical matters and also Budgetary considerations need to be fully examined before any decision could be made.¹⁹

Another submission to the Inquiry reported similar correspondence with the Minister for Finance:

I also have a letter from Senator Minchin addressed to the both of us which basically states that even taking the “interdependent relationship” avenue for giving [name withheld] [my partner] access to my PSS death benefit, the federal government was of the opinion that the cost of allowing this (ie.. allowing same sex couples equality under Comsuper rules) was far too great.²⁰

13.3 Can the surviving same-sex partner of a state public sector superannuation scheme member access death benefits?

It appears to the Inquiry that same-sex couples can now generally access the same benefits as opposite-sex couples under state and territory public sector superannuation legislation. This is because of general reforms recognising same-sex couples under state and territory law (see further Chapter 4 on Recognising Relationships).

However, research indicates that there may still be some discriminatory definitions in the legislation listed below. The Inquiry has not had sufficient resources to investigate whether there has been subsequent law or policy removing any remaining discriminatory impact of this legislation. Further, the Inquiry has not had the resources to investigate whether the children of same-sex couples may be impacted by this legislation.

The Inquiry therefore urges all state and territory authorities to review this legislation, and any other superannuation legislation, to ensure the elimination of any discrimination which may still exist.

New South Wales

- *Coal and Oil Shale Mine Workers (Superannuation) Act 1941* (NSW)
- *Local Government and Other Authorities (Superannuation) Act 1927* (NSW)
- *New South Wales Retirement Benefits Act 1972* (NSW)
- *Public Authorities Superannuation Act 1985* (NSW)
- *Transport Employees Retirement Benefits Act 1967* (NSW)

Victoria

- *Coal Mines (Pensions) Act 1958* (Vic)

Western Australia

- *Superannuation and Family Benefits Act 1938* (WA)

In addition, the Equal Opportunity Commission of Victoria (EOCV) pointed out to the Inquiry that even though discrimination has been removed for a same-sex partner who died after the reforms:

...the new, non-discriminatory provisions only apply to members who 'become entitled' to superannuation benefits or pensions (that is, when their super entitlements vest) after the amendments came into operation. Therefore members who "became entitled to their benefits" prior to the Relationships Acts amendments (either by retiring and in receipt of a pension or death [benefit]) could not have their benefits or entitlements subsequently vest with their same-sex partners. This means that discrimination still occurs where, for example, a same-sex couple member who retired prior to the amendments commencing, was receiving a pension from his or her scheme and dies after the amendments commenced would be prohibited from having a reversionary pension or other benefit pass to their surviving same-sex domestic partner.²¹

The EOCV argues that:

Provisions enabling reversionary pensions or death benefits to vest with domestic partners should apply by reference to the date of death of a superannuant or pensioner and not the date a super member became entitled to their benefits. Furthermore, a scheme should be established to enable provision for bereaved same-sex partners in necessitous circumstances where the past discriminatory laws denied them the super benefits that would otherwise have accrued or reverted to them had they been in a heterosexual relationship.²²

Similar provisions exist in superannuation legislation in other states and territories.²³

13.4 Can the surviving same-sex partner of a private superannuation scheme member access superannuation death benefits?

The *Superannuation Industry (Supervision) Act 1993* (Cth) (Superannuation Industry Act) governs who can receive a death benefit in private superannuation schemes.

The Superannuation Industry Act highlights that one of the main purposes of superannuation is to provide death benefits directly to the 'dependant' of a deceased superannuation member.²⁴ The federal government seeks to encourage contributions to superannuation schemes by providing significant tax concessions for death benefits paid to a dependant directly or via the estate of the deceased fund member.

Since 1 July 2004, the Superannuation Industry Act has provided that a same-sex partner may qualify as a 'dependant' if the couple meets the criteria for an 'interdependency relationship' or if he or she can establish financial dependency on the deceased. A member of an opposite-sex couple will qualify as a 'dependant' if he or she meets the criteria of a 'spouse'.

A child born to an opposite-sex couple will also qualify as a 'dependant'. But a child born to a same-sex couple will only qualify as the 'dependant' of the birth mother or birth father (not the lesbian co-mother or gay co-father) unless he or she can establish financial dependency on the deceased.

The same-sex partner or child of a deceased superannuation member who is not a dependant of the deceased could also receive death benefits through the estate of the deceased (if no other person qualified as a 'dependant'). However, any such payment would only be made at the discretion of the trustee. Further, only a lump sum payment can be paid to the estate and this is generally worth less than a reversionary pension that can be paid to a 'dependant'. Further, a death benefit paid to an estate will only attract the tax concessions available to benefits paid directly to a 'dependant' under superannuation legislation if the recipient is

also considered a ‘dependant’ under the relevant taxation legislation.²⁵ Thus it is financially important for same-sex families to qualify as a ‘dependant’ in the same way as opposite-sex families.

13.4.1 A same-sex partner may be a ‘dependant’ for the purposes of death benefits in private funds

The definition of ‘dependant’ in the Superannuation Industry Act includes:

- a ‘spouse’ of the deceased person²⁶
- a ‘child’ of the deceased person²⁷
- a person in an ‘interdependency relationship’ with the deceased person²⁸
- a dependant in the ordinary sense of the word, generally referring to a person who was partly or wholly financially dependent on the deceased.²⁹

(a) *A same-sex partner cannot be a ‘spouse’*

Under the Superannuation Industry Act, a ‘spouse’ includes a person who:

although not legally married to the person, lives with the person on a genuine domestic basis as the husband or wife of the person.³⁰

As noted above, the Administrative Appeals Tribunal has held that a reference to ‘husband or wife’ requires the couple to be of the opposite-sex.³¹

Furthermore, the Superannuation Complaints Tribunal believes that any attempt to amend a superannuation trust deed to include same-sex partners within the definition of ‘spouse’, would potentially breach the Superannuation Industry Act.³²

(b) *A same-sex partner may be in an ‘interdependency relationship’*

In July 2004 both the Superannuation Industry Act and the *Income Tax Assessment Act 1936* (Cth) (Income Tax Assessment Act 1936) were amended to introduce the category of ‘interdependency relationship’ within the definition of ‘dependant’. This opened the door for same-sex partners to qualify as a ‘dependant’ if they could not establish financial dependency.

However, it is important to note that although these amendments *permit* a superannuation trustee to include same-sex couples by adopting the category of ‘interdependency relationship’, the law does *not require* them to do so.³³ Same-sex couples may therefore still be at a disadvantage in some superannuation trust deeds.

Further, the amendments in the Superannuation Industry Act apply to private superannuation funds only. The interdependency relationship category does not apply to most federal government superannuation schemes, as discussed above.

Finally, as discussed below, a same-sex partner may have a harder time qualifying as a person in an ‘interdependency relationship’ than an opposite-sex partner has in qualifying as a ‘spouse’.

Nevertheless, same-sex couples may qualify for death benefits under the following definition of ‘interdependency relationship’:

2 persons (whether or not related by family) have an *interdependency relationship* if:

- (a) they have a close personal relationship; and
- (b) they live together; and
- (c) one or each of them provides the other with financial support; and
- (d) one or each of them provides the other with domestic support and personal care.³⁴

This definition is used both in the Superannuation Industry Act and relevant tax law (discussed in section 13.5 below).

(c) A same-sex partner may be ‘financially dependent’

According to the Superannuation Complaints Tribunal, the definition of ‘dependant’ in both the Superannuation Industry Act and the Income Tax Assessment Act 1936 extends to those who are ‘financially dependent’, in the ordinary meaning of ‘dependant’.³⁵

This category of financial dependency may continue to be important for surviving same-sex partners where a fund has not adopted the interdependency provisions. Further, in some cases it may be easier to prove financial dependency than an ‘interdependency relationship’.

The Association of Superannuation Funds of Australia (ASFA) outlines what it believes is required for a person to be ‘financially dependent’:

- unless the trust deed provides otherwise, partial financial dependency is sufficient
- unless the trust deed provides otherwise, financial interdependency is sufficient
- a person does not have to prove they were in financial need to establish dependency
- the mere provision of gifts and loans does not establish financial dependency
- if a relationship has broken down, but there is still some degree of financial dependency, a claimant may not qualify as a spouse, but would possibly qualify as a financial dependant.³⁶

The Australian Taxation Office may apply a stricter approach to financial dependency. In some cases, significant or full financial dependency is required: ‘where a person is wholly or substantially maintained financially by another person’.³⁷

(d) A ‘child’ generally includes a birth child only

‘Child’ is defined in the Superannuation Industry Act and the Income Tax Assessment Act 1936 to include an adopted child, step-child or ex-nuptial child.³⁸

Chapter 5 on Recognising Children notes that when children are born to a lesbian or gay couple, their parents may include a birth mother, lesbian co-mother, birth father or gay co-father(s).³⁹

Chapter 5 also explains that definitions of ‘child’, like those in the Superannuation Industry Act and the Income Tax Assessment Act 1936, will generally *include* the child of a birth mother or birth father but *exclude* the child of a lesbian co-mother or gay co-father (in the absence of adoption).⁴⁰

The children of a lesbian co-mother or gay co-father may be able to claim a death benefit as a ‘dependant’ if they are financially dependent on the deceased co-mother or co-father.⁴¹ However, the child of a birth mother or birth father will automatically qualify whereas the child of a lesbian co-mother or gay co-father will have to prove financial dependence.

13.4.2 It is harder to prove an ‘interdependency relationship’ than a de facto ‘spouse’ relationship

The main way a same-sex partner will qualify as a dependant for superannuation purposes is through proving the existence of an ‘interdependency relationship’.

Several submissions to the Inquiry suggest that both the criteria and the process for proving an ‘interdependency relationship’ are unduly onerous. They highlight that it is more difficult to prove an ‘interdependency relationship’ than to prove an opposite-sex married or de facto relationship for the purpose of qualifying as a ‘spouse’.⁴²

(a) *General criteria to prove an opposite-sex partner is a ‘spouse’*

In the case of a married person, a copy of the marriage certificate is sufficient proof that a person is a ‘spouse’ and therefore a ‘dependant’.⁴³

A trustee of a superannuation fund needs to be satisfied that a member of an opposite-sex de facto couple is in a ‘genuine domestic relationship’. The following criteria are considered relevant in making this assessment:

- (a) the duration of the relationship;
- (b) the nature and extent of the common residence;
- (c) whether or not a sexual relationship existed;
- (d) the degree of financial interdependence, and any arrangements for support, between or by the parties;
- (e) the ownership, acquisition and use of property;
- (f) the procreation of children;
- (g) the performance of household duties;
- (h) the degree of mutual commitment and support;
- (i) reputation and ‘public’ aspects of the relationship.⁴⁴

These criteria are not listed in the Superannuation Industry Act but were developed through case law. No one of the above criteria is determinative of the existence of the relationship. The Superannuation Complaints Tribunal adopts the common law interpretation of these criteria which generally requires that the couple must live together.⁴⁵

(b) Prescriptive criteria to prove that a same-sex partner is in an 'interdependency relationship'

The criteria for establishing an 'interdependency relationship' is much more prescriptive than the general criteria for proving a genuine domestic relationship for opposite-sex couples.

A same-sex couple must prove all of the criteria set out in the definition of 'interdependency relationship' in the Superannuation Industry Act. This means that a surviving member of a couple must establish:

- a close personal relationship *and*
- they live together *and*
- financial support *and*
- domestic support *and*
- personal care.⁴⁶

In addition, superannuation trustees must consider the following factors set out in the Superannuation Industry (Supervision) Regulations 1994 (Cth) (Superannuation Regulations) before conferring a death benefit on a person in an 'interdependency relationship':

- (a) all of the circumstances of the relationship between the persons, including (where relevant):
 - (i) the duration of the relationship; and
 - (ii) whether or not a sexual relationship exists; and
 - (iii) the ownership, use and acquisition of property; and
 - (iv) the degree of mutual commitment to a shared life; and
 - (v) the care and support of children; and
 - (vi) the reputation and public aspects of the relationship; and
 - (vii) the degree of emotional support; and
 - (viii) the extent to which the relationship is one of mere convenience; and
 - (ix) any evidence suggesting that the parties intend the relationship to be permanent;
- (b) the existence of a statutory declaration signed by one of the persons to the effect that the person is, or (in the case of a statutory declaration made after the end of the relationship) was, in an interdependency relationship with the other person.⁴⁷

(c) Additional criteria to prove an 'interdependency relationship'

The Superannuation Regulations contain factors which do not otherwise appear in the statutes or case law regarding opposite-sex de facto relationships.

These additional criteria include:

- the degree of emotional support
- whether the relationship is one of mere convenience
- whether the relationship is intended to be permanent.⁴⁸

Again, meeting these additional criteria may make establishing an interdependent relationship more difficult than establishing an opposite-sex de facto relationship.

(d) *'Interdependency relationship' emphasises a carer role*

The hardest element of the legislative definition of 'interdependency relationship' for same-sex couples to prove seems to be 'domestic support and personal care'.⁴⁹

However, the Superannuation Regulations mitigate the impact of these criteria by stating that two people will still be in an 'interdependency relationship' if they have a close personal relationship, live together, financially support each other and:

one or each of them provides the other with support and care of a type and quality normally provided in a close personal relationship, rather than by a mere friend or flatmate.⁵⁰

This still requires one member of a same-sex couple to provide significant and constant care for the other. Examples of relevant care include:

- significant care provided for the other person when he or she is unwell
- significant care provided for the other person when he or she is suffering emotionally.⁵¹

Thus the interdependency criteria appear to emphasise a 'carer' relationship at times of serious illness or trauma rather than a couple-like relationship.⁵² This puts same-sex couples on a different footing to opposite-sex couples.

(e) *Proving an 'interdependency relationship' creates great uncertainty for same-sex couples*

Miranda Stewart argues that the high level of scrutiny and the degree of proof required to persuade a trustee to exercise discretion in favour of a same-sex partner:

results in greater uncertainty and injustice for the surviving same-sex partner, especially where the deceased's family is hostile and makes a competing claim for death benefits.⁵³

Several submissions to the Inquiry expressed concern about the unfairness of having to prove an interdependency relationship. For example:

- According to [the Superannuation Industry Act] if I was to die, any death insurance that I hold through my superannuation would only be paid to my same-sex spouse tax free (up to the pension RBL) if she could prove interdependency. When I asked ASFA (Association of Super Funds of Australia) and the ATO (Aust Tax Office) how does one prove interdependency, they were unable to answer my query, except for stating that my partner would (probably) need to show banking records and photos as proof. Why is this necessary? Do heterosexual couples need to show banking records and personal effects to prove they are in a relationship? I can't imagine the horror that has been or will be faced by many Australian gay or lesbian people, when faced by death and subsequent grief of a loved partner to have to then prove their relationship status. What an inhumane request, especially seeing as though opposite-sex couples do not have to suffer the same experience.⁵⁴

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- Same-sex partners ... will ... still have to prove to the trustee's satisfaction that they were in an interdependency relationship with the deceased in order for their entitlements to be binding on the trustee. This is in stark contrast to opposite-sex spouses, who are automatically recognised as dependents and who do not have to endure the intrusive process of having to provide private information in order to establish a claim to the death benefits. Further, until the interdependency relationship is proven, a same-sex partner's entitlement to the death benefit remains in a doubt and is at greater risk of challenge by relatives of the deceased.⁵⁵
- I have listed my partner down as the recipient of my Super, yet under legislation currently this can be easily challenged. This would not be the case for heterosexual couples. If my partner died I would have to prove an interdependent relationship, which has been interpreted very differently by different courts. There is no clean statement to clear the confusion up.⁵⁶

The uncertainty caused by proving an 'interdependency relationship' also affects financial planning. For example, the Inquiry heard:

The 2004 changes to the [the Superannuation Industry Act] broadened the definition of ['dependant'] to include 'interdependency relationships'. While this change is welcome, the definition still does not offer *equal* rights to couples in same-sex relationships as it remains for the partner left behind, on the death of one member of the couple, to prove that they were indeed in an 'interdependent relationship'. If a married couple have full and unquestioned rights to the benefits of their partner's superannuation, same-sex couples should also have these rights. I have named my partner as sole beneficiary of my superannuation benefits upon my death. However, in order to receive this benefit, not only will she have to prove that we were life partners, she will also be at the mercy of the chair of the board of the superannuation company, who still holds the right to refuse benefit payment. It should not be the responsibility of a stranger to determine who receives my benefits upon my death and it is for this reason that I do not salary sacrifice into my superannuation to provide myself and my family with greater retirement or death benefits – I have no guarantee that they will actually receive my superannuation entitlements.⁵⁷

Margie Collins described the inequities that she and her partner face with superannuation:

Should we now choose to invest in the hope to gain some retirement wealth, we can't be sure our super would be available to each other should one of us die. If it is available, it would only be following legal action.⁵⁸

(f) *'Interdependency relationships' do not adequately characterise same-sex relationships*

The creation of a separate category for same-sex couples suggests, in itself, that there is something different about the quality of a same-sex relationship. And, as indicated above, the interdependency category emphasises a carer role over a couple role.

Some submissions to the Inquiry talk about the indignity of being placed in an 'other' category to that of 'spouse':

Does the Tax Act call de facto heterosexual couples as interdependent? No they are titled and respected as spouses. Does it describe a married couple as interdependent? No they are titled and respected as spouses. Surely a same-sex partner should be recognised under [the Superannuation Industry Act] as a spouse in the same way as heterosexual couples are.⁵⁹

Some people told the Inquiry that the interdependency category inadequately represents the nature of their relationships. For example:

In a general philosophical sense, it causes discomfort, embarrassment or even anger among lesbian and gay people, that their relationship should be defined in that way. It's a lessening, a diminishment and a failure to acknowledge the depth and sincerity of same-sex relationships by using that kind of language.⁶⁰

13.4.3 A same-sex partner can only nominate a 'dependant' as superannuation beneficiary

Some superannuation funds allow members to nominate a person as a 'nominated beneficiary' in case of the member's death. In many superannuation funds, this nomination is not binding but provides an indication to the trustee of the member's wishes. Since same-sex partners do not automatically receive death benefits, some same-sex couples try to nominate their partner as a beneficiary.

In some superannuation funds, a binding nomination can be made subject to various conditions. However, the trustees of a fund are still bound by the provisions of the Superannuation Industry Act regarding the payment of death benefits to dependants. This means that in any case, a death benefit nomination will only bind the trustee if the nominated person is either the member's 'dependant' or legal personal representative (executor of the estate).⁶¹

So, while a nomination indicates the wishes of the deceased member, it does not necessarily bind the trustee regarding the distribution of the death benefit.

13.4.4 A same-sex partner cannot usually receive a reversionary pension

Some superannuation funds pay a reversionary pension to the surviving dependants of a deceased member. This pension is generally a portion of the superannuation pension that would have been paid, or was being paid to the deceased.

However, surviving same-sex partners are generally not eligible for a reversionary pension. This is because most trust deeds only pay a reversionary pension to a married or opposite-sex *de facto* spouse.⁶²

Miranda Stewart explains how reversionary pensions work as follows:

A member of a superannuation fund may be in receipt of benefits, after retirement or disability, as a pension (or income stream) from the fund rather than as a lump sum. A superannuation pension may be 'reversionary' such that it will revert automatically to another nominated person on death of the pensioner. Most trust deeds only allow for reversion of a pension to a *de jure* or *de facto* spouse, which does not include a partner in a same-sex relationship; as a result, trustees have refused to pay reversionary pensions to surviving members of same-sex relationships. As the 'interdependency relationship' reform has not actually amended the meaning of 'spouse', an amendment of trust deeds to include a same-sex partner in this category may breach the [Superannuation Industry Act]. Under the recent proposals to reform superannuation, reversionary pensions would be limited by statute to spouses and would therefore not be allowed for a surviving member in a same-sex couple.⁶³

The Inquiry heard that ineligibility for reversionary pensions affects the long term financial planning of same-sex couples:

Under current legislation, a person can nominate a spouse to continue to receive their pension in the event of their death. When the pension is set up, a person is able to select a term based on either their or their spouse's life expectancy. This assists with managing assets where an age difference exists between a member of a couple. It also slows the eating away of capital and is useful if a longer life expectancy is expected or a selected term is preferred (i.e. to reduce the risk of the survivor outliving their capital).⁶⁴

13.4.5 A surviving same-sex partner may access death benefits from a retirement savings account

A retirement savings account (RSA) is a special account offered by banks, building societies, credit unions, life insurance companies and financial institutions. It is used for retirement savings and is similar to a superannuation fund.⁶⁵

RSA benefits are available to the 'dependants' or personal legal representative of the account holder.⁶⁶ A 'dependant' is defined in identical terms to the Superannuation Industry Act and therefore includes a person in an 'interdependency relationship'.⁶⁷

Consequently, a same-sex partner will be entitled to RSA benefits if an interdependency relationship can be proven or if he or she can establish financial dependence.

13.5 Can a surviving same-sex partner access death benefit tax concessions?

As mentioned earlier, a same-sex partner who does not qualify for direct payment of death benefits as a 'dependant' under the Superannuation Industry Act, or a 'spouse' under the federal government schemes, may still inherit a partner's superannuation benefit through the estate.

In general, death benefits are tax-free when paid to dependants of the deceased. The rate of tax that a surviving partner pays on a death benefit thus depends on whether that partner is considered a 'dependant' under the relevant tax law. A person other than a 'dependant' will pay significantly more tax on a superannuation death benefit received through an estate than a person who meets the tax law definition of 'dependant'.

13.5.1 A same-sex partner may be a 'dependant' for tax concession purposes

The definition of 'dependant' in the tax law is essentially the same as the definition under the Superannuation Industry Act.⁶⁸ So, the main difference is that in the tax law, a child is generally only a dependant if he or she is less than 18 years of age (however, a child over the age of 18 may qualify as a dependant if she or he can provide financial dependency).

It has been held that a same-sex partner is not a 'spouse' under the Income Tax Assessment Act 1997.⁶⁹

Thus, if a surviving same-sex partner qualifies for a direct death benefit as a 'dependant' under the Superannuation Industry Act, he or she will qualify as a 'dependant' under the tax law.

The children of a lesbian co-mother or gay co-father may qualify as a 'dependant' under the tax law if they are financially dependent on the deceased co-mother or co-father. However, the child of a birth mother or birth father will automatically be entitled whereas the child of a lesbian co-mother or gay co-father will have to prove financial dependence.

13.5.2 A 'dependant' is eligible for tax concessions on lump sum superannuation death benefits

The rate at which a superannuation death benefit is taxed depends on whether the benefit is paid to a 'dependant' as defined in the relevant taxation legislation.⁷⁰

If a surviving same-sex partner does not qualify as a 'dependant' he or she will pay a higher rate of tax on a superannuation death benefit received through his or her partner's estate.

A lump sum payment is tax-free when paid to a dependant. If paid to a non-dependant, any element that has already been taxed is subject to 15% tax, while any element that has not been taxed is subject to 30% tax.⁷¹

From 1 July 2007 a non-dependant can only receive a lump sum payment. In contrast, for dependants, depending on the terms of the superannuation fund deed, a superannuation death benefit can be taken as an income stream. Income streams received by non-dependants, which commenced before 1 July 2007, are taxed at the same rate as those received by dependants.⁷²

This means that a non-dependant will pay more tax on a lump sum superannuation death benefit than a dependant.

13.5.3 A same-sex partner cannot access the death benefits anti-detriment payment

The 15% superannuation contributions tax was introduced in 1988. The anti-detriment payment is essentially a reimbursement of the contributions tax that has been paid by those people who were receiving death benefits prior to the introduction of the tax in 1988.⁷³

In other words, the anti-detriment payment ensures that death benefits received prior to and after the introduction of the contributions tax in 1988 are taxed in the same way.⁷⁴

However, in the case of anti-detriment payments, a 'dependant' is defined to include a 'spouse' and 'child' but not an 'interdependency relationship'.⁷⁵ So a same-sex partner will not be eligible for this payment.

13.6 Can a same-sex couple take advantage of superannuation contributions splitting?

Contributions splitting allows a couple to direct superannuation contributions to the superannuation fund of a partner who has a lower superannuation benefit.⁷⁶ This will minimise the amount of tax each member of the couple have to pay on superannuation benefits exceeding the relevant thresholds (the Reasonable Benefit Limit (RBL) threshold and the Eligible Termination Payment (ETP) threshold).⁷⁷

13.6.1 A same-sex partner cannot engage in contributions splitting

Since 1 January 2006, the Superannuation Industry Regulations have provided that an individual can split his or her superannuation contributions with a 'spouse'.⁷⁸

While 'spouse' is not defined in the Superannuation Industry Regulations, the definition of 'spouse' in the Superannuation Industry Act and tax legislation clearly excludes a same-sex partner. Therefore it is the Inquiry's view that a same-sex partner will not qualify as a 'spouse' for the purposes of superannuation contributions splitting.⁷⁹

13.6.2 Negative impact on same-sex couples

The Association of Superannuation Funds of Australia (ASFA) notes that access to contributions splitting can be a considerable financial advantage for couples with large superannuation benefits.⁸⁰ The ALSO Foundation also highlights that contributions splitting greatly helps a couple where one partner is not working.⁸¹

Several people in same-sex couples told the Inquiry of the impact of their ineligibility for these provisions. For example:

In our case, my partner has significantly less superannuation savings than I do and we would like to equalise the amounts saved in superannuation. The ability to do this by splitting superannuation contributions would be of great benefit to our retirement savings. The potential tax saving is over \$20,000 at retirement. We are unable to take advantage of this initiative as it is not available to same sex couples.⁸²

Action Reform Change Queensland and the Queensland AIDS Council describe one couple's experience of discrimination in the area of contributions splitting:

Karen and Siobhan (not their real names) have lived together for 8 years. As Karen works full-time, and Siobhan works on a casual, part-time basis, Karen would like to be able to make contributions into Siobhan's superannuation fund. As Karen says:

What are our rights? Superannuation is quite confusing but for same sex couples it is much worse. This is discriminatory. Super splitting is not an option for same sex couples. This is a good idea if one person in the couple is working more regularly than the other, but this option is not available in same sex couples.⁸³

13.7 Can a same-sex couple access the superannuation spouse tax offset?

A person is eligible for a tax offset if he or she makes an after-tax superannuation contribution on behalf of his or her low-income earning 'spouse'.⁸⁴ The tax offset is 18% for contributions made up to \$3000 per annum (which amounts to a tax offset of up to \$540 per annum).⁸⁵

In addition, any after-tax contribution to the superannuation fund of a 'spouse' or 'child' will be exempt from the 15% superannuation contributions tax.⁸⁶

13.7.1 A same-sex partner cannot access the superannuation spouse tax offset

For the purposes of the spouse tax offset, a 'spouse' is defined as a person who 'lives with the person on a genuine domestic basis as the person's husband or wife' even though they are not legally married.⁸⁷

As discussed previously, the terms 'husband' and 'wife' exclude a same-sex partner from this definition.

13.7.2 Negative impact on same-sex families

A person who makes a superannuation contribution on behalf of a same-sex partner or child other than a birth child will be excluded both from the offset and the contribution tax exemption.

A person will not be entitled to either the spouse tax offset or the tax exemption available to a person who makes after-tax contributions to his or her same-sex partner or non-birth child.

The Inquiry heard of the impact of this discrimination:

There have been some financial years where one of us has qualified as a low income earner under the Tax Office's definition. Yet as we do not qualify as "spouses" under the Taxation Office definition, the other is unable to claim the \$540 rebate for contributing to the lower income earner's superannuation fund. We are therefore financially worse off than we would be if the definition of spouse included same-sex spouse. This impacts not only our pocket today but it removes an incentive to top up superannuation, it impacts upon what is available to us at retirement.⁸⁸

13.8 Can the surviving same-sex partner of a judge access a judicial pension?

Judicial pensions are a form of superannuation entitlement.

13.8.1 The surviving same-sex partner of a federal judge cannot access a reversionary pension

When a federal judge or magistrate dies, his or her 'spouse' is entitled to a reversionary pension equivalent to 62.5% of the pension entitlement paid while the judge was alive.⁸⁹ A pension may also be available to an 'eligible child'.⁹⁰

However, the same-sex partner of a judge does not qualify as a 'spouse who survives a deceased judge' and is therefore not entitled to this reversionary pension.⁹¹

The child of a deceased judge who was the lesbian co-mother or gay co-father may qualify as an 'eligible child' if the Attorney-General forms the view that he or she was wholly or substantially dependent, but otherwise will be excluded.⁹²

The Judicial Conference of Australia told the Inquiry that they believed that 'Australian judicial officers, like other working Australians, should be able to share the fruits of their labours with their partners of either sex'.⁹³ They also argue that:

...it is important to recognise that the pension entitlements or retirement benefits provided to judicial officers play an important role in protecting judicial independence. Entitlements and benefits should be uniform among all judicial officers, State and Federal, and should reflect the principle that family members will be protected after the death of a judicial officer.⁹⁴

The Judicial Conference of Australia also draws attention to potential discrimination in the Federal Magistrates Amendment (Disability and Death Benefits) Bill 2006, which is still before the federal Parliament. The Bill seeks to amend the *Federal Magistrates Act 1999* (Cth) to provide disability cover and death benefits to an 'eligible spouse' or 'eligible child' of a federal magistrate.⁹⁵ However, those definitions do not include the same-sex partner of a magistrate. Nor do they include a child of a lesbian co-mother or gay co-father.⁹⁶

13.8.2 The surviving same-sex partner of a state judge can access a reversionary pension except in Victoria

Except in Victoria, it seems that the same-sex partner of a judge in all state and territory jurisdictions is entitled to the same retirement benefits as an opposite-sex partner.

According to the Equal Opportunity Commission of Victoria, a same-sex partner will be ineligible for a reversionary pension under any of the following legislation. This legislation does not define 'spouse':

- *Attorney-General and Solicitor-General Act 1972* (Vic)⁹⁷
- *Constitution Act 1975* (Vic)⁹⁸
- *County Court Act 1958* (Vic)⁹⁹
- *Magistrates' Court Act 1989* (Vic)¹⁰⁰
- *Public Prosecutions Act 1994* (Vic)¹⁰¹
- *Supreme Court Act 1986* (Vic).¹⁰²

The Equal Opportunity Commission of Victoria describes recent efforts to amend this legislation:

In April 2005 the Victorian Government introduced into Parliament the Courts Legislation (Judicial Pensions) Bill. It sought to modernise the State's constitutionally protected pension schemes to ensure that they operate in accordance with Commonwealth family law and Victorian equal opportunity law. The second reading speech to this Bill acknowledged that the constitutionally protected pension schemes were established in the middle of the 19th century and reversionary pensions were only made available to married partners. This Bill sought to replace references to spouse with domestic partner to ensure that reversionary pension schemes were also available to mixed-sex and same-sex unmarried partners. The proposed amendments would have brought reversionary pension entitlements up to date with commensurate relationship recognition reform under the Relationships Acts.¹⁰³

The situation in the ACT is complex due to the interaction between federal and ACT law. The Judicial Conference of Australia explains:

In the ACT, a judge has the same entitlements as a Federal judge under s.4(1) of the *Judges Pensions Act 1968* (Cth). However, the ACT has effectively overcome the discriminatory operation of the *Judges Pensions Act* by adopting a definition of "marital relationship" in s.37U(3)(h) of the *Supreme Court Act 1933* (ACT) which includes a relationship between two people of the same sex. Section 37U(3)(a) applies the *Judges Pensions Act* as if it was a law of the ACT. Assuming that the ACT has achieved its objective, the odd result is that the *Judges Pensions Act* has a more generous operation as a law of the ACT than it does as a law of the Commonwealth. This raises interesting questions as to the position of judges who hold dual commissions as both Commonwealth and ACT judges.¹⁰⁴

13.9 Can the surviving same-sex partner of a Governor-General access an allowance?

As with judges, a former Governor-General receives an allowance which passes to their 'spouse' on death.¹⁰⁵ However, the relevant definition excludes a same-sex partner.¹⁰⁶ Therefore a same-sex partner of the Governor-General will not be entitled to the allowance.

13.10 Do superannuation laws breach human rights?

This chapter shows that same-sex couples do not have access to the range of superannuation benefits and tax concessions available to opposite-sex couples. In particular, the same-sex partner of a federal public servant does not have access to direct death benefits.

A same-sex partner may be able to access some benefits in private superannuation schemes if he or she can establish financial dependence on his or her partner or meet the 'interdependency relationship' criteria. However, both these categories impose more onerous qualifying criteria than for an opposite-sex de facto partner in the same position.

Therefore, the main finding of this chapter is that superannuation and tax laws which exclude same-sex couples from superannuation entitlements and associated tax concessions available to an opposite-sex couple, breach the right to equal protection of the law under article 26 of the *International Covenant of Civil and Political Rights* (ICCPR).

Under the *International Covenant of Economic Social and Cultural Rights* (ICESCR), any steps Australia takes to guarantee the right to social security (including superannuation

entitlements) must occur without discrimination (articles 9, 2(2)). The discriminatory treatment of same-sex couples in superannuation breaches this right.

In some federal employee superannuation schemes the child of a lesbian co-mother or gay co-father may not be entitled to the direct death benefits available to the child of a birth mother or birth father. This may amount to a breach of article 18(1) of the *Convention on the Rights of the Child* (CRC) which requires recognition of the common responsibilities of both parents of a child.

In other superannuation schemes, the child of a lesbian or gay co-parent may be able to access direct death benefits if they can prove financial dependence. Since these schemes do not deny a child access to direct death benefits outright, the Inquiry makes no finding of breach insofar as the laws apply to the children of same-sex couples.

Nevertheless, to the extent that a same-sex family may be financially worse-off because of discrimination in accessing superannuation entitlements and tax concessions, the best interests of the child may be compromised.

Finally, to the extent that proving the 'interdependency category' requires greater intrusion into the private family life of a same-sex couple than for an opposite-sex couple, there may be a breach of articles 17 and 2(1) of the ICCPR.

13.11 How should the law be changed to avoid future human rights breaches?

It is clear that same-sex couples and families are denied access to a range of superannuation entitlements and associated tax concessions which are available to opposite-sex de facto couples and parents.

The introduction of the interdependency category has given same-sex couples access to certain death benefits which were previously denied to them. However, it is more complex for a same-sex couple to satisfy the 'interdependency' criteria than it is for an opposite-sex de facto couple to satisfy the 'spouse' criteria. And the creation of a different category for same-sex couples suggests that they are a lesser, or at least different quality of couple to an opposite-sex couple. The Inquiry does not accept this distinction.

The Inquiry recommends amending the legislation to avoid future breaches of the human rights of people in same-sex couples.

The following sections summarise the cause of the problems and how to fix them.

13.11.1 Narrow definitions are the main cause of discrimination

Same-sex couples are worse off than opposite-sex couples because the definitions in superannuation and associated taxation legislation fail to treat same-sex couples and families in the same way as opposite-sex couples and families.

In particular, the narrow definition of 'spouse' in various pieces of superannuation and associated taxation legislation limits the entitlements available to same-sex couples and families.

The definition of ‘child’ in certain pieces of superannuation legislation is also problematic because it may exclude the child of a lesbian co-mother or gay co-father.

13.11.2 The solution is to amend the definitions and recognise both same-sex parents

While the interdependency definition opens the door to gay and lesbian couples, it still does not treat same-sex and opposite-sex couples in the same way. And it is not the appropriate mechanism for bringing equality to same-sex couples.

A better way to bring equality is to treat a same-sex partner as a ‘spouse’ in the same-way as an opposite-sex partner.

Chapter 4 on Recognising Relationships presents two alternative approaches to amending federal law to remove discrimination against same-sex couples.

The Inquiry’s preferred approach for bringing equality to *same-sex couples* is to:

- retain the current terminology used in federal legislation (for example retain the term ‘spouse’ in the Superannuation Act 1976)
- redefine the terms in the legislation to include same-sex couples (for example, redefine ‘spouse’ in the Superannuation Act 1976 to include a ‘de facto partner’)
- insert new definitions of ‘de facto relationship’ and ‘de facto partner’ which include same-sex couples.

Chapter 5 on Recognising Children sets out how to better protect the rights of both the *children of same-sex couples* and the parents of those children.

Chapter 5 recommends that the federal government implement parenting presumptions in favour of a lesbian co-mother of a child conceived through assisted reproductive technology (ART). This would mean that an ART child born to a lesbian couple would automatically be the ‘child’ of both members of the lesbian couple (in the same way as an ART child is automatically the ‘child’ of both members of an opposite-sex couple).

Chapter 5 also suggests that it should be easier for a lesbian co-mother and gay co-father to adopt a child for the same reasons.

Chapter 5 further recommends the insertion of a new definition of ‘step-child’ which would include a child under the care of a ‘de facto partner’ of the birth parent. This would make it easier for the child of a lesbian co-mother or gay co-father to qualify under those definitions of ‘child’ which include a ‘step-child’.

It may not be necessary to amend the definition of ‘child’ if these three things occur, because a lesbian co-mother and gay co-father will fall under the definition as is.

Finally, Chapter 5 suggests that federal legislation should clearly recognise the status of a person who has a parenting order from the Family Court of Australia. This would mean that the children of a gay co-father or lesbian co-mother with a parenting order could more confidently assert their right to superannuation entitlements.

The following list sets out the definitions which would need to be amended according to these suggested approaches.

The Inquiry notes that if the government were to adopt the alternative approaches set out in Chapter 4 on Recognising Relationships, then different amendments would be required.

13.11.3 A list of federal legislation to be amended

The Inquiry recommends amendments to the following legislation discussed in this chapter:

Defence Force Retirement and Death Benefits Act 1973 (Cth)

‘child’ (s 3(1) – no need to amend if the child of a lesbian co-mother or gay co-father may be recognised through reformed parenting presumptions, adoption laws or a new definition of ‘step-child’)

‘de facto relationship’ (insert new definition)

‘eligible child’ (s 3(1) – no need to amend if the child of a lesbian co-mother or gay co-father may be recognised through reformed parenting presumptions, adoption laws or a new definition of ‘step-child’)

‘marital relationship’ (s 6A – amend to include a ‘de facto relationship’)

‘spouse’ (s 6B(2) – no need to amend if ‘marital relationship’ is amended)

‘step-child’ (insert new definition)

Federal Magistrates Amendment (Disability and Death Benefits) Bill 2006 seeking to amend the *Federal Magistrates Act 1999 (Cth)*

‘de facto partner’ (insert new definition)

‘de facto relationship’ (insert new definition)

‘eligible child’ (sch 1, cl 13 inserting sch 1, cl 9F into the Act - no need to amend if the child of a lesbian co-mother or gay co-father may be recognised through reformed parenting presumptions or adoption laws)

‘eligible spouse’ (sch 1, cl 13 inserting sch 1, cl 9E into the Act – no need to amend if ‘marital relationship’ is amended)

‘marital relationship’ (sch 1, cl 13 inserting sch 1, cl 9E(5) into the Act – amend to include a ‘de facto partner’)

Governor-General Act 1974 (Cth)

‘de facto relationship’ (insert new definition)

‘marital relationship’ (s 2B – amend to include ‘de facto relationship’)

‘spouse of a deceased person’ (s 2C – no need to amend if ‘marital relationship’ is amended)

Income Tax Assessment Act 1936 (Cth)

‘child’ (s 6(1) – no need to amend if the child of a lesbian co-mother or gay co-father may be recognised through reformed parenting presumptions, adoption laws or a new definition of ‘step-child’ in the Income Tax Assessment Act 1997)

‘relative’ (s 6(1) – no need to amend if ‘spouse’ is amended and a lesbian co-mother or gay co-father may be recognised as a parent through reformed parenting presumptions or adoption laws in the Income Tax Assessment Act 1997)

‘spouse’ (s 6(1) – no need to amend if ‘spouse’ is amended in the Income Tax Assessment Act 1997)

Income Tax Assessment Act 1997 (Cth)

‘child’ (s 995-1 – no need to amend if the child of a lesbian co-mother or gay co-father may be recognised through reformed parenting presumptions, adoption laws or a new definition of ‘step-child’)

‘death benefits dependant’ (s 302-195 – no need to amend if ‘spouse’ is amended and ‘child’ may recognise the child of a lesbian co-mother or gay co-father through reformed parenting presumptions, adoption laws or a new definition of ‘step-child’)

‘de facto partner’ (insert new definition)

‘de facto relationship’ (insert new definition)

‘interdependency relationship’ (s 302-200 – no need to amend if ‘spouse’ is amended)

‘relative’ (s 995-1 – no need to amend if ‘spouse’ is amended and a lesbian co-mother or gay co-father may be recognised as a parent through reformed parenting presumptions or adoption laws)

‘spouse’ (s 995-1 – amend to include a ‘de facto partner’)

‘step-child’ (insert new definition)

Income Tax Regulations 1936 (Cth)

‘interdependency relationship’ (reg 8A(1) – no need to amend if ‘spouse’ is amended in the Income Tax Assessment Act 1997)

Judges’ Pensions Act 1968 (Cth)

‘de facto relationship’ (insert new definition)

‘eligible child’ (s 4AA – amend to clarify the role of a parenting order; otherwise no need to amend if the child of a lesbian co-mother or gay co-father may also be recognised through reformed parenting presumptions or adoption laws)

‘marital relationship’ (s 4AB(1) – amend to include ‘de facto relationship’)

‘spouse who survives a deceased judge’ (s 4AC(2) – no need to amend if ‘marital relationship’ is amended)

Military Superannuation and Benefits Trust Deed (made under s 5(1) of the Military Superannuation and Benefits Act 1991 (Cth))

‘child’ (sch 1, r 1 – no need to amend if ‘spouse’ is amended and the child of a lesbian co-mother or gay co-father may be recognised through reformed parenting presumptions, adoption laws or a new definition of ‘step-child’)

‘de facto relationship’ (insert new definition)

‘eligible child’ (sch 1, r 1 – no need to amend if the child of a lesbian co-mother or gay co-father may be recognised through reformed parenting presumptions, adoption laws or a new definition of ‘step-child’)

‘marital relationship’ (sch 1, r 1A – amend to include ‘de facto relationship’)

‘spouse’ (sch 1, r 9 – no need to amend if ‘marital relationship’ is amended)

‘spouse’ (sch 1, r 12 – delete)

‘step-child’ (insert new definition)

Parliamentary Contributory Superannuation Act 1948 (Cth)

‘child’ (s 19AA(5) – no need to amend if the child of a lesbian co-mother or gay co-father may be recognised through reformed parenting presumptions or adoption laws)

‘de facto relationship’ (insert new definition)

‘eligible child’ (s 19AA(5) – no need to amend if the child of a lesbian co-mother or gay co-father may be recognised through reformed parenting presumptions or adoption laws)

‘marital relationship’ (s 4B – amend to include ‘de facto relationship’)

‘spouse’ (s 4C(2) – no need to amend if ‘marital relationship’ is amended)

Retirement Savings Accounts Act 1997 (Cth)

‘child’ (s 20(3) – no need to amend if the child of a lesbian co-mother or gay co-father may be recognised through reformed parenting presumptions, adoption laws or a new definition of ‘step-child’)

‘de facto partner’ (insert new definition)

‘de facto relationship’ (insert new definition)

‘dependant’ (s 20(1) – no need to amend if ‘spouse’ is amended and ‘child’ may recognise the child of a lesbian co-mother or gay co-father through reformed parenting presumptions, adoption laws or a new definition of ‘step-child’)

‘interdependency relationship’ (s 20A – no need to amend if ‘spouse’ is amended)

‘spouse’ (s 20(2) – amend to include a ‘de facto partner’)

‘step-child’ (insert new definition)

Superannuation Act 1976 (Cth)

‘child’ (s 3(1) – no need to amend if the child of a lesbian co-mother or gay co-father may be recognised through reformed parenting presumptions, adoption laws or a new definition of ‘step-child’)

‘de facto relationship’ (insert new definition)

‘eligible child’ (s 3(1) – no need to amend if the child of a lesbian co-mother or gay co-father may also be recognised through reformed parenting presumptions, adoption laws or a new definition of ‘step-child’)

‘marital relationship’ (s 8A – amend to include ‘de facto relationship’)

‘partially dependent child’ (s 3(1) – no need to amend if the child of a lesbian co-mother or gay co-father may also be recognised through reformed parenting presumptions, adoption laws or a new definition of ‘step-child’)

‘spouse’ (s 8B(2) – no need to amend if ‘marital relationship’ is amended)

‘step-child’ (insert new definition)

Superannuation Act 1990 (Cth)

‘child’ (sch 1, r 1.1.1 – no need to amend if ‘spouse’ is amended and the child of a lesbian co-mother or gay co-father may be recognised through reformed parenting presumptions, adoption laws or a new definition of ‘step-child’)

‘de facto partner’ (insert new definition)

‘de facto relationship’ (insert new definition)

‘eligible child’ (sch 1, r 1.1.1 – no need to amend if the child of a lesbian co-mother or gay co-father may also be recognised through reformed parenting presumptions, adoption laws or a new definition of ‘step-child’)

‘partially dependent child’ (sch 1, r 1.1.1 – no need to amend if the child of a lesbian co-mother or gay co-father may also be recognised through reformed parenting presumptions, adoption laws or a new definition of ‘step-child’)

‘spouse’ (sch 1, r 1.1.1 – amend to include a ‘de facto partner’)

‘step-child’ (insert new definition)

Superannuation Industry (Supervision) Act 1993 (Cth)

‘child’ (s 10(1) – no need to amend if the child of a lesbian co-mother or gay co-father may be recognised through reformed parenting presumptions, adoption laws or a new definition of ‘step-child’)

‘de facto partner’ (insert new definition)

‘de facto relationship’ (insert new definition)

‘dependant’ (s 10 – no need to amend if ‘spouse’ is amended and the child of a lesbian co-mother or gay co-father may be recognised through reformed parenting presumptions, adoption laws or a new definition of ‘step-child’)

‘interdependency relationship’ (s 10A – no need to amend if ‘spouse’ is amended)

‘spouse’ (s 10(1) – amend to include a ‘de facto partner’)

‘step-child’ (insert new definition)

Superannuation Industry (Supervision) Regulations 1994 (Cth)

‘interdependency relationship’ (reg 1.04AAAA – no need to amend if ‘spouse’ is amended in the Superannuation Industry Act)

Superannuation (Public Sector Superannuation Accumulation Plan) Trust Deed (made under s 10 of the *Superannuation Act 2005* (Cth))

‘dependant’ (Div 2, r 1.2.1 – no need to amend if ‘spouse’ is amended in the Superannuation Industry Act)

13.11.4 A list of state legislation to be amended

The Inquiry recommends review of the following legislation and amendment if discrimination remains with respect to same-sex couples or their children:

New South Wales

- *Coal and Oil Shale Mine Workers (Superannuation) Act 1941* (NSW)
- *Local Government and Other Authorities (Superannuation) Act 1927* (NSW)
- *New South Wales Retirement Benefits Act 1972* (NSW)
- *Public Authorities Superannuation Act 1985* (NSW)
- *Transport Employees Retirement Benefits Act 1967* (NSW)

Victoria

- *Attorney-General and Solicitor-General Act 1972* (Vic)
- *Coal Mines (Pensions) Act 1958* (Vic)
- *Constitution Act 1975* (Vic)
- *County Court Act 1958* (Vic)
- *Magistrates Court Act 1989* (Vic)
- *Public Prosecutions Act 1994* (Vic)
- *Supreme Court Act 1986* (Vic)

Western Australia

- *Superannuation and Family Benefits Act 1938* (WA)

Table 1: Federal government superannuation schemes

SCHEME	BENEFITS	DEFINITIONS
<p>Commonwealth Superannuation Scheme (CSS)</p> <p>Members include federal government and ACT government employees. The scheme closed to new members from 1 July 1990.</p> <p>CSS is governed by the <i>Superannuation Act 1976 (Cth)</i>.</p>	<p>A range of death benefits are payable to spouses and children: ss 81-88, 89-92, 93-96AB, 97-109A.</p> <p>Some of these benefits are higher when there are partially dependent children: ss 96B-96BB, 109A.</p> <p>In the event that there is no surviving spouse or child, a benefit is payable to the person's legal personal representative. If no legal personal representative can be found, benefits can be paid to any individual or individuals that the Board determines: s 110SQ.</p>	<p>Spouse: 'a person is a spouse who survives a deceased person if the person had a marital relationship with the deceased person at the time of the death of the deceased person': s 8B(2).</p> <p>Marital relationship: 'a person had a marital relationship with another person at a particular time if the person ordinarily lived with that other person as that other person's husband or wife on a permanent and <i>bona fide</i> domestic basis at that time': s 8A(1).</p> <p>Child: 'a child (including an adopted child, an ex-nuptial child, a foster child, a step child or a ward) of the person or of a spouse of the person': s 3(1).</p> <p>Eligible child: a child under 16 years; or over 16 but under 25 and receiving full-time education and is not ordinarily in employment or engaged in work on his or her own account; and immediately before the deceased person's death, ordinarily lived with the deceased person (except where the person is a child of a spouse but not of the deceased person) or was wholly or substantially dependent upon the deceased person, in the opinion of the Board: s 3(1).</p> <p>Partially dependent child: a child under 16 years; or over 16 but under 25 and receiving full-time education and not ordinarily in employment or engaged in work on his or her own accord; and in respect of whom, immediately before the deceased person's death, the deceased person was making regular maintenance payments: s 3(1).</p> <p>Legal personal representative: the executor of the will, the trustee of the estate of a person under a legal disability or a person who holds an enduring power of attorney granted by a person: s 10(1) of the <i>Superannuation Industry (Supervision) Act 1993 (Cth)</i>.</p>

SCHEME	BENEFITS	DEFINITIONS
<p>Public Sector Superannuation Scheme (PSS)</p> <p>This scheme took over from the CSS. It closed to new members from 1 July 2005.</p> <p>PSS is governed by the Trust Deed scheduled under the <i>Superannuation Act 1990 (Cth)</i>.</p>	<p>A reversionary pension is available to a spouse or an eligible child or a partially dependent child: sch 1, rr 5.1.1, 5.2.1.</p> <p>Preserved benefits of a deceased member are payable to a spouse or an eligible child or a partially dependent child: sch 1, r 6.1.9-6.1.10. Benefits may be paid in the form of a pension rather than a lump sum: sch 1, rr 6.1.12-6.1.13.</p> <p>If there is no surviving spouse or eligible child or partially dependent child, the member must notify the Board that he or she has a dependent person who would not be able to receive benefits as a spouse, eligible child or partially dependent child. The member must tell the Board he or she has included this person in their will. The Board has discretion to pay such benefit as it considers appropriate to the person named: sch 1, r 6.1.11.</p>	<p>Spouse: (a) a person who was legally married to the deceased person at the time of the person's death and who, at that time, was ordinarily living with the person on a permanent and bona fide domestic basis; and (c) a person who was not legally married to the deceased person at the time of the person's death but who, for a continuous period of not less than 3 years immediately before the person's death, had ordinarily lived with the person as the person's husband or wife, as the case may be, on a permanent and bona fide domestic basis': sch 1, r 1.1.1.</p> <p>Child: 'a child (including an adopted child, an ex-nuptial child or a stepchild, or any other person whom the Board determines is to be treated as a child of the first-mentioned person) of the person or of a spouse of the person': sch 1, r 1.1.1.</p> <p>Eligible child: Substantially the same definition as under the <i>Superannuation Act 1976 (Cth)</i>: sch 1, r 1.1.1.</p> <p>Partially dependent child: Substantially the same definition as under the <i>Superannuation Act 1976 (Cth)</i>: sch 1, r 1.1.1.</p>
<p>Defence Force Retirement and Death Benefits Scheme (DFRDB)</p> <p>Provides retirement funds, as well as death and disability benefits, to members of the defence forces. This scheme closed to new members on 1 October 1991.</p>	<p>The surviving spouse of a deceased member is entitled to a pension: ss 38-39. In some circumstances, a spouse is eligible for such pensions as lump sum payments: s 41A. There are also specific pensions payable to surviving children: ss 42-43.</p>	<p>Spouse: a person is a spouse 'if the person had a marital relationship with the deceased person at the time of the death of the deceased person': s 6B(2).</p> <p>Marital relationship: Substantially the same definition as under the <i>Superannuation Act 1976 (Cth)</i>: s 6A(1).</p>

SCHEME	BENEFITS	DEFINITIONS
<p>Defence Force Retirement and Death Benefits Scheme (DFRDB) <i>continued</i></p> <p>The DFRDB is governed by the <i>Defence Force Retirement and Death Benefits Act 1973</i> (Cth).</p>	<p>On the death of a member, a surviving spouse or eligible child may elect that the member joins the Military Superannuation and Benefits Scheme (MSBS): s 133.</p>	<p>Child: a person who is an ex-nuptial child of the member, or, is, immediately before the member's death, a step-child, an adopted child, a foster child or a ward, of the member; and a person who is a child or ex-nuptial child of a spouse who survives the member and was wholly or substantially dependent upon the member at the time of the member's death': s 3(1).</p> <p>Eligible child: a person under 16 years; or a person over 16 but under 25 years and receiving full-time education and not ordinarily in employment or engaged in work on his own account: s 3(1).</p>
<p>Military Superannuation and Benefits Scheme (MSBS)</p> <p>Provides retirement funds and death and disability benefits to members of the defence forces. This fund took over from the DFRDB in 1991.</p> <p>The MSBS is governed by the Military Superannuation and Benefits Trust Deed made under s 5(1) of <i>Military Superannuation and Benefits Act 1991</i> (Cth).</p>	<p>The Trust Deed provides for benefits to be paid to a spouse and children on the death of a member: sch 1, rr 38-48.</p> <p>The Board has wide discretion to pay benefits to those who would not be entitled under the rules in unusual or exceptional circumstances: sch 1, r 66.</p>	<p>Spouse: Substantially the same definition as under the <i>Defence Force Retirement and Death Benefits Act 1973</i> (Cth): Trust Deed, sch 1, r 9(a).</p> <p>'a person is not, for the purposes of these Rules, a spouse in relation to another person if he or she is of the same sex as that other person': Trust Deed, sch 1, r 12.</p> <p>Marital relationship: Substantially the same definition as under the <i>Superannuation Act 1976</i> (Cth): Trust Deed, sch 1, r 1A.</p> <p>Child: Substantially the same definition as under the <i>Defence Force Retirement and Death Benefits Act 1973</i> (Cth): Trust Deed, sch 1, r 1.</p> <p>Eligible child: Substantially the same definition as under the <i>Defence Force Retirement and Death Benefits Act 1973</i> (Cth): Trust Deed, sch 1, r 1.</p>

SCHEME	BENEFITS	DEFINITIONS
<p>Parliamentary Contributory Superannuation Scheme (PCSS)</p> <p>Provides superannuation entitlements to members of federal parliament who entered the scheme prior to 9 October 2004.</p> <p>The PCSS is governed by the <i>Parliamentary Contributory Superannuation Act 1948 (Cth)</i>.</p> <p>The <i>Parliamentary Superannuation Act 2004 (Cth)</i> gave parliamentarians a choice of superannuation fund.</p>	<p>A proportion of a deceased member's parliamentary allowance (if the member dies while still in parliament) or retirement allowance (if they had retired) is payable to a surviving spouse: s 19. An additional benefit is payable to the surviving spouse of a Prime Minister or former Prime Minister: s 19A.</p> <p>There are also benefits in respect of orphaned children and dependent children of the deceased person: ss 19AA (c)-(d).</p> <p>Both surviving spouses and children may convert some or part of the pension to a lump sum payment: ss 19AAA, 19ABA.</p>	<p>Spouse: Substantially the same definition as under the <i>Superannuation Act 1976 (Cth)</i>: s 4C(2)(a).</p> <p>Marital relationship: Substantially the same definition as under the <i>Superannuation Act 1976 (Cth)</i>: s 4B(1).</p> <p>Child: a child (including an adopted or an ex-nuptial child) of the person: s 19AA(5).</p> <p>Eligible child: a child who is under 16; or a child who is over 16 but under 25 and receiving full-time education: s 19AA(5).</p>

Note: The Public Sector Superannuation Accumulation Plan (PSSap) Scheme is discussed in section 13.2.1.

Endnotes

- 1 In early 2007, the federal government enacted major reforms to the superannuation tax and regulatory regime to simplify it. The new superannuation tax regime is effective from 1 July 2007: see *Tax Laws Amendment (Simplified Superannuation) Act 2007* (Cth). This report refers to both the existing tax provisions contained in the *Income Tax Assessment Act 1936* (Cth) and the new (replacement) provisions in the *Income Tax Assessment Act 1997* (Cth), where relevant.
- 2 A death benefit is usually a significant proportion of the superannuation entitlements of the member. The amount of the death benefit will depend on the member's contributions to the fund; earnings on those contributions; an additional element of life insurance: see M Stewart, 'Are You Two Interdependent? Family, Property and Same-Sex Couples in Australia's Superannuation Regime', *Sydney Law Review*, vol 28, no 3, 2006, p441.
- 3 See *Superannuation Act 2005* (Cth), s 10, which provides for a trust deed to establish the PSSAP Fund. All relevant definitions and entitlements are contained within the Deed: Superannuation (PSSAP) Trust Deed, F2005L01901.
- 4 Superannuation (PSSAP) Trust Deed, r 1.2.1: 'dependant has the same meaning as in the *Superannuation Industry (Supervision) Act 1993* (Cth)'.
 5 *Superannuation Act 1976* (Cth), s 8B(2).
 6 *Superannuation Act 1976* (Cth), s 8A(1).
 7 *Gregory Brown v Commissioner for Superannuation* (1995) 21 AAR 378, para 63.
 8 Gary Fan and Wayne Lodge, Submission 123.
 9 Good Process, Submission 284.
 10 Association of Superannuation Funds of Australia, Submission 128.
 11 Association of Superannuation Funds of Australia, Submission 128.
 12 Gay and Lesbian Rights Lobby (NSW), Submission 333. See also Julie Murphy, Submission 254; Paul Cooke, Submission 293; Brian Greig, Submission 110.
 13 Penelope Morton, Submission 5. See also Brian McKinlay, Submission 130.
 14 Barbara Guthrie and Maureen Kingshott, Submission 205.
 15 Name Withheld, Submission 21.
 16 Name Withheld, Submission 246.
 17 Tony Whelan, Submission 20.
 18 Community and Public Sector Union, PSU Group, Submission 135; Name Withheld, Submission 257; Superannuated Commonwealth Officers' Association Inc., Submission 320.
 19 N Minchin (Minister for Finance and Administration; Deputy Leader of the Government in the Senate), Correspondence with Federal Secretary, Superannuated Commonwealth Officers' Association, 8 December 2005. See Superannuated Commonwealth Officers' Association Inc., Submission 320.
 20 Name Withheld, Submission 246. See also Name Withheld, Submission 257.
 21 Equal Opportunity Commission of Victoria, Submission 327.
 22 Equal Opportunity Commission of Victoria, Submission 327.
 23 See for example *Law Reform (Gender, Sexuality and De Facto Relationships) Act 2003* (NT), ss 45, 61, 75, 79; *Statutes Amendment (Domestic Partners) Act 2006* (SA), ss 177, 209 (this Act had not commenced as at 10 April 2007).
 24 *Superannuation Industry (Supervision) Act 1993* (Cth), s 62(1)(a)(iv)-(v). See also Superannuation Complaints Tribunal, *Key considerations that apply to death benefit complaints*, 2006, para 59. The Association of Superannuation Funds of Australia Limited, *Death Benefits*, Best Practice Paper No. 29, September 2006, section 5.3.1.
 25 *Income Tax Assessment Act 1936* (Cth), s 27A(1); *Income Tax Assessment Act 1997* (Cth), s 302-10. The 1936 Act provisions continue to apply until 30 June 2007; the 1997 Act provisions become effective on 1 July 2007. The latter section has clarified existing practice regarding taxation of a death benefit received by a deceased estate.

- 26 *Superannuation Industry (Supervision) Act 1993* (Cth), s 10(1): ‘spouse in relation to a person, includes another person who, although not legally married to the person, lives with the person on a genuine domestic basis as the husband or wife of the person’.
- 27 *Superannuation Industry (Supervision) Act 1993* (Cth), s 10(1): ‘child in relation to a person, includes an adopted child, a step-child or an ex-nuptial child of the person’.
- 28 *Superannuation Industry (Supervision) Act 1993* (Cth), s 10(1). ‘2 persons (whether or not related by family) have an *interdependency relationship* if: (a) they have a close personal relationship; and (b) they live together; and (c) one or each of them provides the other with financial support; and (d) one or each of them provides the other with domestic support and personal care’: s 10A(1).
- 29 Superannuation Complaints Tribunal, *Key considerations that apply to death benefit complaints*, 2006, paras 90-93.
- 30 *Superannuation Industry (Supervision) Act 1993* (Cth), s 10(1). See also *Income Tax Assessment Act 1936* (Cth), s 6(1); *Income Tax Assessment Act 1997* (Cth), s 995-1.
- 31 See *Gregory Brown v Commissioner for Superannuation* (1995) 21 AAR 378.
- 32 Superannuation Complaints Tribunal, *Legal Issues in Death Benefits*, Forum Discussion Paper, January 2002, p45.
- 33 Association of Superannuation Funds of Australia, Submission 128. The inclusion of the category was enabling only, not prescriptive. ASEFA argues that it is likely that funds will not have included this provision where the fund pays pensions to the spouses of deceased members or where a reversionary pension is payable on the death of a person who was already receiving a pension from the fund.
- 34 *Superannuation Industry (Supervision) Act 1993* (Cth), s 10A(1); *Income Tax Assessment Act 1997* (Cth), s 302-200; *Income Tax Assessment Act 1936* (Cth), s 27AAB. The 1936 Act provisions continue to apply until 30 June 2007; the 1997 Act provisions become effective on 1 July 2007.
- 35 Superannuation Complaints Tribunal, *Key considerations that apply to death benefit complaints*, 2006, paras 90-93. Persons who were financially dependent on a deceased member at the time of the death are another category of dependants to whom a death benefit can be paid. Partial financial dependency may be sufficient, and a person does not have to be in financial need to establish that they were financially dependent on the deceased member at the time of death. However, the degree of financial dependency, which may be determined by reference to the degree of financial need, may be important when the trustee exercises its discretion to determine the percentage distribution of the death benefit amongst various dependants.
- 36 Association of Superannuation Funds of Australia, *Death Benefits*, Best Practice Paper No. 29, September 2006, section 5.3.3.
- 37 Australian Taxation Office, *Interpretive Decision 2002/731*. However, certain decisions of the Superannuation Complaints Tribunal have paid death benefits to a same-sex partner, even where only partial financial dependence was established: M Stewart, ‘Are You Two Interdependent? Family, Property and Same-Sex Couples in Australia’s Superannuation Regime’, *Sydney Law Review*, vol 28, no 3, 2006, p448.
- 38 *Superannuation Industry (Supervision) Act 1993* (Cth), s 10(1). See also *Income Tax Assessment Act 1997* (Cth) s 995-1; *Income Tax Assessment Act 1936* (Cth), s 6(1).
- 39 For an explanation of these terms see the Glossary of Terms.
- 40 See further Chapter 5 on Recognising Children.
- 41 Association of Superannuation Funds of Australia notes that the Explanatory Statement (Explanatory Statement, Select Legislative Instrument 2005 No. 261) puts the view that it would be unlikely for children to be in an interdependency relationship with their parents: Association of Superannuation Funds of Australia, *Death Benefits*, Best Practice Paper No. 29, September 2006, section 1.2.2, pp11-12.
- 42 See Victorian Gay and Lesbian Rights Lobby, Submission 256; Walter Lee, Submission 250a.

- 43 Association of Superannuation Funds of Australia, *Death Benefits*, Best Practice Paper No. 29, September 2006, section 4.6, p26. Information should also be provided about whether the couple had separated or divorced. See also Superannuation Complaints Tribunal, *Key considerations that apply to death benefit complaints*, 2006, para 65: 'If there was an undissolved legal marriage at the time of the death of the member to another person, that other person is a legal spouse. A legal spouse qualifies as a dependant of the deceased.' If a spouse is estranged they may not be paid a death benefit.
- 44 *D v McA* (1986) 11 Fam LR 214 at 227 per Powell J, quoted in Superannuation Complaints Tribunal, *Key considerations that apply to death benefit complaints*, 2006, para 68. Powell J reiterated these criteria in *Roy v Sturgeon* (1986) 11 NSWLR 454 at 458-459.
- 45 However, a temporary separation may not mean that a de facto relationship has come to an end: *George v Hibberson* [1987] DFC 95-054, quoted in Superannuation Complaints Tribunal, *Key considerations that apply to death benefit complaints*, 2006, para 69. Also quoted with approval in *Howland v Ellis* (2001) Fam LR 656 and more recently in *Hornsby v Military Superannuation & Benefits Board of Trustees No 1* (2003) FCA 54 at para [25].
- 46 *Superannuation Industry (Supervision) Act 1993* (Cth), s 10A(1); *Income Tax Assessment Act 1997* (Cth), s 302-200; *Income Tax Assessment Act 1936* (Cth), s 27AAB. The 1936 Act provisions continue to apply until 30 June 2007; the 1997 Act provisions become effective on 1 July 2007. See further Miranda Stewart, Submission 266.
- 47 Superannuation Industry (Supervision) Regulations 1994 (Cth), reg 1.04AAAA(1); Income Tax Regulations 1936 (Cth), reg 8A(1).
- 48 M Stewart, 'Are You Two Interdependent? Family, Property and Same-Sex Couples in Australia's Superannuation Regime', *Sydney Law Review*, vol 28, no 3, 2006, p456. Stewart argues that while these additional matters may merely add substance to the definition, they may also require a more narrow reading, which could disadvantage same-sex couples.
- 49 M Stewart, 'Are You Two Interdependent? Family, Property and Same-Sex Couples in Australia's Superannuation Regime', *Sydney Law Review*, vol 28, no 3, 2006, p459.
- 50 Superannuation Industry (Supervision) Regulations 1994 (Cth), reg 1.04AAAA(2). Income Tax Regulations 1936 (Cth), reg 8A(2) (until 30 June 2007).
- 51 Superannuation Industry (Supervision) Regulations 1994 (Cth), reg 1.04AAAA(2); Income Tax Regulations 1936 (Cth), reg 8A(2) (until 30 June 2007). See also M Stewart, 'Are You Two Interdependent? Family, Property and Same-Sex Couples in Australia's Superannuation Regime', *Sydney Law Review*, vol 28, no 3, 2006, p462.
- 52 M Stewart, 'Are You Two Interdependent? Family, Property and Same-Sex Couples in Australia's Superannuation Regime', *Sydney Law Review*, vol 28, no 3, 2006, p462.
- 53 Miranda Stewart, Submission 266. The following Superannuation Complaints Tribunal Determinations demonstrate some of the difficulties that may be faced by a same-sex partner of a deceased person in establishing themselves as a dependant for the purposes of superannuation death benefits: D01-02\212 (21 June 2002); D05-06\061 (20 October 2005).
- 54 Name Withheld, Submission 67.
- 55 Victorian Gay and Lesbian Rights Lobby, Submission 256.
- 56 Marcus Blease, Submission 111.
- 57 Lynne Martin, Submission 38.
- 58 Margie Collins, Adelaide Hearing, 28 August 2006.
- 59 Name Withheld, Submission 67.
- 60 Brian Greig, Perth Hearing, 9 August 2006.
- 61 *Superannuation Industry (Supervision) Act 1993* (Cth), s 59(1A); Superannuation Industry (Supervision) Regulations 1994 (Cth), reg 6.17A(2).
- 62 M Stewart, 'Are You Two Interdependent? Family, Property and Same-Sex Couples in Australia's Superannuation Regime', *Sydney Law Review*, vol 28, no 3, 2006, p464. As noted earlier, superannuation funds were not compelled to adopt the amendments introducing 'interdependency relationship' as a category of 'dependant' to the *Superannuation Industry (Supervision) Act 1993* (Cth) and the *Income Tax Assessment Act 1936* (Cth). The relevant definitions have now been made part of the *Income Tax Assessment Act 1997* (Cth), effective 1 July 2007.

- 63 Miranda Stewart, Submission 266.
- 64 Good Process, Submission 284.
- 65 The *Retirement Savings Accounts Act 1997* (Cth) regulates the provision of retirement savings accounts.
- 66 *Retirement Savings Accounts Act 1997* (Cth), s 15(3)-(4).
- 67 *Retirement Savings Accounts Act 1997* (Cth), ss 20, 20A.
- 68 *Income Tax Assessment Act 1936* (Cth), s 27A(1): 'dependant' is defined as '(i) any spouse or former spouse of the first person; and (ii) any child, aged less than 18 years, of the first person; and (iii) any person with whom the first person has an interdependency relationship'; *Income Tax Assessment Act 1997* (Cth), s 302-195 defines a 'death benefits dependant' as: '(a) the deceased person's spouse or former spouse; or (b) the deceased person's child, aged less than 18; or (c) any other person with whom the deceased person had an interdependency relationship under s 302-200 just before he or she died; or (d) any other person who was a dependant of the deceased person just before he or she died'. 'Spouse' and 'child' are defined in the *Income Tax Assessment Act 1997* (Cth), s 995-1. The 1936 Act provisions continue to apply until 30 June 2007; the 1997 Act provisions become effective on 1 July 2007.
- 69 See *The Roll-over Relief Claimant and Commissioner of Taxation*, [2006] AATA 728 (23 August 2006).
- 70 *Income Tax Assessment Act 1936* (Cth), s 27A(1). As at 1 July 2007, the effective definition will be contained in the *Income Tax Assessment Act 1997* (Cth), s 302-195.
- 71 Parliament of the Commonwealth of Australia, House of Representatives, Tax Laws Amendment (Simplified Superannuation) Bill 2006, Explanatory Memorandum, Tables 2.3, 2.4.
- 72 Parliament of the Commonwealth of Australia, House of Representatives, Tax Laws Amendment (Simplified Superannuation) Bill 2006, Explanatory Memorandum, Tables 2.3, 2.4.
- 73 The superannuation fund claims a deduction in respect of an anti-detriment payment to a dependent beneficiary.
- 74 Association of Superannuation Funds of Australia, Submission 128; *Income Tax Assessment Act 1936* (Cth), s 279D; *Income Tax Assessment Act 1997* (Cth), s 295-485. The 1936 Act provisions continue to apply until 30 June 2007; the 1997 Act provisions become effective on 1 July 2007.
- 75 *Income Tax Assessment Act 1997* (Cth), s 295-485(1)(a); *Income Tax Assessment Act 1936* (Cth), s 279D(4). The 1936 Act provisions continue to apply until 30 June 2007; the 1997 Act provisions become effective on 1 July 2007. See also Association of Superannuation Funds of Australia, *Death Benefits*, Best Practice Paper No. 29, September 2006, p19.
- 76 This includes contributions made by an employer and personal contributions for which an income tax deduction is claimed: Australian Taxation Office, *Superannuation contributions splitting - individuals*, <http://www.ato.gov.au/print.asp?doc=/content/68032.htm>, viewed 2 March 2007.
- 77 In 2006-2007, the RBL threshold is \$678 149 for lump sum payments and \$1 356 291 for pensions: Australian Taxation Office, *Reasonable benefit limits - How these may affect you*, <http://www.ato.gov.au/super/content.asp?doc=/content/12253.htm&page=4&H4>, viewed 5 April 2007. The ETP low-rate threshold is \$135 590 for the 2006-07 financial year: Australian Taxation Office, *Key superannuation rates*, <http://www.ato.gov.au/super/content.asp?doc=/content/60489.htm&page=6&H6>, viewed 2 March 2007. From 1 July 2007, the concept of a Reasonable Benefit Limit will be abolished and no tax will be paid on superannuation benefits received by a member who is over the age of 60. However, a tax benefit [for contributions splitting] will remain for those who receive their superannuation benefits prior to the age of 60. Furthermore, as noted by Miranda Stewart, '[these benefits] remain in the [Superannuation Industry Act] and income tax law and provide a means for an individual to provide a superannuation balance for his or her low-income spouse, a concession which will not apply for same-sex couples': Miranda Stewart, Submission 266.
- 78 See Superannuation Industry (Supervision) Regulations 1994 (Cth), pt 6, div 6.7. Up to 85% of a member's deductible personal contributions and 100% of non-deductible personal contributions can be split with a spouse: Miranda Stewart, Submission 266.
- 79 Superannuation Industry (Supervision) Regulations 1994 (Cth), reg 6.44. See also Miranda Stewart, Submission 266; Victorian Gay and Lesbian Rights Lobby, Submission 256; ACON, Submission 281; Association of Superannuation Funds of Australia, Submission 128; Lynne Martin, Submission 38.

- 80 Association of Superannuation Funds of Australia, Sydney Hearing, 26 July 2006. See also Just Super, Submission 313.
- 81 ALSO Foundation, Submission 307h. See also Law Institute of Victoria, Submission 331.
- 82 Name Withheld, Submission 290. See also Julie Murphy, Submission 254.
- 83 Action Reform Change Queensland and Queensland AIDS Council, Submission 270.
- 84 *Income Tax Assessment Act 1997* (Cth), s 290-230; *Income Tax Assessment Act 1936* (Cth), s 159T. The 1936 Act provisions continue to apply until 30 June 2007; the 1997 Act provisions become effective on 1 July 2007. At the time of making the contribution, the person must not be living separately from their spouse on a permanent basis: *Income Tax Assessment Act 1997* (Cth), s 290-230. See *Income Tax Assessment Act 1997* (Cth), s 995-1(1) for the definition of 'spouse'.
- 85 *Income Tax Assessment Act 1997* (Cth), s 290-235; *Income Tax Assessment Act 1936* (Cth), ss 159T, 159TA. The 1936 Act provisions continue to apply until 30 June 2007; the 1997 Act provisions become effective on 1 July 2007. The full offset is available where a spouse earns less than \$10 800 that year and a partial offset is available where a spouse's income is up to \$13 800: *Income Tax Assessment Act 1997* (Cth), ss 290-230, 290-235. See also Name Withheld, Submission 290; Victorian Gay and Lesbian Rights Lobby, Submission 256; ACON, Submission 281; Gay and Lesbian Rights Lobby (NSW), Submission 333; Australian Coalition for Equality, Submission 228; Association of Superannuation Funds of Australia, Submission 128.
- 86 *Income Tax Assessment Act 1997* (Cth), ss 295-165, 295-170(b); *Income Tax Assessment Act 1936* (Cth), s 274. The 1936 Act provisions continue to apply until 30 June 2007; the 1997 Act provisions become effective on 1 July 2007.
- 87 *Income Tax Assessment Act 1997* (Cth), s 995-1(1).
- 88 Name Withheld, Submission 41.
- 89 *Judges' Pensions Act 1968* (Cth), ss 7-8.
- 90 *Judges' Pensions Act 1968* (Cth), ss 9-10.
- 91 *Judges' Pensions Act 1968* (Cth), ss 4AC, 4AB(1).
- 92 *Judges' Pensions Act 1968* (Cth), s 4AA.
- 93 Judicial Conference of Australia, Submission 197.
- 94 Judicial Conference of Australia, Submission 197. See also Australian Federation of AIDS Organisations, Submission 285; Gay and Lesbian Rights Lobby (NSW), Submission 333; Law Council of Australia, Submission 305; Anti-Discrimination Commission Queensland, Submission 264.
- 95 Judicial Conference of Australia, Submission 197.
- 96 See Federal Magistrates Amendment (Disability and Death Benefits) Bill 2006, sch 1, cl 13, inserting cls 9D-9F into Schedule 1 of the *Federal Magistrates Act 1999* (Cth). See further Judicial Conference of Australia, Submission 197; C Lorimer, Parliament of Australia, Department of Parliamentary Services, 'Federal Magistrates Amendment (Disability and Death Benefits) Bill 2006', *Bills Digest*, no 150, 2005-06, 13 June 2006; Commonwealth of Australia, Senate Legal and Constitutional Affairs Committee, *Provisions of the Federal Magistrates Amendment (Disability and Death Benefits) Bill 2006*, 2 May 2006, paras 2.18, 2.19, http://202.14.81.34/Senate/committee/legcon_ctte/federal_magistrates/report/c02.htm, viewed 21 March 2007.
- 97 The spouse and children of the Victorian Attorney-General are entitled to pensions in the same circumstances and at the same rates and on the same terms as a spouse or child of a Supreme Court judge: *Attorney-General and Solicitor-General Act 1972* (Vic), s 6(1).
- 98 The spouse of a Governor is entitled to a pension at the death of a Governor or former Governor until that spouse dies or remarries: *Constitution Act 1975* (Vic), s 7A(3). The spouse or eligible child of a Judge of the Supreme Court is entitled to a pension at a rate of three-eighths of the annual salary of the Judge at the date of death or of a former Judge at the date of resignation or retirement: *Constitution Act 1975* (Vic), s 83(2)-(3).
- 99 This Act provides benefits to the spouse, widow and eligible child of a Judge on the Judge's death: for example *County Court Act 1958* (Vic), ss 14, 14AA, 17B.
- 100 This Act provides for a pension payable to the spouse of a Chief Magistrate or former Magistrate on his or her death: *Magistrates' Court Act 1989* (Vic), s 10A. 'Spouse' is defined as 'a person to whom the person is or was married': *Magistrates' Court Act 1989* (Vic), s 3A(2)(d).

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- 101 The spouse and children of the Chief Crown Prosecutor or a Senior Crown Prosecutor are entitled to pensions in the same circumstances and at the same rates and on the same terms and conditions as a spouse or child of a judge of the County Court: *Public Prosecutions Act 1994* (Vic), ss 18, 35.
- 102 This Act provides that spouses of Judges are entitled to a Judge's pension on the death of the judge: *Supreme Court Act 1986* (Vic), ss 104A – 104J.
- 103 Equal Opportunity Commission of Victoria, Submission 327. The Bill amends all of the Acts described above.
- 104 Judicial Conference of Australia, Submission 197.
- 105 *Governor-General Act 1974* (Cth), ss 4, 4A, 4AA.
- 106 *Governor-General Act 1974* (Cth), ss 2C, 2B.



CHAPTER 14: *Aged Care*

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14.1 What is this chapter about?

This chapter examines discrimination against same-sex couples and their families in the context of residential aged care (aged care).

When people enter an aged care facility they usually have to pay certain daily fees and other payments to fund their care and residence. The *Aged Care Act 1997* (Cth) (the Aged Care Act) sets out how those fees and payments should be calculated in both public and private aged care facilities.

The Aged Care Act uses assets and income tests to calculate the various residential care fees and the liability to pay a bond.

For an opposite-sex couple, the value of the family home is exempted from the assets test if it is still occupied by the aged person's partner or close family member. However, the Aged Care Act does not recognise a same-sex couple as a genuine couple, so the family home of a same-sex couple is included in the assets test even if a same-sex partner is living in it.

Similarly, the income tests under the Aged Care Act treat a same-sex couple as two individuals rather than as a couple. This means that same-sex couples will be subject to different income thresholds than opposite-sex couples.

The end result is that a person in a same-sex couple will often pay more than a person in an opposite-sex couple when entering an aged care facility.

The discrimination against same-sex couples regarding the calculation of aged care daily fees, payments and bonds occurs because of the definitions of 'member of a couple' and 'partner' in the Aged Care Act. These definitions include married and opposite-sex de facto partners, but exclude same-sex partners.

Further, the definitions of 'dependent child' and 'close relation' may exclude the child of a lesbian co-mother or gay co-father.

The narrow definitions can affect how a same-sex couple's assets are assessed for accommodation payments and may jeopardise the ownership of the family home.

This chapter outlines how the application of assets and income tests for residential aged care fees and payments discriminate against same-sex couples. It also discusses some of the non-financial concerns that same-sex couples have about residential aged care.

The chapter identifies how the human rights of aged same-sex couples are breached. It then recommends changes to the law in order to address those breaches.

Specifically, this chapter addresses the following questions:

- Do same-sex couples pay more for aged care?
- What other issues face ageing same-sex couples?
- Does aged care legislation breach human rights?
- How should aged care legislation be amended to eliminate future breaches?

14.2 Do same-sex couples pay more for aged care?

Same-sex couples are likely to pay different fees for aged care than opposite-sex couples. Often same-sex couples will pay more than opposite-sex couples, sometimes they will pay less. Where same-sex couples do pay more, the impact can be devastating.

14.2.1 There are a range of fees for residential aged care

A person entering an aged care facility must pay both an **accommodation payment** and **daily residential care fees**. These may be reduced and/or waived if a person is facing 'genuine financial hardship'.¹

An assets test is used to determine the **accommodation payments** (in the form of an accommodation charge or an accommodation bond).

An income test is used to determine **daily residential care fees**.

The modified social security assets and income tests used to determine those fees take into account the income, assets and housing needs of the individual going into care as well as his or her partner, close relation or dependent child.

The definitions of 'partner', 'close relation' and 'dependent child' in the Aged Care Act exclude same-sex partners and may exclude a child born into and raised by a same-sex couple in some circumstances. A carer is not specifically defined.

This means that the assets and income tests apply differently to same-sex families than to opposite-sex families. The following sections explain the discriminatory impact that this can have on same-sex families.

14.2.2 A same-sex partner who owns a home will be liable for 'accommodation payments'

A person entering an aged care facility will only have to make an accommodation payment if he or she has qualifying assets valued at more than \$33 000.²

If a person is in a recognised couple then the qualifying assets include the combined asset pool of the couple. The assets are then valued at 50% of the couple's total relevant asset pool.³ In other words, a person who is a member of a recognised couple will only have to pay an accommodation payment if the average of the couple's qualifying assets is valued at more than \$33 000.⁴

The Aged Care Act provides that the value of a person's home is disregarded for the purposes of the assets test if that home is occupied by:

- the person's 'partner' (or the other 'member of a couple')⁵
- a 'dependent child' of the person⁶
- a 'close relation' of the person in certain circumstances⁷
- a carer of the person in certain circumstances.⁸

However, an elderly same-sex couple is unlikely to benefit from any of these exemptions, as described below. This means that a same-sex couple's home will almost always be counted in the assets test. So a person in a same-sex couple entering aged care will generally be liable for an accommodation payment if he or she owns a home (solely or jointly).

(a) *A same-sex partner is not a 'partner'*

The Aged Care Act defines a 'partner' as the other 'member of a couple' of which the person is also a member.⁹

A 'member of a couple' is a person who is legally married to another person or someone who lives with another person 'in a marriage-like relationship, although not legally married to the other person'.¹⁰

The term 'marriage-like relationship' is not defined in the Aged Care Act. However, as discussed in Chapter 4 on Recognising Relationships, the 1998 Federal Court decision in *Commonwealth of Australia v HREOC and Muller* suggests that the reference to a 'marriage-like relationship' will exclude a same-sex relationship.¹¹

Consequently, a member of a same-sex couple entering an aged care facility cannot exempt his or her home from the assets test, even though his or her partner is living in it.

(b) *A same-sex partner is unlikely to be a carer*

If a same-sex partner is a carer then the couple's home may be exempt from the assets test.¹² A carer is not specifically defined in the legislation but includes a person who:

- has been living in the home for at least two years; and
- is eligible to receive an income support payment (for example a Centrelink or Department of Veterans' Affairs means-tested pension or benefit).¹³

Only a limited number of people will be eligible for those payments, and therefore a limited number of same-sex partners will qualify as a carer.¹⁴

(c) *A child of a same-sex couple may be a 'dependent child'*

If a 'dependent child' is living in the house owned by the person entering an aged care facility, the home will be excluded from the assets test.¹⁵

The Aged Care Act defines a 'dependent child' to include a child where the adult:

- (i) is legally responsible (whether alone or jointly with another person) for the day-to-day care, welfare and development of the young person; or
- (ii) is under a legal obligation to provide financial support in respect of the young person...¹⁶

In addition, the child must not be in full-time employment or be receiving a social security pension or benefit.¹⁷ And the child must be either under 16, or between 16 and 25 and in full-time education.¹⁸

Chapter 5 on Recognising Children notes that when children are born to a lesbian or gay couple their parents may include a birth mother, lesbian co-mother, birth father or gay co-father(s).¹⁹

This definition of 'dependent child' potentially includes the child of all of these parents. However, it may be more difficult for a lesbian co-mother or gay co-father to prove that he or she is 'legally responsible' or 'under an obligation to support' a child, than it would be for a birth mother or birth father.

The legislation does not specify what is required to prove these elements of the definition. However, a birth mother or birth father are generally the legal parents of a child and therefore are *assumed* to have legal responsibility. On the other hand, a lesbian co-mother or gay co-father may have to take additional steps to prove that legal relationship. A parenting order in favour of the lesbian co-mother or gay co-father should be sufficient. However, as Chapter 5 on Recognising Children explains, parenting orders can be expensive and may involve lengthy court proceedings.

If a same-sex couple does not have the resources to go through this process, a lesbian co-mother or gay co-father may be in a more tenuous position than a birth mother or birth father (who need little more than a birth certificate to prove that a child is a 'dependent child').

However, the impact of this potential discrimination is limited, as few people old enough to enter an aged care facility will have a child under 25 living with them in their home.

(d) *A child of a lesbian co-mother or gay co-father is not a 'close relation'*

Under the Aged Care Act, a 'close relation' of a person entering residential aged care is:

the father or mother of the person, or a sister, brother, child or grandchild of the person, or a person included in a class of persons specified in the Residential Care Subsidy Principles.²⁰

In addition, the person must have occupied the home for the past five years and must be eligible to receive an income support payment at the time.²¹

'Child' is not defined in the legislation. As discussed in Chapter 5 on Recognising Children, where there is no definition of child it is generally assumed that the legislation is only referring to the child of a birth mother or birth father. This means that the child of a lesbian co-mother or gay co-father will not qualify as that person's 'close relation'.

(e) *A same-sex couple's home will usually be counted in the assets test for accommodation payments*

Since an elderly same-sex couple is unlikely to qualify for any of the exemptions under the legislation, the couple's home will generally be counted in the assets test.

The full value of a same-sex couple's home will be taken into account in the assets test if the partner entering aged care is the sole title-holder. And half of the value will be taken into account if the partner entering aged care holds half the title of the home. The value of the home will only be exempt if the partner entering aged care has no interest in the home at all. An opposite-sex couple's home would be exempt in all these circumstances.

Therefore, most people in a same-sex relationship who own a home on their own, or with their partner, will have to make accommodation payments. Only those opposite-sex couples with sufficient assets *on top of* their home will have to make these payments.

14.2.3 A same-sex partner who owns any other assets is likely to be liable for accommodation payments

In addition to a home, there are a large range of other assets included in the assets test.²²

If a person is a member of an opposite-sex couple, the value of that person's assets and the value of his or her partner's assets will be added together and then halved for the purposes of the assets test.²³

However, if a person is a member of a same-sex couple, the full value of that person's assets will be counted and none of his or her partner's assets will be counted. This will disadvantage a same-sex couple where the partner entering aged care owns substantial assets, and the other partner owns very few assets. It could be to the advantage of the same-sex couple if the situation were reversed.

The main point is that for a same-sex couple, which partner owns what asset will determine liability for accommodation payments. In an opposite-sex couple, it does not matter who owns what assets.

14.2.4 A same-sex couple will generally pay higher accommodation payments

The assets test described above is used to decide whether, and how much, a person entering aged residential care must pay in **accommodation payments**.

Depending on the level of care a person requires, the **accommodation payment** will take the form of one of two types of payments:

- an **accommodation charge**
- an **accommodation bond**.

The following sections show that the discriminatory application of assets tests means that same-sex couples will generally pay higher **accommodation payments** than opposite-sex couples.

(a) Same-sex couples generally pay higher accommodation charges

An accommodation charge is a daily amount that is payable (in addition to daily residential care fees – see section 14.2.5) by residents who enter permanent care and need a high level of care.²⁴

The amount of the accommodation charge depends on the value of the resident's assets at the time of their entry as a permanent resident to the aged care home. Since more assets are often counted for same-sex couples they will generally pay a higher accommodation charge.

(i) More assets may be counted for same-sex couples

For a same-sex couple, but not an opposite-sex couple, the following assets will generally be counted:

● Same-Sex: Same Entitlements

- the home in which the same-sex couple lives (this asset is usually exempt for an opposite-sex couple)
- the full value of all other assets owned by the partner entering care (only the average of both partners' combined assets will be counted for an opposite-sex couple).

Therefore a person in a same-sex couple will generally pay a higher charge because more of their assets will be counted.²⁵

(ii) *The charges increase if a person has more assets*

The maximum accommodation charge of \$17.13 a day only applies if a person entering aged care has relevant assets worth \$64 263 or more.²⁶

People with assets between \$33 000 and \$64 263 may pay an accommodation charge on a sliding scale, based on the amount of assets above \$33 000.²⁷

People with less than \$33 000 in assets, respite residents, concessional residents and residents for whom a hardship determination is in place, do not have to pay an accommodation charge.²⁸

(iii) *Example comparing accommodation charges for a same-sex and opposite-sex couple*

The following example illustrates how the assets tests for accommodation payments affect same-sex and opposite-sex couples differently.

If a person enters an aged care facility and requires a high level of care, they will be asked to pay a daily accommodation charge.

Jane is entering an aged care facility requiring a high level of care. Her partner Michael will remain in their jointly owned family home.

Sean is entering an aged care facility requiring a high level of care. His partner Brian will remain in their jointly owned family home.

Because Jane is a member of an opposite-sex couple:

- *her family home will not be included in the assets test²⁹*
- *the sum total of all of Jane and Michael's other assets will be halved.³⁰*

As the following table demonstrates, despite the fact that Jane and Michael, and Sean and Brian, have the same total assets, Sean will be liable for a \$17.13 daily accommodation charge and Jane will not.

ASSETS (\$)	JANE (AND MICHAEL)	SEAN (AND BRIAN)
Home (jointly owned)	\$600,000	\$600,000
Motor vehicle (owned by Jane/Sean)	\$30,000	\$30,000
Savings account (held by Jane/Sean)	\$33,500	\$33,500
Total asset value	\$663,500	\$663,500
Assessable assets	\$31,750	\$363,500
Daily accommodation charge	Nil	\$17.13

(b) Same-sex couples generally pay higher accommodation bonds

An accommodation bond is payable (in addition to daily residential care fees – see section 14.2.5) by residents who enter permanent care at a low level of care. An accommodation bond must also be paid if a resident would like a higher standard of service and accommodation.³¹

An accommodation bond is like an interest free loan by the resident to the aged care facility.³² Accommodation bonds can be high amounts. They can cost up to tens of thousands of dollars.

Under the Aged Care Act, the facility can deduct a monthly amount from the bond, called the retention amount, for up to five years.³³ The facility can also take any interest earned from the accommodation bond.³⁴ The balance of the bond is refunded to the resident on departure, or to their estate on death.³⁵

(i) More assets are counted for same-sex couples

A person entering aged care cannot be charged a bond which would leave them with less than \$33 000 in assets.³⁶ For a member of an opposite-sex couple the couple must be left with their home plus \$66 000 in other assets. This is because the total value of both partners' assets will be halved for opposite-sex couples for the purposes of the assets test.³⁷ For a same-sex couple who owns a home, that home will automatically require them to pay the bond, irrespective of the value of the other assets of the partner entering care.

(ii) The bond increases if a person has more assets

There is no fixed formula for calculating an accommodation bond, but the amount is related to the assets of the person entering aged care. So a person in a same-sex couple will likely be asked to pay a higher bond because their home will be counted in the assets test.

(iii) A same-sex couple's home may be at higher risk

A person or couple can choose to fund an accommodation bond in any way that is convenient, either as a lump sum, as a periodic payment, or as a combination of both.³⁸

However, for many people their home is their primary, or only, asset with sufficient value to fund an accommodation bond.

The risk of having to sell or refinance a home to pay a bond will be higher for a same-sex couple whose only major asset is their home. This is because the home will be used to calculate the accommodation bond *and* it will be the only asset to support the payment of that bond.

For an opposite-sex couple in the same situation, their home will be exempt from the calculation with the likely result that no bond is payable. Thus, the home of an opposite-sex couple is much better protected than the home of a same-sex couple.

The risk to same-sex couples is described by Jim Woulfe as follows:

[W]here a member of an opposite-sex couple is incapacitated and requires nursing home care, the means test for an accommodation bond excludes the family home. However, if one member of a same-sex couple requires residential nursing care, then that person's share of

the family home is treated as an asset. What this means for us is that if either of us were ever incapacitated, we would face the possibility of being forced to sell our home out from under the other one.³⁹

Rod Swift from Gay and Lesbian Equality (WA) told the Inquiry:

If one person is being admitted to a nursing home, and the other person is staying at home, [de facto heterosexual couples and married couples] don't have to sell the family home to pay for nursing home bonds. That's not the case for a same-sex couple. They [are], even... as tenants in common... treated as individuals for that law, and would have to sell one half the house to raise the bond... this is a huge financial burden [for] same-sex couples.⁴⁰

(iv) Example comparing accommodation bonds for same-sex and opposite-sex couples

If Jane (who is a member of an opposite-sex couple) and Sean (who is a member of a same-sex couple) from the example in section 14.2.4, are both entering an aged care facility and require a low level of care, they will be asked to make an accommodation payment in the form of a bond.

The assets of both couples will be assessed in the same way as illustrated in section 14.2.4.

Jane and Michael

Jane is entering an aged care facility and Michael will remain in the family home:

<i>Total assets value</i>	\$663 500
<i>Jane's assessable assets</i>	\$31 750

A person cannot be asked to pay an accommodation bond if they are left with less than \$33 000 in assets.⁴¹ Therefore, Jane will not be required to pay an accommodation bond.

Sean and Brian

Sean is entering an aged care facility and Brian will remain in the family home:

<i>Total assets value</i>	\$663 500
<i>Sean's assessable assets</i>	\$363 500

There is no maximum accommodation bond an aged care facility can charge, but a person must be left with \$33 000 in assets. Sean could be asked to pay an accommodation bond of over \$100 000 because he has \$363 500 in assessable assets.⁴²

14.2.5 The income distribution between same-sex partners will determine the amount of daily care fees

All people entering residential aged care facilities must pay daily care fees in addition to an accommodation payment (unless they are former prisoners of war).⁴³

There are two types of daily care fees:⁴⁴

- Every person who enters a residential aged care facility must pay a **basic daily care fee** which is currently set at:

- \$30.77 for pensioners receiving a means-tested income support payment⁴⁵
- \$38.35 for non-pensioners.⁴⁶
- Part-pensioners and non-pensioners may be asked to pay an **additional income-tested fee**.⁴⁷

The amount of the daily care fee is determined by an income test using the same rules as the age and service pensions.⁴⁸ Centrelink and the Department of Veterans' Affairs assess the income for the Department of Health and Ageing for the purposes of determining daily care fees.

As discussed in Chapter 9 on Social Security, and Chapter 10 on Veterans' Entitlements, the income test applies differently to same-sex and opposite-sex couples because a same-sex couple is treated as two individuals.

(a) Only the income of the same-sex partner in care will be counted in the income test

If a person is a member of an opposite-sex couple, the income of each member of the couple is added together and then divided in half.⁴⁹

However, a same-sex partner is not recognised as a 'partner' under the Aged Care Act, the *Social Security Act 1991* (Cth) or the *Veterans' Entitlements Act 1986* (Cth), so a same-sex couple is not recognised as a couple for the purposes of the income test.

This means that only the income of the same-sex partner in care will be counted in the income test.

(b) Same-sex and opposite-sex partners will pay different daily care fees

Since same-sex partners are treated as two individuals rather than as a couple, the amount of the daily care fee paid by a member of a same-sex couple will depend on the distribution of income between that couple. For an opposite-sex couple the income distribution between partners is irrelevant.⁵⁰

Sometimes a same-sex couple will pay more than an opposite-sex couple and other times less than an opposite-sex couple.

(i) A same-sex couple may pay higher daily care fees

A resident entering care who has a higher income than his or her same-sex partner will be at a **disadvantage** when compared to an opposite-sex couple in the same position.

This is because the person entering care will not be able to combine his or her own income with that of his or her partner and divide the total amount by two for the purposes of the income test. The entirety of the income of the person entering care will be included in the income test and he or she will be charged a higher rate than a person in an opposite-sex couple.

(ii) A same-sex couple may pay lower daily care fees

A resident entering care who has a lower income than his or her same-sex partner will be at an **advantage** when compared to an opposite-sex couple in the same position.

This is because only the lower income of the person entering care will be assessed. He or she will be charged a lower rate than a member of an opposite-sex couple in similar circumstances.

14.3 What other issues face ageing same-sex couples?

There were a number of oral and written submissions to the Inquiry discussing issues facing ageing same-sex couples. Many of them are about the extra cost and financial risks associated with aged care.

The following issues do not directly relate to financial matters. However, they do relate to additional discrimination facing ageing same-sex couples.⁵¹

14.3.1 Aged care policies and codes ignore same-sex couples

A number of submissions to the Inquiry argue that federal government policies do not acknowledge the existence of older gay, lesbian, bisexual, trans and intersex (GLBTI) Australians.⁵² For example, the Australian Medical Association argues that:

[t]here is a need to recognise sexual and gender diversity within the aged care sector as this lack of recognition means that the health needs of many older people are not being adequately addressed with culturally appropriate care.⁵³

The Gay and Lesbian Rights Lobby (NSW) argues that ‘it is important that aged care policy and education reflects the diversity in aged care needs.’⁵⁴

Dr Jo Harrison, an academic in the field on ageing, states that the *User Rights Principles 1997* under the Aged Care Act make no mention of same-sex couples.⁵⁵ She argues that the Charter of Resident Rights contained within the *User Rights Principles 1997* should make explicit reference to GLBTI concerns.

A number of submissions note that the Council on the Ageing and the National Seniors Association have already recommended changes to the Code of Practice for Residential Aged Care to include same-sex couples:

Facilities [should] be provided for couples – including same-sex couples – requiring different levels of nursing care to enable them to remain together and care for each other in the same establishment should they so choose. Provision of this supportive care to elderly same-sex couples allows them the same dignity and respect as heterosexual couples in comparable situations.⁵⁶

Lesbian and Gay Solidarity (Melbourne) argue that outlawing discrimination on the grounds of sexuality could be a useful addition to the *Code of Ethics for the aged care industry*, which was developed in 2001.⁵⁷

14.3.2 Aged care facilities may not accept same-sex couples

Many submissions expressed great concern that aged care facilities will not accept and recognise the legitimacy of same-sex couples. As one person told the Inquiry:

I have recently started thinking about what will happen if or when one of us requires some sort of assisted accommodation or nursing home care and the prospect of that alienation in our elderly years because we will no longer be recognised as a couple is distressing to say the least.⁵⁸

The ALSO Foundation told the Inquiry that:

There is an assumption in many aged care facilities that older people have heterosexual partners or no partner at all and there is usually no precedence for same-sex couples to cohabit at such facilities. While it would be extremely traumatic for elderly GLBTI [gay, lesbian, bisexual, transgender and intersex] people to live without their long-term partners, their vulnerability at this time due to a lack of viable alternatives will often mean they will not complain about discriminatory practices.⁵⁹

Other concerns regarding access to aged care include:

- overt discrimination experienced by GLBTI people accessing aged care⁶⁰
- difficulties for same-sex couples seeking to access shared space within aged care facilities⁶¹
- no acknowledgement of a visiting partner⁶²
- no staff training to ensure recognition and respect for GLBTI residents and their relationships⁶³
- the failure of official forms (for registration etc) to recognise GLBTI relationships⁶⁴
- the invisibility of older GLBTI people⁶⁵
- potential discrimination when care is provided at home.⁶⁶

14.4 Does aged care legislation breach human rights?

The definitions of ‘partner’ and ‘close relation’ in the Aged Care Act exclude a same-sex partner. This means that the assets tests apply differently to same-sex couples than to opposite-sex couples. In many circumstances a same-sex couple will pay more for residential aged care than an opposite-sex couple in the same position.

Where the narrow definitions place same-sex couples at a financial disadvantage to opposite-sex couples in the same position, there will be a breach of article 26 of the *International Covenant on Civil and Political Rights*, which prohibits discrimination in any law.

Chapter 3 on Human Rights Protections explains Australia’s human rights obligations to same-sex couples in more detail.

14.5 How should aged care legislation be amended to avoid future breaches?

It is clear that same-sex couples are treated differently to opposite-sex couples when determining the fees for residential aged care. And in most cases, same-sex couples seeking to access aged care will pay higher fees than opposite-sex couples.

The Inquiry recommends amending aged care legislation to avoid future discrimination against same-sex couples seeking to access aged care.

The following sections summarise the causes of the problem and how to fix them.

14.5.1 Narrow definitions are the main cause of discrimination

Same-sex couples are generally worse off than opposite-sex couples because the definitions in aged care legislation fail to include same-sex couples and families.

The primary cause of the discrimination lies in the definition of ‘member of a couple’ in the *Aged Care Act 1997* (Cth). That definition does not consider a same-sex partner to be a member of a couple.

The definition of ‘close relation’ is also a problem because it does not appear to include the children of a lesbian co-mother or gay co-father.

The definition of ‘dependent child’ may include the child of a lesbian co-mother and gay co-father as well as the child of the birth parents. But in the absence of parenting presumptions or adoption, the lesbian co-mother or gay co-father may need to get a parenting order to prove the relationship. This can be expensive and complicated.

14.5.2 The solution is to amend the definitions and clearly recognise both same-sex parents

Since the main problem with the Aged Care Act is the narrow scope of legislative definitions, the solution is to amend those definitions so they are inclusive, rather than exclusive, of same-sex couples and families.

Chapter 4 on Recognising Relationships presents two alternative approaches to amending federal law to remove discrimination against same-sex couples.

The Inquiry’s preferred approach for bringing equality to *same-sex couples* is to:

- retain the current terminology used in federal legislation (for example retain the term ‘member of a couple’ in the Aged Care Act)
- redefine the terms in the legislation to include same-sex couples (for example, redefine ‘member of a couple’ to include a person in a ‘de facto relationship’)
- insert a new definition of ‘de facto relationship’ which includes same-sex couples.

Chapter 5 on Recognising Children sets out how to better protect the rights of both the *children of same-sex couples* and the parents of those children.

The Inquiry recommends that the federal government implement parenting presumptions in favour of a lesbian co-mother of a child conceived through assisted reproductive technology (ART). This would mean that a lesbian co-mother of an ART child would automatically be a ‘close relation’ of the child (in the same way as the father in an opposite-sex couple would be a ‘close relation’).

Chapter 5 also suggests that it should be easier for a lesbian co-mother or gay co-father to adopt a child. Again, if this occurred then they would also be assumed as parents under the legislation and the child would automatically qualify as a 'close relation' or 'dependent child'.

Finally, Chapter 5 suggests that federal legislation should clearly recognise the status of a person who has a parenting order from the Family Court of Australia. This would mean that the child of a gay co-father or lesbian co-mother with parenting orders would more clearly qualify as a 'dependent child' under the Aged Care Act.

The following list sets out the definitions which would need to be amended according to these suggested approaches.

The Inquiry notes that if the government were to adopt the alternative approach set out in Chapter 4 on Recognising Relationships then different amendments may be required.

14.5.3 A list of legislation to be amended

The Inquiry recommends amendments to the following legislation discussed in this chapter:

Aged Care Act 1997 (Cth)

'close relation' (s 44.11(1) – no need to amend if a lesbian co-mother and gay co-father and their children may be recognised through reformed parenting presumptions or adoption laws)

'de facto relationship' (insert new definition)

'dependent child' (s 44.11(2) – amend to clarify the role of a parenting order; otherwise no need to amend if the child of a lesbian co-mother or gay co-father may also be recognised through reformed parenting presumptions or adoption laws)

'member of a couple' (amend s 44.11(1) to replace 'marriage-like relationship' with 'de facto relationship')

'partner' (s 44.11(1) – no need to amend if 'member of a couple' is amended)

'young person' (s 44.11(3) – no need to amend)

Endnotes

- 1 Australian Government, Department of Health and Ageing, *5 Steps to Entry into Residential Aged Care*, June 2006, p26, http://www.health.gov.au/internet/wcms/publishing.nsf/Content/ageing-rescare-resentry_a.htm-copy2, viewed 14 March 2007.
- 2 Australian Government, Department of Health and Ageing, Aged Care Australia, *Help with aged care homes*, updated 03 August 2006, <http://www.agedcareaustralia.gov.au/internet/agedcare/publishing.nsf/Content/Accommodation+payments#PaymentAssessed>, viewed 5 April 2007.
- 3 *Aged Care Act 1997* (Cth), s 44.10(3).
- 4 Relevant assets include accounts held with banks, building societies, credit unions, bonds, shares, superannuation assets from which lump sums can be drawn, real estate, businesses, farms and surrender value of life insurance policies: *Residential Care Subsidy Principles 1997*, s 21.15. The *Residential Care Subsidy Principles 1997* were made under the *Aged Care Act 1997* (Cth), s 96(1).
- 5 'Partner' and 'member of a couple' include a person who lives with another person 'in a marriage-like relationship, although not legally married to the other person': *Aged Care Act 1997* (Cth), ss 44.11(1), 44.10(2)(a).
- 6 *Aged Care Act 1997* (Cth), s 44.10(2)(a).
- 7 *Aged Care Act 1997* (Cth), s 44.10(2)(c).
- 8 *Aged Care Act 1997* (Cth), s 44.10(2)(b).
- 9 *Aged Care Act 1997* (Cth), s 44.11(1).
- 10 *Aged Care Act 1997* (Cth), s 44.11(1).
- 11 *Commonwealth of Australia v HREOC and Muller* (1998) EOC 92–931.
- 12 *Aged Care Act 1997* (Cth), s 44.10(2)(b).
- 13 *Aged Care Act 1997* (Cth), s 44.10(2)(b). See also Australian Government, Department of Health and Ageing, *The Residential Care Manual*, April 2005, para 8.3.2.5, <http://www6.health.gov.au/internet/wcms/publishing.nsf/Content/ageing-manuals-rcm-rcmindx1.htm~ageing-manuals-rcm-rcmindx109.htm>, viewed 14 March 2007. Under the *Aged Care Act 1997* (Cth), sch 1, an income support payment includes a social security benefit, job search allowance, a social security pension; a youth training allowance under the *Social Security Act 1991* (Cth), s 23(1); a service pension or income support supplement under the *Veterans' Entitlement Act 1986* (Cth). A social security pension includes a carer payment: *Social Security Act 1991* (Cth), s 23(1).
- 14 See Chapter 9 on Social Security.
- 15 *Aged Care Act 1997* (Cth), s 44.10(2)(a).
- 16 *Aged Care Act 1997* (Cth), s 44.11(2)(a).
- 17 *Aged Care Act 1997* (Cth), s 44.11(2)(b).
- 18 *Aged Care Act 1997* (Cth), s 44.11(3).
- 19 For an explanation of these terms see the Glossary of Terms.
- 20 *Aged Care Act 1997* (Cth), s 44.11(1). The *Residential Care Subsidy Principles 1997* do not specify any other category of person as a 'close relation': *Residential Care Subsidy Principles 1997* (Cth).
- 21 *Aged Care Act 1997* (Cth), s 44.10(2)(c).
- 22 Assets include (but are not limited to): accounts, interest-bearing deposits, fixed deposits, bonds, debentures, shares, investments in property trusts, real estate, businesses, farms, loans, motor vehicles, boats, caravans, surrender value of life insurance policies, investment collections, superannuation from which lump sums can be withdrawn, household contents and personal effects. Australian Government Department of Health and Ageing, *The Residential Care Manual*, April 2005, para 6.3.5.1.5 at: <http://www6.health.gov.au/internet/wcms/publishing.nsf/Content/ageing-manuals-rcm-rcmindx1.htm~ageing-manuals-rcm-rcmindx107.htm>, viewed 21 March 2007.
- 23 *Aged Care Act 1997* (Cth), s 44.10(3).

- 24 Australian Government, Department of Health and Ageing, *The Residential Care Manual*, April 2005, para 8.3.1.1, <http://www6.health.gov.au/internet/wcms/publishing.nsf/Content/ageing-manuals-rcm-rcmindx1.htm~ageing-manuals-rcm-rcmindx109.htm>, viewed 14 March 2006. This does not apply to a person who accesses care on an 'extra services' basis. Instead they may be asked to pay an accommodation bond, regardless of the level of care they require. An 'extra services' place provides a significantly higher standard of accommodation and services to residents, but not a higher standard of care, para 14.2, <http://www6.health.gov.au/internet/wcms/publishing.nsf/Content/ageing-manuals-rcm-rcmindx1.htm~ageing-manuals-rcm-rcmindx115.htm>, viewed 14 March 2007.
- 25 See ACON, Submission 281; Australian Coalition for Equality, Submission 228; Tasmanian Gay and Lesbian Rights Group, Submission 233; ALSO Foundation, Submission 307b; Action Reform Change Queensland and Queensland AIDS Council, Submission 270a; Gay and Lesbian Rights Lobby (NSW), Submission 333.
- 26 Australian Government, Department of Health and Ageing, *The accommodation charge*, September 2006 – March 2007, <http://www.health.gov.au/internet/wcms/publishing.nsf/Content/ageing-publicat-qcoa-15info.htm>, viewed 5 April 2007.
- 27 Australian Government, Department of Health and Ageing, *The accommodation charge*, September 2006 – March 2007, <http://www.health.gov.au/internet/wcms/publishing.nsf/Content/ageing-publicat-qcoa-15info.htm>, viewed 5 April 2007.
- 28 Australian Government, Department of Health and Ageing, *The Residential Care Manual*, April 2005, para 8.3.3.2, <http://www6.health.gov.au/internet/wcms/publishing.nsf/Content/ageing-manuals-rcm-rcmindx1.htm~ageing-manuals-rcm-rcmindx109.htm>, viewed 19 February 2006; Australian Government, Department of Health and Ageing, *The accommodation charge*, September 2006 – March 2007, <http://www.health.gov.au/internet/wcms/publishing.nsf/Content/ageing-publicat-qcoa-15info.htm>, viewed 14 March 2007. The Secretary to the Department of Health and Ageing may make a financial hardship determination in favour of someone if the Secretary is satisfied that paying the maximum accommodation charge would cause the care recipient financial hardship: *Aged Care Act 1997* (Cth), s 44.31(1).
- 29 *Aged Care Act 1997* (Cth), s 44.10(2).
- 30 *Aged Care Act 1997* (Cth), s 44.10(3).
- 31 Australian Government, Department of Health and Ageing, *5 Steps to Entry into Residential Aged Care*, p5, http://www.health.gov.au/internet/wcms/publishing.nsf/Content/ageing-rescare-resentry_a.htm-copy2, viewed 14 March 2007. See also Australian Government, Department of Health and Ageing, *The Residential Care Manual*, April 2005, para 14.2, <http://www6.health.gov.au/internet/wcms/publishing.nsf/Content/ageing-manuals-rcm-rcmindx1.htm~ageing-manuals-rcm-rcmindx109.htm>, viewed 14 March 2007.
- 32 The facility must use income from the loan to improve its building standards, and the quality and range of its aged care services. Australian Government, Department of Health and Ageing, *5 Steps to Entry into Residential Aged Care*, p23, [http://www.health.gov.au/internet/wcms/publishing.nsf/Content/5D86020729E69196CA256F1900106532/\\$File/06working.pdf](http://www.health.gov.au/internet/wcms/publishing.nsf/Content/5D86020729E69196CA256F1900106532/$File/06working.pdf), viewed 14 March 2007.
- 33 The maximum retention amount is currently \$273.50 per month: Australian Government, Department of Health and Ageing, *Accommodation bonds*, September 2006 – March 2007, <http://www.health.gov.au/internet/wcms/publishing.nsf/content/ageing-publicat-qcoa-16info.htm>, viewed 14 March 2007.
- 34 The maximum permissible interest rate which can be charged by the Australian Government Department of Health and Ageing is announced quarterly. From January 1 2007 to 31 March 2007 the maximum permissible interest rate was 10.37%: Australian Government, Department of Health and Ageing, *Maximum Bond Interest Rate*, <http://www.aodgp.gov.au/internet/wcms/publishing.nsf/Content/ageing-finance-gic.htm-copy2>, viewed 14 March 2007.
- 35 Australian Government, Department of Health and Ageing, *The Residential Care Manual*, April 2005, para 8.3.1.2, <http://www6.health.gov.au/internet/wcms/publishing.nsf/Content/ageing-manuals-rcm-rcmindx1.htm~ageing-manuals-rcm-rcmindx109.htm>, viewed 14 March 2007.
- 36 Australian Government, Department of Health and Ageing, *Accommodation bonds*, September 2006 – March 2007, <http://www.health.gov.au/internet/wcms/publishing.nsf/content/ageing-publicat-qcoa-16info.htm>, viewed 5 April 2007.

- 37 *Aged Care Act 1997* (Cth), s 44.10(3).
- 38 Australian Government Department of Health and Ageing, *The Residential Care Manual*, April 2005, para 8.3.1.2. <http://www6.health.gov.au/internet/wcms/publishing.nsf/Content/ageing-manuals-rcm-rcmindx1.htm~ageing-manuals-rcm-rcmindx109.htm>, viewed 20 March 2007.
- 39 Jim Woulfe, Opening Statement, Sydney Hearing, 26 July 2006. See also Jim Woulfe, Submission 50; Jennifer Cahalan, Submission 239.
- 40 Rod Swift, Perth Hearing, 9 August 2006. See also Jennifer Cahalan, Submission 239.
- 41 Australian Government, Department of Health and Ageing, *Accommodation bonds*, September 2006 – March 2007, <http://www.health.gov.au/internet/wcms/publishing.nsf/content/ageing-publicat-qcoa-16info.htm>, viewed 5 April 2007.
- 42 Australian Government, Department of Health and Ageing, *The Residential Care Manual*, April 2005, para 8.3.3.2, <http://www6.health.gov.au/internet/wcms/publishing.nsf/Content/ageing-manuals-rcm-rcmindx1.htm~ageing-manuals-rcm-rcmindx109.htm>, viewed 19 February 2006.
- 43 Australian Government, Department of Health and Ageing, *The Residential Care Manual*, April 2005, para 7.3.2.2, <http://www6.health.gov.au/internet/wcms/publishing.nsf/Content/ageing-manuals-rcm-rcmindx1.htm~ageing-manuals-rcm-rcmindx108.htm>, viewed 9 March 2007.
- 44 Australian Government, Department of Health and Ageing, *5 Steps to Entry into Residential Aged Care*, p18, http://www.health.gov.au/internet/wcms/publishing.nsf/Content/ageing-rescare-reentry_a.htm-copy2, viewed 14 March 2007.
- 45 Australian Government, Department of Health and Ageing, *Residential care fees for full pensioners*, <http://www.health.gov.au/internet/wcms/Publishing.nsf/Content/ageing-publicat-qcoa-12info.htm>, viewed 5 April 2007.
- 46 Australian Government, Department of Health and Ageing, *Residential care fees for self funded retirees*, <http://www.health.gov.au/internet/wcms/publishing.nsf/Content/ageing-publicat-qcoa-14info.htm>, viewed 5 April 2007.
- 47 Australian Government, Department of Health and Ageing, *5 Steps to Entry into Residential Aged Care*, p18, http://www.health.gov.au/internet/wcms/publishing.nsf/Content/ageing-rescare-reentry_a.htm-copy2, viewed 4 October 2006.
- 48 Australian Government, Department of Health and Ageing, *The Residential Care Manual*, April 2005, para 7.3.4.2, <http://www6.health.gov.au/internet/wcms/publishing.nsf/Content/ageing-manuals-rcm-rcmindx1.htm~ageing-manuals-rcm-rcmindx108.htm>, viewed 14 March 2007.
- 49 *Aged Care Act 1997* (Cth), s 44.24, adopting the definition in *Social Security Act* (Cth) s 1064-E2.
- 50 A single person under the income test must pay \$0.25 for every dollar he or she earns over the single person income threshold (\$64). Additional income-tested income fees are capped at \$52.56. A person who is a member of a couple pays \$0.25 for every dollar of a couple's combined non-pension income over the income test free area for a member of a couple (\$114 per week), divided by two. Australian Government, Department of Health and Ageing, *The Residential Care Manual*, April 2005, para 7.3.4.1, <http://www6.health.gov.au/internet/wcms/publishing.nsf/Content/ageing-manuals-rcm-rcmindx1.htm~ageing-manuals-rcm-rcmindx108.htm>, viewed 5 April 2007.
- 51 See also ACON, Submission 281; Australian Medical Association, Submission 314; Dr Jo Harrison, Submission 183.
- 52 ACON, Submission 281; ALSO Foundation, Submission 307b.
- 53 Australian Medical Association, Submission 314.
- 54 Gay and Lesbian Rights Lobby (NSW), Submission 333.
- 55 Dr Jo Harrison, Adelaide Hearing, 28 August 2006.
- 56 Australian Coalition for Equality, Submission 228. See also Tasmanian Gay and Lesbian Rights Group, Submission 233.
- 57 Lesbian and Gay Solidarity (Melbourne), Submission 89a.
- 58 Name Withheld, Submission 138.
- 59 ALSO Foundation, Submission 307b. See also, Blue Mountains Forum, 16 November 2006; Dr Jo Harrison, Adelaide Hearing, 28 August 2006; Murray Bridge Forum, 29 August 2006.
- 60 Dr Jo Harrison, Adelaide Hearing, 28 August 2006.

- 61 Gay and Lesbian Rights Lobby (NSW), Submission 333.
- 62 Gay and Lesbian Rights Lobby (NSW), Submission 333; Dr Jo Harrison, Adelaide Hearing, 28 August 2006.
- 63 Gay and Lesbian Rights Lobby (NSW), Submission 333; Lesbian and Gay Solidarity, Submission 89a.
- 64 Gay and Lesbian Rights Lobby (NSW), Submission 333.
- 65 Dr Jo Harrison, Adelaide Hearing, 28 August 2006; J Harrison, 'Pink lavender and grey: Gay, lesbian, bisexual, transgender and intersex ageing in Australian gerontology', *Gay and Lesbian Issues and Psychology Review*, vol 1, no 1, 2005, p12.
- 66 Lesbian and Gay Solidarity (Melbourne), Submission 89a.



CHAPTER 15: *Migration*

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15.1 What is this chapter about?

This chapter discusses the impact of migration laws on same-sex couples.

Many same-sex couples who appeared at the Inquiry's community forums talked about the problems they face in getting visas. They highlighted the limited options available to a same-sex couple wanting to migrate to Australia as a couple. They talked about the additional expense and disruption to their lives in proving their entitlement to a visa. And they talked about the indignity of being treated differently to genuine opposite-sex couples.

There is only one category of visa available to the same-sex partner of an Australian permanent resident or citizen – the Interdependency visa category. The Interdependency visa is similar to the Spouse visa available to an opposite-sex partner of an Australian resident or citizen but it may be more expensive to apply for the Interdependency visa in some circumstances.

There is also only one category of visa which allows a same-sex partner of a primary visa applicant to accompany them to migrate to Australia – the Temporary Business (Long Stay) 457 visa (the 457 visa). This compares to the myriad of visas available to an opposite-sex couple wishing to migrate to Australia together. The result is that each member of a same-sex couple may have to qualify separately for a visa. If one is not successful, the couple will be separated across the world.

Same-sex couples are denied access to the range of visas available to opposite-sex couples because a same-sex partner does not qualify as a 'spouse' and is therefore not a 'member of the family unit' in the Migration Regulations 1994 (Cth) (Migration Regulations).

This chapter briefly sets out what visas are available to a same-sex couple and the impact that limited visa options may have on them.

Specifically, this chapter address the following questions:

- How can the same-sex partner of an Australian citizen or resident get a visa?
- How can a same-sex couple migrate to Australia together?
- Do migration laws breach human rights?
- How should federal migration laws be amended to avoid future breaches?

15.2 How can the same-sex partner of an Australian citizen or resident get a visa?

Until 1991, the only visa available to an Australian's partner was the Spouse visa (or Prospective Marriage visa) and a same-sex partner could not qualify.

When the Interdependency category of visa was introduced in 1991, a same-sex partner of an Australian citizen or permanent resident could apply to stay in, or come to, Australia.¹

However, the Inquiry has been told that it may be harder for a same-sex partner to qualify for an Interdependency visa than it is for an opposite-sex partner to qualify for a Spouse visa. It

may also be more expensive to obtain that visa. Further, because the visa marks the partner as a same-sex partner, there may be a higher risk of discrimination in the workplace.

15.2.1 A same-sex partner is not a 'spouse'

Under the Migration Regulations a person can only be a 'spouse' if he or she is married or in a 'de facto relationship' with a person of the opposite-sex.² The *Migration Act 1958* (Cth) does not recognise a marriage between same-sex partners which took place outside Australia.³

Thus, a same-sex partner can never be a 'spouse'.

15.2.2 A same-sex partner may be in an 'interdependent relationship'

The Migration Regulations define an 'interdependent relationship' to be a relationship between any two people where:

- there is a 'mutual commitment to a shared life';
- the relationship is 'genuine and continuing'; and
- they live together.⁴

Thus, a same-sex partner can be a member of an 'interdependent relationship'.

15.2.3 The only visas available to same-sex partners are Interdependency visas

Since a same-sex partner cannot be a 'spouse', he or she will not qualify for a Spouse visa or a Prospective Marriage visa.⁵

However, a same-sex partner can qualify for a permanent Interdependency visa if he or she is in an 'interdependent relationship'.⁶

The Department of Immigration and Citizenship (DIAC) affirms that:

The Interdependency visa is the only visa that is available for a person who is a same-sex partner of another person. A same-sex partner of a person cannot be included as a member of the family unit on a visa application, even if the same-sex couple has been married according to the laws of another country. Under Australian law, only opposite-sex relationships can constitute a spouse relationship (ie. de jure (married) or de facto).⁷

15.2.4 Interdependency visas may cost more than Spouse visas

The same-sex partner of an Australian resident or citizen may pay more than double the amount than an opposite-sex partner to apply for a visa in Australia.

The cost of applying for a Spouse visa in Australia is as follows:

- \$650 for those who hold a valid Prospective Marriage visa and have married their partner

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- \$820 for those who entered Australia on a Prospective Marriage visa, have married their partner, but do not hold a current visa
- \$1990 for those who hold any other visa.⁸

An Interdependency visa costs \$1990 regardless.⁹

As the same-sex partner of an Australian resident or citizen can only apply for an Interdependency visa, he or she will always pay the highest application fee.

15.2.5 It can be difficult to prove entitlement to an Interdependency visa

There are substantial hurdles to proving both a genuine opposite-sex 'de facto relationship' and a same-sex 'interdependent relationship'. However, several people suggested to the Inquiry that it may be harder for a same-sex couple to prove an interdependent relationship.¹⁰

Anthony Pannuzzo and Daniel Milano write in their submission:

We started collecting information from the beginning, information that would prove our interdependency. We collected letters and cards addressed to us both (including envelopes as the immigration department loves to see post marks – legal proof), we collected legal documents, bank statements, leases, wills drawn up in each others names. What we would have given for a marriage licence. Or any form of federally recognised paperwork stating we were a couple who shared each others lives.¹¹

A woman at the Inquiry's Canberra forum said the following:

Proving interdependency for immigration is the same process for both straight and gay couples but the nature of the evidence and the interviews is very different. We accumulated 15 A4 binders of proof over 2 years. Straight couples provided their marriage certificate and a couple of bills. But they didn't need to provide the same level of evidence. The immigration interview was much more intrusive and detailed. For example, 'what colour is your partner's toothbrush?', rather than 'how was your wedding?'. So there can be differential treatment even when the wording of the law is the same.¹²

15.2.6 Interdependency visas may impact on job opportunities

Some submissions to the Inquiry raised issues of workplace discrimination as a possible outcome of Interdependency visas for same-sex partners. The Anti-Discrimination Commission Queensland comments:

As evidence of their eligibility to work legally in Australia, persons with a Subclass 310 [Interdependency] visa are required to produce the visa when applying for employment. Committee members suggest that some Australian employers are familiar with the Subclass 310 visa category and aware that it is issued to same-sex couples. They expressed concern that gay and lesbian persons who are temporary residents under this visa category are particularly vulnerable to employment discrimination.

This approach to partner migration is differential and places individuals in the precarious position of having their sexual preference flagged each time they apply for paid work in Australia. Committee members further noted that this approach to partner migration does not encourage diversity in Australia's workforce and shows no regard for privacy.¹³

One person talked about her experience as follows:

There's this thing with getting your Visa when you immigrate to Australia: If you're in a same sex couple under the Partner Migration Program, you have to nominate that you are an 'Interdependent' rather than married or de facto which heterosexual couples qualify for. This means that when you get your Visa you will have 'Interdependent' or number 814, permanently on your Visa showing that you belong to a particular sub-class and in this case "same sex."

Now I am usually asked to show my Visa when I apply for jobs. How do I know that people aren't saying: 'Oh, sub-class 814, that means she's gay! We don't want that kind working here!' I mean, what difference does it make to my professional qualifications what gender my partner is? That's a really bad kind of discrimination and it can have disastrous financial consequences.¹⁴

The Anti-Discrimination Commission Queensland recommends that the Spouse visa category (for opposite-sex couples) and the Interdependency visa category be merged into a single Partner/Domestic Relationship visa category.¹⁵

15.3 How can a same-sex couple migrate to Australia together?

Usually, when one member of a family obtains a work visa, business visa, student visa, migrant visa, graduate visa, temporary resident visa or other visa, the remainder of the family can accompany that person for the duration of the primary visa.

However, there is only one visa available to same-sex couples who wish to accompany each other to Australia: the Temporary Business (Long Stay) 457 visa (the 457 visa).

This is because a same-sex partner does not qualify as a 'spouse' and therefore cannot be a 'member of the family unit'. And most visas only allow people who are a 'member of the family unit' to accompany the primary visa holder.¹⁶

There may also be some visas available to a 'member of the immediate family'.¹⁷ This definition also excludes a same-sex partner because it relies on the definition of a 'spouse'.

Elizabeth Franklin and Vivianne Arnold articulate the impact of restricted visa categories as follows:

Same-sex couples suffer discrimination in immigration provisions that affect[s] their ability to live and work together in Australia. The ability for a couple to live and work together in the same country is a crucial financial and work-related entitlement and benefit, and a basic human rights issue.¹⁸

15.3.1 A same-sex partner is not a 'member of the family unit'

A 'member of the family unit' includes a person's 'spouse' but does not include a person in an 'interdependent relationship'.¹⁹ As discussed above, a same-sex partner does not qualify as a person's 'spouse' under the Migration Regulations. So a same-sex partner cannot be a 'member of the family unit'.

15.3.2 A same-sex partner is not a 'member of the immediate family'

The definition of a 'member of the immediate family' also includes a 'spouse' but not a person in an 'interdependent relationship'.²⁰ Thus a same-sex partner cannot be a 'member of the immediate family'.

15.3.3 The only visa available to a non-Australian same-sex couple is the 457 visa

On 1 July 2006, the visa rules for 457 visas were amended so that a person in an 'interdependent relationship' can accompany a person who has been granted a 457 visa.²¹ The 457 visa grants residency for between three months and four years.²²

15.3.4 A same-sex couple will usually have to make separate visa applications

If neither member of a same-sex couple is an Australian citizen or permanent resident, and one is granted a temporary visa other than a 457 visa, the other will have to apply for a visa on his or her own merits if he or she wishes to accompany a same-sex partner to Australia.

15.3.5 Separate applications cost more and can have long term financial impact

The fact that a migrant same-sex couple cannot generally make a joint visa application can put that couple at a considerable financial disadvantage. It can also create a great deal of unnecessary stress in terms of life planning.

Some of those disadvantages are as follows.

Firstly, in a joint application only the primary applicant must meet all the eligibility criteria, although the partner (or secondary applicant) must still meet health and character tests.

Secondly, it will cost more in both money and time to make two applications rather than one.

Thirdly, it is unlikely that both members of a couple will get the same visas at the same time with the same benefits and conditions. It is also possible that the second person does not qualify for a visa at all.

This may mean that one partner is left behind – either temporarily or for longer periods – and the couple must maintain two households in two countries. It may also mean that one partner has to leave Australia at different times than the other to get a visa renewed. Alternatively one partner may accompany the other on a temporary visa, like a tourist visa, and be denied the right to work during that time. An opposite-sex couple will not have to face any of these expenses or disruptions to their life.

Doug Pollard comments that if he had been able to work during the extensive period of time in which he was trying to get a visa in Australia, he might still have superannuation savings now:

When [my partner] was transferred to Australia by his company more than ten years ago, on a working visa, despite the fact that we had been together for three years, I was not allowed to come with him as his spouse.

Because we are not a young couple – I am 56 this year, my partner 53 – I had great difficulty in getting a visa in my own right, and we had to rely on a series of tourist visas, failed visa applications and appeals to stay together until he eventually gained permanent residency and I could apply as his dependent partner. Eventually we both took Australian citizenship.

For more than five years I was unable to work, and had to leave the country regularly, never knowing if I would be allowed back.

This not only imposed a great strain on our relationship, but also a considerable financial burden. It rendered me unemployable – I have only, finally, gained regular paid (part-time) employment this year, after working as an unpaid volunteer for years to re-establish my credentials.

If our relationship had been recognised at the outset, as a heterosexual marriage would have been, none of this would have happened. I might, for example, still have my own superannuation fund, instead of having to rely on my partners.²³

15.4 Do migration laws breach human rights?

Excluding a same-sex partner from the definition of ‘spouse’ in the Migration Regulations means that there are only two visa categories available to same-sex couples. Those two categories are available because of the introduction of the ‘interdependent relationship’ criteria.

While this interdependency criteria has brought improvements for same-sex couples, there are still a large range of visas denied to a same-sex partner simply because of his or her sexuality. This will breach article 26 of the *International Covenant on Civil and Political Rights* (ICCPR), which protects non-discrimination and equal treatment under the law. Chapter 3 on Human Rights Protections explains these principles more fully.

15.5 How should federal migration laws be amended to avoid future breaches?

Introducing a definition of ‘interdependent relationship’ to cover same-sex couples has opened up access to two discrete visa categories, but it has not brought equality to same-sex couples.

15.5.1 Narrow definitions are the main cause of discrimination

The main problem is that the definition of ‘spouse’ in the Migration Regulations excludes a same-sex partner. This is because it relies on a definition of ‘de facto relationship’ which can only include people of the opposite-sex. The problem is compounded because the definition of a ‘member of the family unit’ and ‘member of the immediate family’ relies on the definition of a ‘spouse’.

15.5.2 The solution is to amend the definitions

Chapter 4 on Recognising Relationships presents two alternative approaches to amending federal law to remove discrimination against same-sex couples.

The Inquiry's preferred approach for bringing equality to *same-sex couples* is to:

- retain the current terminology used in federal laws (for example retain the term 'spouse' – which includes a 'de facto relationship' – in the Migration Regulations)
- redefine the terms in the laws to include same-sex couples (for example, redefine 'de facto relationship' to include a same-sex relationship)

15.5.3 A list of legislation to be amended

The Inquiry recommends amendment to the following legislation discussed in this chapter:

Migration Regulations 1994 (Cth)

'member of the family unit' (reg 1.12 – no need to amend if 'spouse' is amended)

'member of the immediate family' (reg 1.12AA – no need to amend if 'spouse' is amended)

'spouse' (reg 1.15A(2) – amend criteria of 'de facto relationship' to include same-sex couples)

Endnotes

- 1 Migration Regulations (Amendment) 1991 No. 60 (Cth), regs 17, 19, 20, 28, 31. See also S. Warne, 'Moving in the Right Direction: Migration for same-sex couples', *Alternative Law Journal*, vol 19, no 5, Oct 1994, p219. The permanent interdependency visas are now called the Partner (Residence)(Class BS), Subclass 814 (Interdependency) visa and the Partner (Migrant)(Class BC), Subclass 110 (Interdependency) visa: Migration Regulations 1994 (Cth), sch 1. The temporary interdependency visas are now called the Partner (Temporary)(Class UK), Subclass 826 (Interdependency) visa and the Partner (Provisional)(Class UF), Subclass 310 (Interdependency) visa: Migration Regulations 1994 (Cth), sch 1.
The interdependency visa also applies to a person in an interdependent relationship with an 'eligible' New Zealand citizen. See Australian Government, Department of Immigration and Citizenship, *Partner Migration*, <http://www.immi.gov.au/allforms/booklets/1127.pdf>, p 34, viewed 4 April 2007.
- 2 Migration Regulations 1994 (Cth), reg 1.15A.
- 3 *Migration Act 1958* (Cth), s 12.
- 4 Migration Regulations 1994 (Cth), reg 1.09A(2).
- 5 For Spouse visas, see Partner (Residence)(Class BS), Subclass 801 (Spouse) and Partner (Migrant)(Class BC), Subclass 100 (Spouse): Migration Regulations 1994 (Cth), sch 1. For Prospective Marriage visas, see Prospective Marriage (Temporary)(Class TO) visa: Migration Regulations 1994 (Cth), sch 1.
- 6 See Partner (Residence)(Class BS), Subclass 814 (Interdependency), and Partner (Migrant)(Class BC), Subclass 110 (Interdependency): Migration Regulations 1994 (Cth), sch 1.
- 7 Australian Government, Department of Immigration and Citizenship, *Partner Migration*, <http://www.immi.gov.au/allforms/booklets/1127.pdf>, viewed 5 March 2007.
- 8 Australian Government, Department of Immigration and Citizenship, *Partner Visa Charges*, <http://www.immi.gov.au/allforms/990i/partner.htm>, viewed 19 January 2007.
- 9 Australian Government, Department of Immigration and Citizenship, *Partner Visa Charges*, <http://www.immi.gov.au/allforms/990i/partner.htm>, viewed 19 January 2007.
- 10 See for example, Elizabeth Franklin and Vivianne Arnold, Submission 181; Doug Pollard, Melbourne Hearing, 27 September 2006; Name Withheld, Submission 48; Anthony Pannuzzo and Daniel Milano, Submission 72.
- 11 Anthony Pannuzzo and Daniel Milano, Submission 72.
- 12 Canberra Public Forum, 19 October 2006.
- 13 Anti-Discrimination Commission Queensland, Submission 264. 'Subclass 310 visa' is the temporary Interdependency visa applied for when outside Australia: Australian Government, Department of Immigration and Citizenship, *Interdependency Visa: Offshore Temporary and Permanent (Subclasses 310 and 110)*, <http://www.immi.gov.au/migrants/partners/interdependency/110-310/how-the-visa-works.htm>, viewed 21 March 2007.
- 14 Action Reform Change Queensland and Queensland AIDS Council, Submission 270.
- 15 Anti-Discrimination Commission Queensland, Submission 264.
- 16 For example, the following are some of the visas allowing a 'member of the family unit' to accompany a primary visa holder: Business Skills visas (subclasses 132, 845, 846, 890, 891, 892, 893, 160-165); Parent visas (subclasses 118, 173, 884); Skilled Migrant visas (subclasses 134, 105, 106, 138, 139, 136); Cultural/Social visas (subclasses 411, 416, 420, 421, 423, 428); Domestic Worker visas (subclasses 426, 427); Educational visas (415, 418, 419, 442); Emergency visas (subclasses 302, 303); Graduate visas (subclasses 497); Prospective Marriage visa (subclass 300); Student visas (subclasses 570-576, 580): Migration Regulations 1994 (Cth), sch 1.
- 17 For example, the Resolution of Status (Temporary) (Class UH), Subclass 450 (Resolution of Status – Family Member (Temporary)) visa may be available to a 'member of the immediate family': Migration Regulations 1994 (Cth), sch 1.
- 18 Vivianne Arnold and Elizabeth Franklin, Submission 181.
- 19 Migration Regulations 1994 (Cth), reg 1.12.
- 20 Migration Regulations 1994 (Cth), reg 1.12AA.

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- 21 Temporary Business Entry (Class UC) Subclass 457 (Business (Long Stay)), Migration Regulations 1994 (Cth), sch 1. See also Australian Government, Department of Immigration and Citizenship, *Legislation Change – 1 July 2006: Amendments to Subclass 457 – Temporary Business (Long Stay) visa*, http://www.immi.gov.au/legislation/amendments/lc01062006_4.htm, viewed 17 January 2007.
- 22 Australian Government, Department of Immigration and Citizenship, *Temporary Business (Long Stay) – Standard Business Sponsorship (Subclass 457)*, <http://www.immi.gov.au/skilled/skilled-workers/sbs/index.htm>, viewed 8 March 2007.
- 23 Doug Pollard, Submission 1.



CHAPTER 16:

Additional Federal and State Legislation

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16.1 What is this chapter about?

As part of the Inquiry's audit of federal, state and territory laws, the Inquiry has identified a range of laws which potentially discriminate against same-sex couples and families, but do not fall within the previous topic-specific chapters.

The following list of legislation sets out those laws, identifies the potentially discriminatory definitions and notes some of the substantive financial and work-related provisions which rely on those terms.

The laws cover a range of topics including insurance, trusts, foreign investment restrictions, investment disclosure rules, bankruptcy, licensing arrangements and diplomatic privileges, amongst others.

Not all of the legislation will be to the disadvantage of same-sex couples, but it all appears to treat same-sex and opposite-sex families differently.

For some of the laws in the following lists, the relevant definitions of 'spouse', 'relative', 'partner', 'de facto spouse' and 'child' clearly exclude a same-sex couple, the child of a lesbian or gay co-parent or the lesbian or gay co-parents themselves.

For other laws in the list, there is no definition of the terms which describe a person's partner or child. Chapter 4 on Recognising Relationships and Chapter 5 on Recognising Children provide some guidance on why federal legislation without definitions may discriminate against same-sex couples and their children.

The Inquiry has not investigated the possible interpretations of state and territory legislation without definitions. However, a number of state and territory laws are listed here to highlight them for analysis by state and territory authorities.

The Inquiry notes that there may be further discriminatory laws in addition to those in this list and the lists of legislation at the end of each chapter. In particular, there may be additional federal, state and territory laws which fail to treat the children of same-sex and opposite-sex couples equally.

The Inquiry therefore encourages federal, state and territory governments to conduct their own audits and remedy the remaining discrimination.

16.2 What additional federal legislation may discriminate against same-sex couples and their children?

The following list identifies federal laws containing definitions which appear to discriminate between same-sex and opposite-sex couples and their children.

The list notes the sections of the relevant legislation which:

- contain the relevant definitions (where there are definitions)
- suggest an impact on financial or work-related benefits.

This list should be read in conjunction with Chapter 4 on Recognising Relationships and Chapter 5 on Recognising Children. Those chapters will assist in the interpretation of the relevant definitions.

A brief description of the financial impact of this legislation can be found in the Inquiry's Research Paper.¹

Aboriginal Councils and Associations Act 1976 (Cth)

Definition of 'spouse' (s 3) excludes a same-sex partner. This affects the operation of s 49(1).

Aboriginal Land Grant (Jervis Bay Territory) Act 1986 (Cth)

Definition of 'spouse' excludes a same-sex partner for the purposes of the definition of 'relative' (s 37(1)). The definition of 'relative' (s 37(1)) also excludes a lesbian co-mother or gay co-father and their children. This impacts on the operation of s 42.

Australian Meat and Live-Stock Industry Act 1997 (Cth)

No definition of 'spouse' or 'de facto spouse' in the Act. This impacts on the definition of 'associate' (s 3) and affects the operation of s 25A.

Bankruptcy Act 1966 (Cth)

No definition of 'spouse' in the Act generally. This will exclude same-sex couples from the operation of ss 60(4), 116, 120, 121, 134(1)(ma) and 139T.

Definition of 'spouse' in s 139K excludes a same-sex partner. The impact of that definition is limited to div 4B.

Definition of 'de facto spouse' (s 5) excludes a same-sex partner. This impacts on the definition of 'relative', which in turn impacts on the definition of 'related entity' (s 5). This affects the operation of ss 73-73C, 120, 139CA, 189A, 194A(5) and 215A(3)-(4).

Definition of 'child' (s 5) does not include the child of a lesbian co-mother or gay co-father (unless adopted). The definition of 'relative' includes a 'child'. This may impact on sections using the expression 'child' (ss 139L, 139N, 139T(2)(e)), as well as provisions using the expression 'related entity', the definition of which includes a 'relative'.

Broadcasting Services Act 1992 (Cth)

No definition of 'spouse', 'de facto spouse', 'parent' or 'child' in the Act. This impacts on the definition of 'associate' (s 6) and will affect the operation of ss 70(7), 116 and sch 1.

Civil Aviation (Carriers' Liability) Act 1959 (Cth)

No definition of 'spouse' in the Act. This will affect the operation of ss 15(d), 38(d).

No definition of 'de facto spouse' in the Act. This will affect the operation of ss 12(3), 12(5), 35(3), 35(5).

No definition of 'child' in the Act. This will affect the operation of ss 12(3), 12(5), 15(d), 35(3), 35(5) and 38(d).

No definition of 'parent', 'step-parent' or 'step-child'. This will affect the operation of ss 12(3), 12(5), 35(3), 35(5).

Corporations Act 2001 (Cth)

Definition of 'de facto spouse' (s 9) excludes a same-sex partner. This affects the operation of ss 213, 228(2), 440J, 601JA and 601JB.

No definition of 'spouse' in the Act. This impacts on the operation of ss 200C, 200D, 213, 228(2), 440J, 556(2), 567(1), 567(2), 708(12)(a), 1012(9B) and 1346. It also affects the definition of 'relative' (s 9), which impacts on the operation of ss 200C, 200D, 228, 440J, 556(2), 567(1), 567(2), 601JA(2)(f), 601JB(2)(e) and 1012H(3)(b).

No definition of 'parent' or 'child' in the Act, which affects the operation of ss 228(3), 708(12)(a) and 1346.

The definition of 'relative' (s 9) excludes a lesbian co-mother or gay co-father and their children.

The definitions of 'relative', 'de facto spouse' and 'spouse' impact on the definition of a 'close associate' (s 9), which affects the operation of s 588FDA. These definitions also impact on the definition of 'related entity' (s 9), which affects the operation of ss 486A, 588FE, 588FH, 600A, 792A, 795B, 821A and 824B.

The definitions of 'de facto spouse' and 'spouse' affect the definition of 'immediate family member' (s 9). This impacts on the operation of ss 324CE(5), 324CF(5), 324CG(9) and 324CH(6).

Diplomatic Privileges and Immunities Act 1967 (Cth)

No definition of 'member of the family', as appearing in ss 9 and 10B.

Education Services for Overseas Students Act 2000 (Cth)

No definition of 'spouse', 'de facto spouse', 'child' or 'parent' in the Act. This impacts on the definition of 'associate' (s 6) and affects the operation of ss 9, 11, 17, 83 and 97.

Financial Sector (Shareholdings) Act 1998 (Cth)

No definition of 'spouse', 'parent', 'son' or 'daughter' in the Act. This impacts on the definition of 'relative' (sch 1, cl 2), which in turn affects the definition of 'associates' (sch 1, cl 4), affecting the operation of pt 2 and sch 1 of the Act.

Foreign Acquisitions and Takeovers Act 1975 (Cth)

No definition of 'spouse' or 'parent' which impacts on the definition of 'associate' in s 6(a). This affects the operation of ss 9-9A, 17A, 17D, 18-21 and 21A.²

Foreign Acquisitions and Takeovers Regulations 1989 (Cth)

Definition of 'spouse' (reg 2) excludes a same-sex partner for the purposes of reg 3(t).

Foreign States Immunities Act 1985 (Cth)

No definition of 'spouse' in the Act. This affects the operation of s 36.

Higher Education Funding Act 1988 (Cth)

No definition of 'spouse' or 'relative' in the Act. This impacts on the definition of an 'overseas student' (s 3) and affects the operation of ss 13(5), 35(4) and 54.

Higher Education Support Act 2003 (Cth)

No definition of 'spouse' or 'relative' in the Act. This will impact on the definition of an 'overseas student' (sch 1, cl 1) and affect the operation of s 19.102.

Insurance Acquisitions and Takeovers Act 1991 (Cth)

No definition of 'spouse' or 'parent' for the purposes of the definition of 'relative' (s 4). This will affect the definition of 'associate' (s 7) and impact on the operation of ss 5, 14, 36 and 50.

International Organisations (Privileges and Immunities) Act 1963 (Cth)

No definition of 'spouse', which affects the operation of the Second Schedule, pt 1; Third Schedule, cl 5; and Fourth Schedule, cls 3 and 6.

No definition of 'children' in the Second Schedule, pt 1.

No definition of 'dependent relatives', affecting the operation of the Fourth Schedule, cls 3 and 6.

Life Insurance Act 1995 (Cth)

Definition of 'spouse' (sch 1) excludes a same-sex partner. This will affect the operation of ss 204, 211 and 212.

No definition of 'child'. This will affect the operation of ss 211, 212, 218, 219 and 220.

Passenger Movement Charge Collection Act 1978 (Cth)

Definition of 'spouse' (s 3) excludes a same-sex partner. This affects the operation of s 5.

Definition of 'child' (s 3) excludes the child of a lesbian co-mother or gay co-father. This affects the operation of s 5.

Pooled Development Funds Act 1992 (Cth)

Definition of 'de facto spouse' (s 4(1)) excludes a same-sex partner. This affects the definition of 'associate' in s 31(2) and the operation of s 31.

No definition of 'child' or 'parent' in the Act. This also affects the definition of 'associate' (s 31(2)) and the operation of s 31.

Proceeds of Crime Act 2002 (Cth)

No definition of 'spouse' in the Act. This affects the operation of ss 180(1) and 181(1). This also impacts on the definition of 'dependant' (s 338) which affects the operation of ss 24(1), 24A(2), 72.

No definition of 'de facto spouse'. This affects the operation of ss 180(1) and 181(1).

No definition of 'de facto partner' or 'child' in the Act. This also impacts on the definition of 'dependant' (s 338) and affects the operation of ss 24(1), 24A(2), 72.

16.3 What additional state legislation may still discriminate against same-sex couples and their children?

As discussed in Chapter 4 on Recognising Relationships, all states and territories have substantially addressed the discrimination between same-sex and opposite-sex *couples*.

However, Chapter 5 on Recognising Children notes that state and territory reforms have been less comprehensive regarding recognition of the *children* of same-sex couples.

The focus of this Inquiry has been to audit federal laws. However, the following are some of the state laws identified in submissions to the Inquiry and as a result of the Inquiry's research, which may still discriminate against same-sex couples and their children.

The Inquiry emphasises that it has not investigated the various possible interpretations of these state and territory laws – especially those which do not define the relevant terms. It may be that state and territory courts will interpret potentially discriminatory legislation in light of the law reforms removing discrimination against same-sex couples. However, the Inquiry notes the following laws in order to attract further investigation.

The Inquiry also notes that there may be many more state and territory laws which restrict the financial and work-related entitlements available to same-sex parents and their children than those in the following list and in the topic-specific chapters.

16.3.1 New South Wales

Local Government Act 1993 (NSW)

No definition of 'spouse'.

Definition of 'de facto partner' excludes same-sex couples, which affects the definition of 'relative' (see Dictionary scheduled to the Act).

Definition of 'relative' in relation to children does not include the child of a lesbian co-mother or gay co-father (unless adopted).

This impacts on the operation of ss 443, 448, 449, 454 and 664.

Rural Lands Protection Act 1998 (NSW)

No definition of 'spouse' or 'de facto partner' in the Act. This impacts on the operation of schs 1 and 5.

Testator's Family Maintenance and Guardianship of Infants Act 1916 (NSW)

No definition of 'husband', 'wife', 'widow' or 'child' under the Act. This impacts on the operation of ss 2, 3 and 5.

16.3.2 Victoria

Aboriginal Lands Act 1970 (Vic)

No definition of 'husband', 'wife', 'child' or 'parent' under the Act. This impacts on the operation of s 14.

Members of Parliament (Register of Interests) Act 1978 (Vic)

No definition of 'spouse' or 'child' for the purposes of the definition of 'family' (s 2). This impacts on the operation of s 6.

Rural Finance Act 1988 (Vic)

No definition of 'spouse' under the Act. This impacts on the operation of ss 32, 35 and 44.

No definition of 'child' under the Act. This impacts on the operation of ss 32, 33, 35 and 44.

No definition of 'widow' under the Act. This impacts on the operation of s 33.

16.3.3 Queensland***Aboriginal Land Act 1991 (Qld)***

No definition of 'husband' or 'wife' under the Act. This impacts on the operation of ss 39 and 76.

Trusts Act 1973 (Qld)

No definition of 'husband' or 'wife' under the Act. This impacts on the operation of s 64. There is also no definition of a beneficiary's 'issue' as that term is used in s 64.

16.3.4 South Australia***Law of Property Act 1936 (SA)***

No definition of 'husband' or 'wife' under the Act. This impacts on the operation of ss 40, 42, 94, 95, 95A, 96, 98, 100, 101, 102, 104, 105, 105A, 106, 108, 109 and 111.

No definition of 'child' or 'children' under the Act. This impacts on the operation of ss 60, 61 and 100.

16.4 What are the Inquiry's recommendations regarding these additional federal and state laws?

With regards to these outstanding miscellaneous pieces of legislation, the Inquiry recommends:

- a full audit of state and territory laws by the relevant agencies, paying special attention to the treatment of children of same-sex couples
- amendment of federal laws along the lines suggested in Appendix 1 to this report.

Endnotes

- 1 J Millbank, 'Areas of Federal Law that Exclude Same-Sex Couples and their Children', Inquiry Research Paper, September 2006, available at <http://www.humanrights.gov.au/samesex/index.html>.
- 2 See Marcus Bleasde, Submission 111; Anthony Pannuzzo and Daniel Milano, Submission 72, regarding the impact of restrictions on a same-sex couple buying a home together where one partner is not an Australian citizen.



CHAPTER 17:

Additional Issues: Homophobia and Gender Identity

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17.1 What is this chapter about?

Organisations and individuals raised a range of issues with the Inquiry that did not fall strictly within its Terms of Reference. Where these issues relate to one of the main chapters of this report, they are discussed within that chapter.

This chapter addresses two issues which did not fit squarely into any other chapter: general homophobia and gender identity.

The Inquiry has not made findings or recommendations about these issues as they are outside the Inquiry's Terms of Reference. However, they are important issues which should be examined in the future.

17.2 What did the Inquiry hear about homophobia in the community?

Homophobia was mentioned in many of the Inquiry's forums and written submissions. Homophobia in the context of employment, health care and aged care is discussed in Chapters 6, 11 and 14 respectively. The following are comments about homophobia more generally.

17.2.1 Experiences of homophobia

Gay and lesbian people told the Inquiry about ongoing experiences of homophobia. Some experience homophobia in the form of verbal abuse. For others the homophobia includes physical abuse and harassment.¹

One person commented in the Sydney forum:

I received hate mail the first day I walked into the [parliament] house. It came in the form of a letter, anonymous of course. It said: 'I hope people like you die, your children don't deserve to be born.'²

Tony Whelan talked about the personal strength required to resist homophobic attacks:

I know what it is like to being the target of half a dozen thugs with baseball bats screaming anti-gay abuse. If I weren't both lucky and prepared to stand up for myself, I would not be writing this letter. Some of my friends have been less fortunate.³

At the Lismore forum a woman spoke about her experiences in the home, community and workplace.

[I] was demonised and bossed by my family and friends; taunted and sexually harassed by male co-workers. I got the sack, but noticed that cosseted gays and lesbians weren't shown the door...[I] came up against many brick walls in tackling this discrimination: mainstream patriarchal attitudes and structures; sexism; and homophobia from many straight women... But I was expected to remain invisible and silent.⁴

A number of young gay and lesbian people identified school as an area where they were most likely to experience violence. For example, the Coalition of Activist Lesbians (COAL) describes the experiences of a young lesbian at a regional high school:

...when she confided to a friend that she might be a lesbian, the story circulated in the school quickly. After school, in the car park, hostile school students held her still as they drove a car over her feet, all the while yelling verbal harassment. She told me she was too frightened to tell a school authority, to seek medical advice or speak with the police for fear of further violence and of having to tell her parents.⁵

According to the Gay and Lesbian Rights Lobby (NSW) the possibility of violence impacts on the lives of many gay and lesbian members of the community:

A survey of 600 GLBT people conducted by the NSW Attorney-General's Department in 2003 found that 85% of respondents had experienced abuse, harassment or violence. A nationwide survey of 5476 GLBT Australians undertaken in 2005 reported that 67% of respondents modified their daily activities as a result of fear of prejudice and discrimination. While removing legislative discrimination will not result in the elimination of homophobia in Australian society, it will be influential in challenging the stigmatization that exists against GLBT people and same-sex relationships.⁶

Henry Collier said that:

There is evidence that hate crimes against gay men and lesbians results from the systematic discrimination entrenched in the law. When gays and lesbians are determined to be unequal at law, then homophobes assume the privilege of vigilante justice by bashing and attacking gays and their organisations.⁷

17.2.2 Discriminatory laws are an endorsement of homophobia

Many people argued that discrimination against same-sex couples in federal legislation perpetuates homophobia. For example, The Hon Ian Hunter MLC stated that the federal government's resistance to recognising same-sex couples:

...reinforces the belief that it is alright to feel that there is something wrong with homosexuals and it is alright to think less of them. Worse still, to a small minority it says that it is OK to attack homosexuals, both verbally and physically.⁸

ACON wrote that:

...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 workplace,⁹ at school,¹⁰ and on the street.¹¹ 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 services.¹²

ACON also told the Inquiry:

Current policies that do not recognise the entitlements of same sex couples reinforce social exclusion and legitimise the discrimination and homophobia that gay and lesbian people are subject to.

While we recognise that removing legislative inequality against same-sex relationships will not end homophobia and homophobic abuse in Australian society, it is an important step in challenging the stigmatization, discrimination and social exclusion experienced by GLBT Australians.¹³

Grant Goodwin argued that:

Coming out is hard enough given that one has to deal with the negative attitudes within society. The situation is only exacerbated by the intrinsic approval of homophobia through the government's legislation.

When our own government participates in and endorses discrimination against its citizens, they construct a society that follows their lead. This is very dangerous as it reinforces homophobia from the top down.¹⁴

Jim Woulfe addressed this issue at the Sydney Hearing:

Andreas and I strongly believe that by retaining the inequalities, and refusing to recognise same-sex relationships, our Federal Government maintains an environment in which hate and homophobia can thrive. It validates the views of the very few in our society who would attack us because of our sexuality. The government treats gays and lesbians differently, they say, so why shouldn't we?

A great power to end the discrimination and neutralise the homophobes resides with our Federal Government. Granting equality for same-sex relationships would rob the people who attack us of their phoney justification – it's the single biggest step our government could take against homophobic harassment and violence.¹⁵

Further, the Gay and Lesbian Rights Lobby (NSW) note that:

...legislative discrimination is a major contributor to the high levels of social discrimination and stigmatisation that still exists towards GLBT Australians. By refusing to recognise same-sex relationships at a federal level, the Federal Government is sending a message that same-sex couples and GLBT people in general, should not be valued or treated equally with others. By failing to acknowledge the existence of same-sex families under NSW law, the NSW Government is stating that these families do not deserve the protection of the law that is afforded to other families. This discrimination manifests through higher levels of homophobic violence, harassment and exclusion in all aspects of society for GLBT people.¹⁶

Some people also talked about the positive role that law reform can play in improving community attitudes. For example, the Commissioner for Equal Opportunity in Western Australia told the Inquiry about positive changes in attitude following the introduction of law reform recognising same-sex couples in Western Australia.¹⁷

17.3 What did the Inquiry hear about discrimination on the basis of gender identity?

Several submissions to the Inquiry raised issues of discrimination faced by people with diverse gender identities. For example, Sex and Gender Education Australia told the Inquiry there is:

...still a great amount of public homophobia and transphobia in Australia that leads to discrimination. That discrimination can be either overt or covert and the law is still deficient in protecting gay, transsexual, transgender, androgynous and intersex people, often not understanding the difference between the different groups.¹⁸

The WA Gender Project told the Inquiry:

Recent Australian research confirms that transgender people experience significantly higher rates of discrimination, harassment and vilification than both their heterosexual and same-sex attracted non-transgender peers.¹⁹

One person who identifies as neither male nor female told the Inquiry:

I am human being, and deserve human rights on that basis, and not have them denied because I cannot establish that I am a man or a woman. Likewise, my rights to have my domestic relationship recognised should be upheld, without regard to whether I have a normative gender or an androgynous reality. To do less leaves me and my partner legally vulnerable, and endangers any dependent children our family might have, legally, socially and in the workplace.²⁰

17.3.1 People who are ‘transgender’, ‘transsexual’ and ‘intersex’

The term ‘transgender’ is generally used to refer to someone who does not desire surgical intervention to ‘change sex’ and/or who believes that they fall ‘between’ genders. A person who is transgender does not usually identify fully, or strictly, as either male or female. This term has also been used to describe anyone who does not strictly adhere to the gender norms of their peers.

Sex and Gender Education Australia describe a transgender person as ‘a person who may be one sex but may live as a different gender. This term is also used as an umbrella term to denote sex and gender diverse people.’²¹

A person who is transsexual is someone who has transitioned from one sex to another.²² The process of physical transition for transsexual people usually includes hormone replacement therapy and may also include sexual or gender reassignment surgery. The process can take several years.

Transsexuals can be MTF (male to female) or FTM (female to male). They may be heterosexual, gay, lesbian or bisexual following their transition.

A person who is intersex is someone who is ‘born with sex chromosomes, external genitalia, or an internal reproductive system that is not exclusively either male or female.’²³ The person may identify as being ‘neither male or female, or as both.’²⁴ Some people who are intersex undergo surgery to make them either male or female.

17.3.2 Health care services do not adequately cater for people with diverse gender identity

The Inquiry heard that people with diverse gender identity face a range of issues in accessing appropriate health care.

The Australian Medical Association note that:

...anecdotal research indicates that experiences or expectations of discriminatory treatment [for intersex people] may lead to decreased accessing of healthcare facilities. This has flow on effects for untreated mental and physical health problems.²⁵

The Inquiry also heard that neither Medicare nor the Pharmaceutical Benefits Scheme (PBS) adequately meet the needs of gender diverse people.

The WA Gender Project told the Inquiry of problems with Medicare:

The Health Insurance Commission will not recognise the affirmed sex of a transgender individual unless surgery has been performed. In many circumstances this denies transgender people appropriate medical treatment. For example, a pre-operative transsexual woman may be denied Medicare rebates for mammograms (McNair & Medland 2002). This is alarming, given that transsexual women, like all women, are at risk of breast cancer.²⁶

The ALSO Foundation told the Inquiry that the PBS does not meet the needs of transgender people:

The Federal Government should urgently review the health care rebate system and the Pharmaceutical Benefits Scheme to ensure that it better reflects the needs of transgender people. Currently transgender people that take medications and hormone therapies are often subject to extremely high cost prescriptions that are often not subsidised by the Pharmaceutical Benefits Scheme. These medications and hormones are vital to the health and wellbeing of many transgender people and should be available at affordable prices and accessible across Australia, particularly in regional areas.²⁷

17.3.3 Aged care services do not adequately cater for people with diverse gender identity

The Inquiry heard from a specialist in aged care that transgender and intersex people face particular difficulties in accessing appropriate aged care. Dr Jo Harrison argues that:

Transgender and intersex people are also particularly vulnerable to discrimination in aged care settings, to the point where they may avoid seeking assistance altogether. There is anecdotal evidence of denial of services, forcibly preventing cross-dressing and deliberate physical violence when people are revealed to be transgender.

Transgender people may also have medical issues related to their original gender that emerge with ageing, such as osteoporosis or prostate cancer. These may not be addressed because they may be too intimidated to seek medical advice of any kind.²⁸

17.3.4 Gender diverse people who are married face difficulty having their affirmed gender recognised

The WA Gender Project explained that '[s]tate and territory laws that facilitate legal recognition of a transgender person's affirmed sex require that the individual be unmarried.' This:

...requirement forces married transgender people to choose between ending a loving relationship by divorce to achieve legal recognition of their affirmed sex; or continuing to be recognised as a sex inappropriate to their appearance and sense of self.²⁹

A number of individuals told the Inquiry about their difficulties in having both their relationship and their affirmed gender recognised. For example, the Inquiry heard the story of Grace, a lesbian post-operative transsexual woman who (as a man) married her female partner prior to her sex reassignment surgery. Her birth certificate now cannot be amended

to reflect her 'affirmed gender' because she is married. Grace concludes by speaking about the impact of discrimination on her family:

It is grossly unfair to force people in my position to choose between having a marriage or their gender recognised by the law, where anyone else would simply be granted both. This is especially evident when the rights of children and recognition as a family and the attendant rights granted by the marriage act, are concerned. All of this complex situation disadvantages me, my legal partner and whatever family we may have with regard to workplace benefits that are presently available to the average heterosexual couple.³⁰

17.3.5 Gender diverse people face difficulties obtaining an appropriate passport

Many people who are gender diverse have trouble obtaining appropriate travel documentation.

The ALSO Foundation explains that a person undergoing gender reassignment surgery overseas:

...may obtain a temporary passport in their new sex and once the surgery has been completed they will be eligible to apply for a full ten year passport in their new sex. However, transgender people that have not undergone reassignment surgery are not able to have their identified gender recorded on their passport. A new passport does not mean that the Federal Government recognises transsexual gender identity in any other capacity and this document cannot be used as proof of gender identity for other purposes such as marriage.³¹

The requirement that gender reassignment surgery be completed before a person can obtain a passport also ignores the gender identity of 'many transgender people that are unable to have gender reassignment surgery for medical or financial reasons and those that have no desire to have such surgery and live comfortably in their identified gender.'³²

The Inquiry heard of the difficulty experienced by Jack, who does not consider himself to be male or female, although he presents as masculine:

I have never travelled overseas – should I wish to do so, my passport would define me as female, according to my birth certificate. Imagine the fuss at customs! In an ideal world I would like to be able to change my passport to reflect me as male, to represent the masculine way I feel and am in the world. Currently this is impossible without first changing my birth certificate.³³

17.3.6 Case study: being gender diverse

Zoe Ellen Brain is a transsexual woman currently undergoing transition from male to female. She has been happily married for 25 years.

My problem is that while we remain married, I will always be legally male according to [s]tate law.

The Health Department currently regards me as [f]emale, but this recognition may be withdrawn at any time. This will deny me access under the PBS to medications I'm currently taking, which are only available to treat female conditions - which I have.

Being male under state law, it is likely that any Australian passport I acquire will also state that I am male, unless I get a temporary passport for the purpose of getting gender reassignment

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surgery. Under normal circumstances, I could get my legal sex changed to female then, if I was unmarried, and thus the correct passport. However, in my case, my status would revert to male again.

Travelling overseas with an obviously somatically female body and a male gender on the passport may cause a multitude of problems, from being denied entry due to inconsistent documentation, through to being held in a male immigration holding facility, to being subject to full body and cavity searches by male immigration personnel.³⁴

Endnotes

- 1 See Coalition of Activist Lesbians, Submission 171; Gay and Lesbian Solidarity, Submissions 89 and 89a; Anti-Discrimination Board NSW, Submission 317; Australian Marriage Equality, Submission 238a; Gay and Lesbian Rights Lobby (NSW), Submission 333.
- 2 Speaker, Sydney Forum, 26 July 2006.
- 3 Tony Whelan, Submission 20.
- 4 Speaker, Lismore Forum, 11 November 2006.
- 5 Coalition of Activist Lesbians, Submission 171.
- 6 Gay and Lesbian Rights Lobby (NSW), Submission 333.
- 7 Henry Collier, Submission 121.
- 8 The Hon Ian Hunter MLC, Opening Statement, Adelaide Hearing, 28 August 2006. See also Let's Get Equal, Adelaide Hearing, 28 August 2006; Kaz Heffernan, Brisbane Hearing, 11 October 2006; ACON, Sydney Hearing, 26 July 2006.
- 9 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.
- 10 See L Hillier, A Turner, A Mitchell (2005), *Writing Themselves In Again: The 2nd National Report on the Sexual Health and Wellbeing of Same-Sex Attracted Young People in Australia*, Australian Research Centre in Sex, Health & Society (ARCSHS) La Trobe University, Melbourne, Australia.
- 11 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*.
- 12 ACON, Submission 281. See also 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.
- 13 ACON, Opening Statement, Sydney Hearing, 26 July 2006.
- 14 Grant Goodwin, Melbourne Hearing, 27 September 2006.
- 15 Jim Woulfe, Sydney Hearing, 26 July 2006.
- 16 Gay and Lesbian Rights Lobby (NSW), Submission 333.
- 17 Yvonne Henderson, Commissioner for Equal Opportunity, Perth Hearing, 9 August 2006.
- 18 Sex and Gender Education Australia, Submission 17.
- 19 WA Gender Project, Submission 165.
- 20 Sex and Gender Education Australia, Submission 17a.
- 21 Sex and Gender Education Australia, Submission 17a.
- 22 Sex and Gender Education Australia, Submission 17.
- 23 Australian Medical Association, Submission 314.
- 24 Sex and Gender Education Australia, Submission 17.
- 25 Australian Medical Association, Submission 314.
- 26 WA Gender Project, Submission 165.
- 27 ALSO Foundation, Submission 307b.
- 28 J Harrison, 'Discrimination and older gays: surviving aged care', *Equal Time, Anti-Discrimination Board of NSW*, no 61, 2004, pp1, 3.
- 29 WA Gender Project, Submission 165.
- 30 Sex and Gender Education Australia, Submission 17a.
- 31 ALSO Foundation, Submission 307d.
- 32 ALSO Foundation, Submission 307d.
- 33 Sex and Gender Education Australia, Submission 17a.
- 34 Zoe Ellen Brain, Submission 52.



CHAPTER 18:

Summary of Findings and Recommendations

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18.1 What is this chapter about?

The following chapter summarises the findings and recommendations made in each of Chapters 4–16 in this report. This chapter should be read in conjunction with Appendix 1 which sets out the list of legislation to be amended in order to eliminate discrimination against same-sex couples and their children.

18.2 What are the Inquiry's findings?

The principles of non-discrimination, equality before the law and the best interests of the child are amongst the most fundamental of all human rights principles. Yet there are a raft of federal laws which breach these principles.

18.2.1 The laws in Appendix 1 discriminate against same-sex couples and families

The Inquiry finds that:

1. **The 58 federal laws in Appendix 1 discriminate against same-sex couples in the area of financial and work-related entitlements.**

Those laws breach the *International Covenant on Civil and Political Rights*.

2. **Many of the federal laws in Appendix 1 discriminate against the children of same-sex couples and fail to protect the best interests of the child in the area of financial and work-related entitlements.**

Those laws breach the *International Covenant on Civil and Political Rights* and the *Convention on the Rights of the Child*.

18.2.2 Discrimination can lead to further human rights breaches

The breach of the right to non-discrimination and the failure to protect the best interests of the child does, in some circumstances, result in further breaches of other human rights principles.

Those additional human rights principles are set out in the *International Covenant on Civil and Political Rights* (ICCPR), the *Convention on the Rights of the Child* (CRC), the *International Covenant on Economic, Social and Cultural Rights* (ICESCR) and the *Discrimination (Employment and Occupation) Convention* (ILO 111).

The findings in each of the topic-specific chapters explain which laws breach the various provisions in those four human rights treaties.

The following is a list of the human rights principles which are breached by the totality of federal legislation listed in Appendix 1:

- the right to *equal protection* and *non-discrimination* under the law (ICCPR, article 26)
- the right to *non-discrimination* in the enjoyment of human rights (ICCPR, article 2(1); CRC, article 2; ICESCR, article 2(2))

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- the right to just and favourable conditions of work, *non-discrimination* and equality of opportunity *in the workplace* (ICESCR, article 7; ILO 111, articles 2-3)
- the obligation to ensure that the *best interests of the child is a primary consideration* in all decisions and laws relating to children (CRC, article 3)
- the right of *both parents to be assisted* in fulfilling *common parental responsibilities* (CRC, article 18)
- the right to *protection of, and assistance for, the family* (ICCPR, article 23(1); ICESCR, article 10)
- the right to *privacy and protection from interference with the family* (ICCPR, article 17; CRC, article 16)
- the right to access and benefit from *social security* (CRC, article 26; ICESCR, article 9)
- the *child's right to an identity* and to know and be cared for by his or her parents (CRC, articles 7–8; ICCPR, article 24)
- the *best interests of the child* must be the *paramount consideration* in *adoption* (CRC, article 21)
- the right to the *highest attainable standard of health* (CRC, article 24; ICESCR, article 12)
- the right to an *effective remedy* for a breach of human rights (ICCPR, article 2(3)).

These principles are explained in Chapter 3 on Human Rights Protections and in the relevant topic-specific chapters.

18.3 What are the reasons for the Inquiry's findings?

Each of the topic-specific chapters goes through relevant federal laws to identify whether and when there is discrimination against same-sex couples and their children. In particular, the Inquiry examines whether there are financial and work-related rights and entitlements which are available to opposite-sex couples and families, but denied to same-sex couples and families. The Inquiry has identified many areas where this discrimination occurs.

The primary cause of the discrimination against same-sex couples lies in the definitions those laws use to describe a couple or a family.

18.3.1 Same-sex couples are excluded from definitions describing *de facto* couples

Chapter 4 on Recognising Relationships describes the variety of definitions used to describe a couple in federal law. Broadly speaking those definitions can be grouped into the following categories:

- definitions using the words 'opposite sex' to describe a couple
- definitions using the words 'husband or wife' to describe a couple

- definitions using the words ‘spouse’ or ‘de facto spouse’ to describe a couple
- definitions using the words ‘marriage-like relationship’ to describe a couple.

All of those definitions include an opposite-sex couple, whether or not they are married. None of those definitions include a same-sex couple.

There are also some federal laws which do not include a definition of a spouse or couple. Those federal laws have also been interpreted to exclude a same-sex partner or couple.

The consequence of these narrow definitions and interpretations is that a genuine same-sex couple cannot access the financial and work-related rights and entitlements available to an opposite-sex couple. Where those couples have children, those children will be at a disadvantage.

18.3.2 The ‘interdependency’ category does not give full equality to same-sex couples

The recent introduction of the ‘interdependency’ relationship category to certain federal laws has meant that same-sex couples can now access certain superannuation, immigration and Australian Defence Force employment entitlements that were previously denied to them.

However, the ‘interdependency’ category has not brought full equality to same-sex couples, primarily because it treats genuine same-sex couples differently to genuine opposite-sex couples.

The problems with using an ‘interdependency’ category to remove discrimination against same-sex couples include the following:

- The ‘interdependency relationship’ label for a same-sex relationship mischaracterises a genuine same-sex couple as different or inferior to a genuine opposite-sex couple.
- The criteria to qualify as a same-sex interdependency relationship can be more onerous than the criteria to qualify as an opposite-sex de facto relationship. This may mean that some same-sex couples cannot access the entitlements available to opposite-sex couples.
- The introduction of a federal interdependency relationship category creates inconsistencies with definitions used in state and territory laws.
- The interdependency relationship category extends beyond people in a couple. For example, it may include elderly friends or siblings living with, and caring for, each other in old age. This means that the interdependency category may have the unintended consequence of expanding the number of people eligible for federal financial and work-related entitlements.

18.3.3 Children of same-sex couples are excluded from some definitions describing parent-child relationships

Chapter 5 on Recognising Children discusses the variety of legislative definitions used to describe the relationship between a child and his or her parents. Broadly speaking, those definitions can be categorised into the following groups:

- laws defining a child to include an adopted, ex-nuptial or step-child
- laws defining a child to include a person for whom an adult has legal responsibility or custody and care
- laws including a child who is wholly or substantially dependent on an adult who stands in the position of a parent.

There are also several laws which do not define the relevant parent-child relationship at all.

The interpretation of these definitions and laws relies heavily on how family law characterises the legal relationship between a same-sex parent and child.

As Chapter 5 explains, a child born to a gay or lesbian couple could have any one or more of a birth mother, birth father, lesbian co-mother or gay co-father(s).¹

Generally speaking, a birth mother and birth father will be recognised as legal parents under family law and will therefore have access to financial and work-related entitlements available to help support a child. However, the legal status of a lesbian co-mother or gay co-father(s) of a child is extremely uncertain.

The result of this uncertainty is that a same-sex family will often have more difficulty accessing financial and work-related benefits, which are intended to support children than an opposite-sex family. This may mean that the best interests of a child born to a same-sex couple will be compromised.

18.3.4 Same-sex couples and families cannot access the same financial and work-related entitlements as opposite-sex couples and families

The following sections set out the financial and work-related entitlements and benefits which are available to opposite-sex couples and families, but denied to same-sex couples and families.

The list does not cover all the financial and work-related entitlements and benefits discussed in the various topic-specific chapters. However, it does note the main entitlements denied to a same-sex partner; a lesbian co-mother or gay co-father; or a child of a lesbian co-mother or gay co-father.

As discussed earlier in this chapter, every time a same-sex couple or family are denied entitlements available to an opposite-sex couple or family, there will be a breach of the right to non-discrimination under article 26 of the ICCPR. In some circumstances that discrimination may lead to further breaches under the CRC, ILO 111 and ICESCR.

(a) Discrimination under employment laws

The Inquiry finds that federal workplace laws discriminate against same-sex couples or families in the following ways:

- A same-sex partner is not guaranteed the same *carer's leave* and *compassionate leave* as an opposite-sex partner.
- A lesbian co-mother or gay co-father is not guaranteed the same *carer's leave* and *compassionate leave* as a birth mother or birth father.
- A lesbian co-mother or gay co-father is not guaranteed *parental leave*.
- A same-sex partner of a federal *member of parliament* cannot access all the *travel entitlements* available to an opposite-sex partner.
- A same-sex partner of a *federal judge or magistrate* cannot access all the *travel entitlements* available to an opposite-sex partner.
- A same-sex couple in the *Australian Defence Force* does not have the same access to *low-interest home loans* as an opposite-sex couple.
- Employees in a same-sex couple are not adequately protected from *discrimination in the workplace* on the grounds of sexual orientation.

Chapter 6 on Employment provides more detail about these and other work-related entitlements.

(b) Discrimination under workers' compensation laws

The Inquiry finds that the federal Comcare scheme and the Seacare Authority discriminate against same-sex couples or families in the following ways:

- A same-sex partner is not entitled to *lump sum workers' compensation death benefits* available to an opposite-sex partner.
- A same-sex partner will not automatically be taken into account for the purposes of calculating the *workers' compensation sums* available on an employee's *incapacity*.

Chapter 7 on Worker's Compensation provides more detail about these and other workers' compensation entitlements.

(c) Discrimination under tax laws

The Inquiry finds that federal tax laws discriminate against same-sex couples or families in the following ways:

- A same-sex partner cannot access the *dependent spouse tax offset* available to an opposite-sex partner.
- A same-sex partner cannot access the *tax offset for a partner's parent* available to an opposite-sex partner.
- A same-sex partner, lesbian co-mother or gay co-father cannot access the *housekeeper tax offset* available to an opposite-sex partner, birth mother or birth father.

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- A lesbian co-mother or gay co-father cannot access the *child-housekeeper tax offset* available to a birth mother or birth father.
- A lesbian co-mother or gay co-father cannot access the *invalid relative tax offset* available to a birth mother or birth father.
- A taxpayer in a same-sex couple cannot access the higher rate of *overseas forces tax offset* available to an opposite-sex couple.
- A taxpayer in a same-sex couple cannot access the higher rate of *zone tax offset* available to an opposite-sex couple.
- A *US defence force* same-sex couple cannot access *tax exemptions* available to an opposite-sex couple.
- A lesbian co-mother or gay co-father cannot assert a primary entitlement to the *baby bonus*.
- A same-sex partner of a person eligible for the *child care tax rebate* cannot access the rebate in the same way as an opposite-sex partner. And a person eligible for the child care tax rebate cannot transfer the unused value of the rebate to his or her same-sex partner.
- A same-sex couple must spend more than an opposite-sex couple to qualify for the *medical expenses tax offset*.
- A same-sex couple may pay a higher *Medicare levy* and *Medicare levy surcharge* than an opposite-sex couple.
- A same-sex partner cannot access the same *capital gains tax concessions* available to an opposite-sex couple.
- A same-sex couple *transferring property to a child* (or trustee) on family breakdown will be taxed at the top marginal rate, unlike an opposite-sex couple.
- A same-sex partner must pay income tax on *child maintenance payments* received from a former partner, unlike an opposite-sex partner.
- A same-sex partner is not eligible for the same *fringe benefit tax exemptions* available to an opposite-sex partner.

Chapter 8 on Tax provides more detail about these and other tax entitlements.

(d) Discrimination under social security laws

Social security laws treat a same-sex couple as two individuals. Sometimes this brings a benefit to a same-sex couple or family; other times this brings a detriment.

As discussed in Chapter 9 on Social Security, the main point of concern is that social security laws treat a same-sex couple differently to an opposite-sex couple.

However, as discussed in Chapter 3 on Human Rights Protections, under human rights law, generally there will only be discrimination if there is a negative impact on the affected person.

Thus, the following is a list of those areas of social security law where there is clearly a negative impact, and therefore discrimination against a same-sex couple:

- A same-sex partner cannot access the *Partner Allowance* available to an opposite-sex partner.
- A same-sex partner cannot access the *bereavement benefits* available to an opposite-sex partner.
- A same-sex partner cannot access the *Widow Allowance* available to an opposite-sex partner.
- A same-sex partner cannot access *concession card benefits* available to an opposite-sex partner.
- A same-sex partner cannot access a *gaoled partner's pension* available to an opposite-sex partner.
- A young same-sex couple is less likely to qualify for the independent rate of *Youth Allowance* than a young opposite-sex couple in the same situation.

Chapter 9 on Social Security provides more detail about these and other social security entitlements.

(e) *Discrimination under veterans' entitlements laws*

The Inquiry finds that federal veterans' entitlements laws discriminate against same-sex couples or families in the following ways:

- A veteran's surviving same-sex partner cannot access the *War Widow/Widower's Pension* available to an opposite-sex partner.
- A veteran's surviving same-sex partner cannot access the *Income Support Supplement* available to an opposite-sex partner.
- A veteran's surviving same-sex partner cannot access the *Bereavement Payment* available to an opposite-sex partner.
- There is no support available for the *funeral of a deceased veteran's indigent* same-sex partner, but there is for an opposite-sex partner.
- A veteran's surviving same-sex partner cannot access the *Gold Repatriation Card* available to an opposite-sex partner.
- A veteran's surviving same-sex partner cannot access *military compensation* available to an opposite-sex partner.
- A veteran's same-sex partner cannot access the *Partner Service Pension* available to an opposite-sex partner.
- A veteran's same-sex partner cannot access the *Utilities Allowance* under the same circumstances as an opposite-sex partner.
- A veteran's same-sex partner cannot usually access the *Telephone Allowance* available to an opposite-sex partner.

Chapter 10 on Veterans' Entitlements provides more detail about these and other veterans' entitlements.

(f) Discrimination under health care laws

The Inquiry finds that laws relating to the Medicare and Pharmaceutical Benefits Scheme (PBS) Safety Nets discriminate against same-sex couples or families in the following ways:

- A same-sex couple or family must spend more than an opposite-sex couple or family to qualify for the *Medicare Safety Net* and *Medicare Extended Safety Net*.
- A same-sex couple or family must spend more on pharmaceuticals than an opposite-sex couple or family to qualify for the *PBS Safety Net*.

Chapter 11 on Health Care Costs provides more detail about these and other health care entitlements.

(g) Discrimination under family laws

The Inquiry finds that family laws discriminate against same-sex couples or families in the context of relationship breakdown in the following ways:

- A same-sex couple cannot access the more comprehensive federal *property settlement* regime on relationship breakdown. This access is only available to married couples, though it is expected that opposite-sex de facto couples will have access to the federal regime shortly.
- A birth mother and birth father cannot pursue *child support* against a lesbian co-mother or gay co-father.

Chapter 12 on Family Law provides more detail about these and other entitlements relevant to relationship breakdown.

(h) Discrimination under superannuation laws

The Inquiry finds that federal superannuation laws discriminate against same-sex couples or families in the following ways:

- A *federal government employee's* surviving same-sex partner cannot access *direct death benefits* (lump sum or reversionary pension) available to a surviving opposite-sex partner (unless the employee joined the public service after 1 July 2005).
- The surviving child of a lesbian co-mother or gay co-father who was a *federal government employee* will not usually qualify for *direct death benefits* (lump sum or reversionary pension) available to the child of a birth mother or birth father.
- It is harder for a surviving same-sex partner to qualify for *death benefits in private superannuation schemes* (as a person in an 'interdependency relationship') than for a surviving opposite-sex partner (as a 'spouse').
- A surviving same-sex partner cannot usually qualify for a *reversionary pension in a private superannuation scheme*, which is available to an opposite-sex partner.
- It is harder for a surviving same-sex partner to access *death benefits from a retirement savings account* (as a person in an 'interdependency relationship') than for a surviving opposite-sex partner.

- It is harder for a surviving same-sex partner to access *death benefits tax concessions* than for a surviving opposite-sex partner.
- A same-sex partner cannot access the *death benefits anti-detriment payment* available to an opposite-sex partner.
- A same-sex partner cannot engage in *superannuation contributions splitting* and the associated tax advantages available to an opposite-sex partner.
- A same-sex partner cannot access the *superannuation spouse tax offset* available to an opposite-sex partner.
- A surviving same-sex partner of a *federal judge* cannot access the *reversionary pension* available to a surviving opposite-sex partner.
- A surviving same-sex partner of a *Governor-General* cannot access the *allowance* available to a surviving opposite-sex partner.

Chapter 13 on Superannuation provides more detail about these and other superannuation entitlements.

(i) Discrimination under aged care laws

Aged care laws treat a same-sex couple as two individuals. Depending on the asset distribution between the two members of a same-sex couple, a same-sex couple may be better off or worse off when entering residential aged care facilities.

As discussed in Chapter 14 on Aged Care, the main point of concern is that aged care laws treat a same-sex couple differently to an opposite-sex couple.

However, as discussed in Chapter 3 on Human Rights Protections, under human rights law, generally there will only be discrimination if there is a negative impact on the affected individual.

Thus, the following is a list of those areas of aged care law where there is usually a negative impact, and therefore discrimination against a same-sex couple:

- A same-sex partner is more likely to be *liable for accommodation payments*, because the family home is not exempt from the assets test as it is for an opposite-sex couple.
- A same-sex couple will usually pay a *higher accommodation charge* than an opposite-sex couple.
- A same-sex couple will usually pay a *higher accommodation bond* than an opposite-sex couple.

Chapter 14 on Aged Care provides more detail about these and other aged care payments.

(j) Discrimination under immigration laws

The Inquiry finds that federal immigration laws discriminate against same-sex couples in the following ways:

- A same-sex partner of an Australian citizen or permanent resident may have to *pay more for an Interdependency visa* than an opposite-sex partner pays for a Spouse visa.
- A same-sex couple is *only eligible for one visa category* if they wish to migrate to Australia as a couple, compared to the many options available to an opposite-sex couple.

Chapter 15 on Migration provides more detail about the visas available to same-sex couples and the financial implications of restricted visa options.

18.4 What are the Inquiry's recommendations?

The Inquiry has only two recommendations. They both aim to protect non-discrimination, equality under the law and the best interests of the child.

Those recommendations are:

1. **The federal government should amend the discriminatory laws identified by this Inquiry to ensure that same-sex and opposite-sex couples enjoy the same financial and work-related entitlements.**
2. **The federal government should amend the discriminatory laws identified by this Inquiry to ensure that the best interests of children in same-sex and opposite-sex families are equally protected in the area of financial and work-related entitlements.**

18.5 How can the federal government fulfil those recommendations?

A number of submissions to the Inquiry observed that there is no federal legislation which broadly protects against discrimination on the grounds of sexual orientation. This means that people who suffer discrimination on the grounds of their sexuality have no remedies under Australian law.

The Inquiry agrees that the enactment of 'sexuality discrimination' legislation along the lines of the *Sex Discrimination Act 1984* (Cth), *Disability Discrimination Act 1992* (Cth), *Racial Discrimination Act 1975* (Cth) and the *Age Discrimination Act 2004* (Cth) would help protect the rights of gay and lesbian individuals, couples and families in Australia.

The Inquiry makes a specific recommendation in Chapter 6 on Employment for the introduction of federal legislation to protect against discrimination in employment on the grounds of sexual orientation.

However, such legislation is not a prerequisite to removing discrimination in the 58 laws listed in Appendix 1 to this report.

The recommendations of this Inquiry focus on a more direct route to ensuring equality for same-sex couples and families in the area of financial and work-related entitlements. This includes enacting omnibus legislation amending all legislative definitions currently excluding same-sex couples and families.

18.5.1 Enact omnibus legislation amending all discriminatory laws

Appendix 1 to this report identifies 58 federal laws which currently exclude same-sex couples from financial and work-related entitlements. The federal Parliament should introduce ‘omnibus’ legislation to simultaneously eliminate discrimination against same-sex couples in all those federal laws.

The Inquiry’s preferred approach to amendments is that the omnibus legislation:

- retain the current terminology used in federal legislation
- redefine the terminology in the legislation to include same-sex couples
- insert a new definition of ‘de facto relationship’ and ‘de facto partner’ following the model definition set out below.

If this approach is adopted amendments will generally be restricted to the ‘definitions’ or ‘interpretation’ sections of the relevant legislation. Appendix 1 provides some guidance on how this approach may be applied in the context of the specific legislation.

18.5.2 Insert a new definition of ‘de facto relationship’ and ‘de facto partner’ in federal law

In developing the following definition of ‘de facto relationship’ the Inquiry has examined:

- the various definitions and criteria describing same-sex and opposite-sex couples in state and territory laws
- the various definitions and criteria describing ‘interdependency’ relationships in federal laws
- the criteria for a ‘marriage-like relationship’ used in social security law.

The Inquiry has used the term ‘de facto’ because it is the most common of the terms used in state and territory laws. However, the Inquiry has no strong preference for the term ‘de facto relationship’ above terms such as ‘domestic relationship’ or ‘significant relationship’, as long as the term covers same-sex and opposite-sex couples alike.

For reasons expressed earlier in this chapter, the Inquiry does not believe that the introduction of an ‘interdependency’ category is an appropriate approach to removing discrimination against same-sex couples.

The following definition of ‘de facto relationship’ has sought to include the following features:

- **Inclusiveness.** The focus of the definition is on the genuineness of the relationship rather than the gender of the partners.
- **Flexibility.** The definition considers a range of factors relevant to a relationship, but no one factor is determinative. Further, the definition starts with the assumption that the couple must live together, but allows for the possibility that they may be temporarily separated.

- **Consistency.** The proposed federal definition is generally consistent with definitions in state and territory jurisdictions. The goal is to reduce the uncertainty currently facing same-sex couples seeking to access entitlements in different jurisdictions.
- **Evidentiary guidelines.** The definition seeks to indicate the type of evidence that may assist a couple to prove the genuineness of the relationship, including statutory declarations and other formal recognition schemes if available.

With those factors in mind, the Inquiry recommends that the following definition of ‘de facto relationship’ be inserted into federal laws conferring financial and work-related entitlements:

- (1) *‘De facto relationship’ means the relationship between two people living together as a couple on a genuine domestic basis.*
- (2) *In determining whether two people are in a de facto relationship, all the circumstances of the relationship must be taken into account, including any of the following:*
 - (a) *the length of their relationship*
 - (b) *how long and under what circumstances they have lived together*
 - (c) *whether there is a sexual relationship between them*
 - (d) *their degree of financial dependence or interdependence, and any arrangements for financial support, between or by them*
 - (e) *the ownership, use and acquisition of their property, including any property that they own individually*
 - (f) *their degree of mutual commitment to a shared life*
 - (g) *whether they mutually care for and support children*
 - (h) *the performance of household duties*
 - (i) *the reputation, and public aspects, of the relationship between them*
 - (j) *the existence of a statutory declaration signed by both persons stating that they regard themselves to be in a de facto relationship with the other person.*
- (3) *No one factor, or any combination of factors, under (2) is necessary to establish a de facto relationship.*
- (4) *A de facto relationship may be between two people, irrespective of gender.*
- (5) *Two people may still be in a de facto relationship if they are living apart from each other on a temporary basis.*

If the various states and territories adopt a relationship registration scheme (like that which exists in Tasmania), subsection (6) could be added to the definition of ‘de facto relationship’ along the following lines:

- (6) *If a relationship is registered under a state or territory law allowing for the registration of relationships, registration is proof of the relationship from that date.*

If the various states and territories adopt a civil union scheme, subsection (7) could be added along the following lines:

(7) *If two people enter into a civil union under a state or territory law, evidence of that civil union is proof of the relationship from that date.*

If relationship registration or civil unions become relevant to the definition of ‘de facto relationship’, subsection (3) should change to read:

(3) *No one factor, or any combination of factors, under (2), (6) or (7) is necessary to establish a de facto relationship.*

The Inquiry further recommends the following definition of ‘de facto partner’:

‘de facto partner’ means one of two people in a de facto relationship.

18.5.3 Enact laws recognising the relationship between a child and both same-sex parents

The amendments necessary to ensure equal protection of the children of same-sex families and opposite-sex families go beyond the federal financial laws themselves. This is because the definitions in those laws rely on the way family law recognises the legal status of a lesbian co-mother or gay co-father. Family laws have not caught up with the reality that lesbian and gay couples are now raising children from birth.

The Inquiry recommends that the following steps be taken to better ensure protection of the best interests of children raised in all families, irrespective of the gender of their parents:

1. *Federal laws without a definition of ‘child’ should include a definition which recognises the children of a birth mother, birth father, lesbian co-mother or gay co-father.*
2. *Federal laws should ensure that a lesbian co-mother of a child conceived through assisted reproductive technology (an ART child) can access the same financial and work-related entitlements available to a birth mother and birth father (a legal parent).*

This could be achieved by amending:

- the *Family Law Act 1975* (Cth) (Family Law Act) to include a parenting presumption in favour of the lesbian co-mother of an ART child and ensuring that the definition of ‘child’ in any relevant legislation recognises the parenting presumptions in the Family Law Act; or
- the *Acts Interpretation Act 1901* (Cth) (Acts Interpretation Act) such that any references to a person’s ‘child’ in federal legislation includes the ART child of a lesbian co-mother.

It could also be achieved if:

- all states enacted parenting presumptions in favour of a lesbian co-mother of an ART child (following the models in WA, ACT and NT); and
- federal law clearly recognised those presumptions and the birth certificates flowing from those presumptions.

While parenting presumptions are appropriate for the ART child of a lesbian couple, broader adoption laws are the better solution for a gay couple having an ART child (as set out in the following Recommendations 4–5).²

3. *Federal financial and work-related laws should include a definition of ‘step-child’ which recognises a child under the care of a ‘de facto partner’ of a birth mother or birth father.*

The previous section suggests an appropriate definition of ‘de facto partner’.

Amending laws in this way would generally recognise the child of a lesbian co-mother or gay co-father as a step-child. It would also include a child under the care of a subsequent de facto partner in an opposite-sex and same-sex couple. (Currently a step-child can only be a child under the care of a subsequent partner who marries the birth parent).

4. *‘Step-parent adoption’ laws should more readily consider adoption by a lesbian co-mother or gay co-father.*

This will require amendments to remove the prohibition on same-sex step-parent adoption in all state and territory laws other than in WA, the ACT and Tasmania. It may also require reconsideration of the general presumption against step-parent adoption, in the event of gay and lesbian co-parenting arrangements. The Victorian Law Reform Commission is due to publish a report on this issue during 2007.

5. *Gay and lesbian couples should have equal rights to apply for adoption of an unrelated child.*

This will require amendments to adoption laws in all states and territories other than in WA and the ACT. Further, the federal government should not introduce legislation limiting the possibility of overseas adoptions by gay and lesbian couples.

6. *Where access to financial or work-related benefits is intended to extend beyond the legal parents, federal laws should explicitly recognise the eligibility of a person who has a parenting order from the Family Court of Australia.*

This could be achieved by amending:

- the relevant federal legislation to define a person who is ‘legally responsible’, has ‘custody and care’, is in the ‘position of a parent’ (and other similar terms) to *include* a person who has been granted a parenting order from the Family Court of Australia; or
 - the Acts Interpretation Act such that any reference to a person who is ‘legally responsible’, has ‘custody and care’, is in the ‘position of a parent’ (or other similar terms) *includes* a person who has been granted a parenting order from the Family Court of Australia.
7. *There should be a public information and education campaign to ensure that gay and lesbian families are aware of their rights and entitlements under federal financial and work-related laws.*

In particular, same-sex parents should be:

- informed about the role of parenting orders in asserting legal rights; and
- assisted through the process of obtaining such an order.

Appendix 1 provides some direction as to how these seven recommendations may be applied in the context of specific legislation.

Endnotes

- 1 The Glossary of Terms in this report and Chapter 5 on Recognising Children explain these terms more fully.
- 2 For further discussion see Chapter 5 on Recognising Children, sections 5.2.2(b) and 5.2.4(d).



APPENDIX 1:

A List of Federal Laws to be Amended

The following 58 legal instruments must be amended to eliminate discrimination against same-sex couples and their children in the area of financial and work-related entitlements.

The legal instruments include legislation, regulations, federal government superannuation trust deeds, Remuneration Tribunal Determinations and a bill currently before federal Parliament.

The following list identifies the relevant definitions in each of the 58 legal instruments and suggests an approach to amending those definitions. The Inquiry's preferred approach to amending the laws is explained further in Chapter 18 on Findings and Recommendations.

The impact of the discrimination caused by this legislation is described in Chapters 4 – 16 of this report.

The focus of this Inquiry has been on federal laws regarding financial and work-related entitlements. Thus, the following list includes laws in those areas only. There may still be a range of federal laws which discriminate against same-sex couples and their children in other areas of law. The Inquiry therefore recommends that all federal laws be reviewed to identify and eliminate all areas of discrimination against same-sex couples and their children.

The Inquiry has not had sufficient time or resources to conduct a comprehensive audit of state and territory laws. However, where the Inquiry has identified discriminatory state and territory laws, they are listed in the relevant chapters. They are not included in this list.

LEGAL INSTRUMENT	DEFINITIONS
<p><i>A New Tax System (Family Assistance) Act 1999 (Cth)</i></p>	<p>‘FTB child’ (s 22 – no need to amend if the child of a lesbian co-mother or gay co-father may also be recognised through reformed parenting presumptions or adoption laws)</p> <p>‘member of a couple’ (s 3 – no need to amend if ‘member of a couple’ in the <i>Social Security Act 1991</i> (Cth) (Social Security Act) is amended)</p> <p>‘partner’ (s 3 – no need to amend if ‘member of a couple’ in the Social Security Act is amended)</p>
<p><i>Aboriginal Councils and Associations Act 1976 (Cth)</i></p>	<p>‘de facto partner’ (insert new definition)</p> <p>‘de facto relationship’ (insert new definition)</p> <p>‘spouse’ (s 3 – amend to include ‘de facto partner’)</p>
<p><i>Aboriginal Land Grant (Jervis Bay Territory) Act 1986 (Cth)</i></p>	<p>‘de facto partner’ (insert new definition)</p> <p>‘de facto relationship’ (insert new definition)</p> <p>‘relative’ (s 37(1) – no need to amend if ‘spouse’ is amended and ‘parent’ and ‘child’ can include a lesbian co-mother or gay co-father and her or his children through reformed parenting presumptions or adoption laws)</p> <p>‘spouse’ (s 37(1) – amend to include ‘de facto partner’)</p>
<p><i>Aged Care Act 1997 (Cth)</i></p>	<p>‘close relation’ (s 44.11(1) – no need to amend if a lesbian co-mother and gay co-father and her or his children may be recognised through reformed parenting presumptions or adoption laws)</p> <p>‘de facto relationship’ (insert new definition)</p> <p>‘dependent child’ (s 44.11(2) – amend to clarify the role of a parenting order; otherwise no need to amend if the child of a lesbian co-mother or gay co-father may also be recognised through reformed parenting presumptions or adoption laws)</p> <p>‘member of a couple’ (amend s 44.11(1) to replace ‘marriage-like relationship’ with ‘de facto relationship’)</p> <p>‘partner’ (s 44.11(1) – no need to amend if ‘member of a couple’ is amended)</p> <p>‘young person’ (s 44.11(3) – no need to amend)</p>
<p><i>Australian Meat and Live-Stock Industry Act 1997 (Cth)</i></p>	<p>‘associate’ (s 3 – amend to replace the term ‘de facto spouse’ with ‘de facto partner’)</p> <p>‘de facto partner’ (insert new definition)</p> <p>‘de facto relationship’ (insert new definition)</p>
<p><i>Bankruptcy Act 1966 (Cth)</i></p>	<p>‘child’ (s 5 – no need to amend if the child of a lesbian co-mother or gay co-father may be recognised through reformed parenting presumptions, adoption laws or a new definition of ‘step-child’)</p> <p>‘de facto partner’ (insert new definition)</p> <p>‘de facto relationship’ (insert new definition)</p> <p>‘de facto spouse’ (s 5 – amend to include a ‘de facto partner’)</p>

LEGAL INSTRUMENT	DEFINITIONS
	<p>‘related entity’ (s 5 – no need to amend if ‘de facto spouse’ is amended and a lesbian co-mother or gay co-father and her or his children may be recognised in the definition of ‘relative’ through reformed parenting presumptions, adoption laws or a new definition of ‘step-child’)</p> <p>‘relative’ (s 5 – no need to amend if ‘de facto spouse’ is amended and a lesbian co-mother or gay co-father and her or his children may be recognised through reformed parenting presumptions, adoption laws or a new definition of ‘step-child’)</p> <p>‘spouse’ (insert new definition including a ‘de facto spouse’)</p> <p>‘spouse’ (s 139K – no need to amend if ‘de facto spouse’ is amended)</p> <p>‘step-child’ (insert new definition)</p>
<p>Broadcasting Services Act 1992 (Cth)</p>	<p>‘associate’ (s 6(1) – no need to amend if new definition of ‘de facto spouse’ and ‘parent’ and ‘child’ can include a lesbian co-mother or gay co-father and her or his children through reformed parenting presumptions and adoption laws)</p> <p>‘de facto partner’ (insert new definition)</p> <p>‘de facto relationship’ (insert new definition)</p> <p>‘de facto spouse’ (insert new definition including a ‘de facto partner’)</p>
<p>Child Support (Assessment) Act 1989 (Cth)</p>	<p>‘eligible carer’ (s 7B – no need to amend if ‘parent’ recognises a gay co-father or lesbian co-mother through reformed parenting presumptions or adoption laws)</p> <p>‘parent’ (s 5 – no need to amend if section 60H of the <i>Family Law Act 1975</i> (Cth) is amended and a gay co-father or lesbian co-mother may be recognised through reformed adoption laws)</p>
<p>Civil Aviation (Carriers’ Liability) Act 1959 (Cth)</p>	<p>‘child’ (no need to insert definition if the child of a lesbian co-mother or gay co-father may be recognised through reformed parenting presumptions or adoption laws)</p> <p>‘de facto partner’ (insert new definition)</p> <p>‘de facto relationship’ (insert new definition)</p> <p>‘de facto spouse’ (insert new definition including a ‘de facto partner’)</p> <p>‘parent’ (no need to insert definition if a lesbian co-mother or gay co-father may be recognised through reformed parenting presumptions or adoption laws)</p> <p>‘spouse’ (insert new definition including a ‘de facto partner’)</p> <p>‘step-child’ (insert new definition)</p> <p>‘step-parent’ (insert new definition)</p>
<p>Corporations Act 2001 (Cth)</p>	<p>‘child’ (no need to insert definition if the child of a lesbian co-mother or gay co-father may be recognised through reformed parenting presumptions or adoption laws)</p>

LEGAL INSTRUMENT	DEFINITIONS
	<p>‘close associate’ (s 9 – no need to amend if ‘de facto spouse’ is amended)</p> <p>‘de facto partner’ (insert new definition)</p> <p>‘de facto relationship’ (insert new definition)</p> <p>‘de facto spouse’ (s 9 – amend to include a ‘de facto partner’)</p> <p>‘immediate family member’ (s 9 – no need to amend if ‘spouse’ is inserted and ‘de facto spouse’ is amended)</p> <p>‘parent’ (no need to insert definition if a lesbian co-mother or gay co-father may be recognised through reformed parenting presumptions or adoption laws)</p> <p>‘related entity’ (s 9 – no need to amend if ‘de facto spouse’ is amended and if a lesbian co-mother or gay co-father and her or his children may be recognised through reformed parenting presumptions and adoption laws)</p> <p>‘relative’ (s 9 – no need to amend if new definition of ‘spouse’; if the child of a lesbian co-mother or gay co-father may be recognised as a ‘son’ or ‘daughter’; and if the co-mother or co-father may be recognised as a ‘parent’ through parenting presumptions or adoption laws)</p> <p>‘spouse’ (insert new definition including a ‘de facto partner’)</p>
<p><i>Defence Act 1903 (Cth)</i></p>	<p>‘child’ (no need to insert definition if the child of a lesbian co-mother or gay co-father may be recognised through reformed parenting presumptions or adoption laws)</p> <p>‘de facto partner’ (insert new definition)</p> <p>‘de facto relationship’ (insert new definition)</p> <p>‘dependant’ (insert definition to include a ‘de facto partner’ and ‘child’.)</p> <p>‘member of a family’ (s 58A - no need to amend if new definition of ‘dependant’)</p>
<p><i>Defence Force (Home Loans Assistance) Act 1990 (Cth)</i></p>	<p>‘child’ (s 3 – no need to amend if the child of a lesbian co-mother or gay co-father may be recognised through reformed parenting presumptions, adoption laws or a new definition of ‘step-child’)</p> <p>‘de facto partner’ (insert new definition)</p> <p>‘de facto relationship’ (insert new definition)</p> <p>‘family member’ (s 6 – no need to amend if ‘spouse’ is amended and a lesbian co-mother or gay co-father and her or his children may be recognised through reformed parenting presumptions, adoption laws or a new definition of ‘step-child’)</p> <p>‘spouse’ (s 3 – amend to include a ‘de facto partner’)</p> <p>‘step-child’ (insert new definition)</p> <p>‘widow’ (s 3 – amend to remove gender specific language, otherwise no need to amend if ‘spouse’ is amended)</p> <p>‘widower’ (s 3 – amend to remove gender specific language, otherwise no need to amend if ‘spouse’ is amended)</p>

LEGAL INSTRUMENT	DEFINITIONS
<i>Defence Force Retirement and Death Benefits Act 1973 (Cth)</i>	<p>‘child’ (s 3(1) – no need to amend if the child of a lesbian co-mother or gay co-father may be recognised through reformed parenting presumptions, adoption laws or a new definition of ‘step-child’)</p> <p>‘de facto relationship’ (insert new definition)</p> <p>‘eligible child’ (s 3(1) – no need to amend if the child of a lesbian co-mother or gay co-father may be recognised through reformed parenting presumptions, adoption laws or a new definition of ‘step-child’)</p> <p>‘marital relationship’ (s 6A – amend to include a ‘de facto relationship’)</p> <p>‘spouse’ (s 6B(2) – no need to amend if ‘marital relationship’ is amended)</p> <p>‘step-child’ (insert new definition)</p>
<i>Diplomatic Privileges and Immunities Act 1967 (Cth)</i>	<p>‘de facto partner’ (insert new definition)</p> <p>‘de facto relationship’ (insert new definition)</p> <p>‘member of the family’ (insert new definition including a ‘de facto partner’. No need to insert definition of ‘child’ if a lesbian co-mother or gay co-father and her or his children may be recognised through reformed parenting presumptions or adoption laws)</p>
<i>Education Services for Overseas Students Act 2000 (Cth)</i>	<p>‘associate’ (s 6(1) – no need to amend if new definition of ‘de facto spouse’ and if a lesbian co-mother or gay co-father and her or his children may be recognised as a ‘parent’ or ‘child’ through reformed parenting presumptions or adoption laws)</p> <p>‘de facto partner’ (insert new definition)</p> <p>‘de facto relationship’ (insert new definition)</p> <p>‘de facto spouse’ (insert new definition including a ‘de facto partner’)</p>
<i>Family Law Act 1975 (Cth)</i>	<p>‘parent’ (s 4 – no need to amend if s 60H is amended and a gay co-father or lesbian co-mother may be recognised through reformed adoption laws)</p> <p>Parenting presumptions for a child born through assisted reproductive technology (s 60H – amend to include a parenting presumption in favour of a lesbian co-mother)</p>
<i>Federal Magistrates Amendment (Disability and Death Benefits) Bill 2006 (seeking to amend the Federal Magistrates Act 1999 (Cth))</i>	<p>‘de facto partner’ (insert new definition)</p> <p>‘de facto relationship’ (insert new definition)</p> <p>‘eligible child’ (sch 1, cl 13 inserting sch 1, cl 9F into the Federal Magistrates Act – no need to amend if the child of a lesbian co-mother or gay co-father may be recognised through reformed parenting presumptions or adoption laws)</p> <p>‘eligible spouse’ (sch 1, cl 13 inserting sch 1, cl 9E into the Federal Magistrates Act – no need to amend if ‘marital relationship’ is amended)</p> <p>‘marital relationship’ (sch 1, cl 13 inserting sch 1, cl 9E(5) into the Federal Magistrates Act – amend to include a ‘de facto partner’)</p>

LEGAL INSTRUMENT	DEFINITIONS
<p>Financial Sector (Shareholdings) Act 1998 (Cth)</p>	<p>‘associates’ (sch 1, cl 4 – no need to amend if new definition of ‘spouse’ and a lesbian co-mother or gay co-father and her or his children may be recognised as a ‘parent’, ‘son’ or ‘daughter’ through reformed parenting presumptions or adoption laws)</p> <p>‘de facto partner’ (insert new definition)</p> <p>‘de facto relationship’ (insert new definition)</p> <p>‘relative’ (sch 1, cl 2 –no need to amend if new definition of ‘spouse’ and a lesbian co-mother or gay co-father and her or his children may be recognised as a ‘parent’, ‘son’ or ‘daughter’ through reformed parenting presumptions or adoption laws)</p> <p>‘spouse’ (insert new definition including a ‘de facto partner’)</p>
<p>Foreign Acquisitions and Takeovers Act 1975 (Cth)</p>	<p>‘associate’ (s 6(a) – no need to amend if new definition of ‘spouse’ and a lesbian co-mother or gay co-father and her or his children may be recognised as a ‘parent’, ‘son’ or ‘daughter’ through reformed parenting presumptions or adoption laws)</p> <p>‘de facto partner’ (insert new definition)</p> <p>‘de facto relationship’ (insert new definition)</p> <p>‘spouse’ (insert new definition including a ‘de facto partner’)</p>
<p>Foreign Acquisitions and Takeovers Regulations 1989 (Cth)</p>	<p>‘de facto partner’ (insert new definition)</p> <p>‘de facto relationship’ (insert new definition)</p> <p>‘spouse’ (reg 2 – amend to include a ‘de facto partner’)</p>
<p>Foreign States Immunities Act 1985 (Cth)</p>	<p>‘de facto partner’ (insert new definition)</p> <p>‘de facto relationship’ (insert new definition)</p> <p>‘spouse’ (insert new definition including a ‘de facto partner’)</p>
<p>Fringe Benefits Tax Assessment Act 1986 (Cth)</p>	<p>‘associate’ (s 136(1) – no need to amend if ‘spouse’ is amended in the <i>Income Tax Assessment Act 1997</i> (Cth) (Income Tax Assessment Act 1997) and the child of a lesbian co-mother or gay co-father may be recognised through reformed parenting presumptions, adoption laws or a new definition of ‘step-child’ in the <i>Income Tax Assessment Act 1997</i>)</p> <p>‘child’ (s 136(1) – no need to amend if the child of a lesbian co-mother or gay co-father may be recognised through reformed parenting presumptions, adoption laws or a new definition of ‘step-child’ in the <i>Income Tax Assessment Act 1997</i>)</p> <p>‘relative’ (s 136(1) – no need to amend if ‘spouse’ is amended in the <i>Income Tax Assessment Act 1997</i> and a lesbian co-mother or gay co-father may be recognised as a parent through reformed parenting presumptions or adoption laws or a new definition of ‘step-child’ in the <i>Income Tax Assessment Act 1997</i>)</p> <p>‘spouse’ (s 136(1) – no need to amend if ‘spouse’ is amended in the <i>Income Tax Assessment Act 1997</i>)</p>

LEGAL INSTRUMENT	DEFINITIONS
<i>Governor-General Act 1974 (Cth)</i>	<p>‘de facto relationship’ (insert new definition)</p> <p>‘marital relationship’ (s 2B – amend to include ‘de facto relationship’)</p> <p>‘spouse of a deceased person’ (s 2C – no need to amend if ‘marital relationship’ is amended)</p>
<i>Health Insurance Act 1973 (Cth)</i>	<p>‘de facto partner’ (insert new definition)</p> <p>‘de facto relationship’ (insert new definition)</p> <p>‘dependent child’ (s 10AA(7) – amend to clarify the role of a parenting order; otherwise no need to amend if the child of a lesbian co-mother or gay co-father may also be recognised through reformed parenting presumptions or adoption laws)</p> <p>‘member of a person’s family’ (s 10AA(1) – no need to amend if ‘spouse’ is amended and ‘dependent child’ recognises the child of a lesbian co-mother or gay co-father through reformed parenting presumptions or adoption laws)</p> <p>‘spouse’ (s 10AA(7) – amend to refer to a ‘de facto partner’)</p>
<i>Higher Education Funding Act 1988 (Cth)</i>	<p>‘de facto partner’ (insert new definition)</p> <p>‘de facto relationship’ (insert new definition)</p> <p>‘overseas student’ (s 3 – no need to amend if new definition of ‘spouse’)</p> <p>‘relative’ (no need to insert definition if a lesbian co-mother or gay co-father and her or his children may be recognised through reformed parenting presumptions or adoption laws)</p> <p>‘spouse’ (insert new definition including a ‘de facto partner’)</p>
<i>Higher Education Support Act 2003 (Cth)</i>	<p>‘de facto partner’ (insert new definition)</p> <p>‘de facto relationship’ (insert new definition)</p> <p>‘overseas student’ (sch 1, r 1 – no need to amend if new definition of ‘spouse’)</p> <p>‘relative’ (no need to insert definition if a lesbian co-mother or gay co-father and her or his children may be recognised through reformed parenting presumptions or adoption laws)</p> <p>‘spouse’ (insert new definition including a ‘de facto partner’)</p>
<i>Income Tax Assessment Act 1936 (Cth)</i>	<p>‘associate’ (s 318 – no need to amend if ‘spouse’ is amended in the Income Tax Assessment Act 1997 and the child of a lesbian co-mother or gay co-father may be recognised through reformed parenting presumptions, adoption laws or a new definition of ‘step-child’ in the Income Tax Assessment Act 1997)</p> <p>‘child’ (s 6(1) – no need to amend if the child of a lesbian co-mother or gay co-father may be recognised through reformed parenting presumptions, adoption laws or a new definition of ‘step-child’ in the Income Tax Assessment Act 1997)</p>

LEGAL INSTRUMENT	DEFINITIONS
	<p>‘child-housekeeper’ (s 159J(6) – no need to amend if the child of a lesbian co-mother or gay co-father may be recognised through reformed parenting presumptions, adoption laws or a new definition of ‘step-child’ in the Income Tax Assessment Act 1997)</p> <p>‘dependant’ (s 251R – no need to amend if ‘spouse’ is amended in the Income Tax Assessment Act 1997; ‘member of a couple’ is amended in the Social Security Act; and the child of a lesbian co-mother or gay co-father may be recognised through reformed parenting presumptions, adoption laws or a new definition of ‘step-child’ in the Income Tax Assessment Act 1997)</p> <p>‘invalid relative’ (s 159J(6) – no need to amend if the child of a lesbian co-mother or gay co-father may be recognised through reformed parenting presumptions, adoption laws or a new definition of ‘step-child’ in the Income Tax Assessment Act 1997)</p> <p>‘relative’ (s 6(1) – no need to amend if ‘spouse’ is amended in the Income Tax Assessment Act 1997 and a lesbian co-mother or gay co-father may be recognised as a parent through reformed parenting presumptions or adoption laws in the Income Tax Assessment Act 1997)</p> <p>‘spouse’ (s 6(1) – no need to amend if ‘spouse’ is amended in the Income Tax Assessment Act 1997)</p>
<p><i>Income Tax Assessment Act 1997 (Cth)</i></p>	<p>‘child event’ (s 61-360(a) – no need to amend if ‘legally responsible’ is amended and the child of a lesbian co-mother or gay co-father may also be recognised through reformed parenting presumptions or adoption laws)</p> <p>‘child’ (s 995-1(1) – no need to amend if the child of a lesbian co-mother or gay co-father may be recognised through reformed parenting presumptions, adoption laws or a new definition of ‘step-child’)</p> <p>‘de facto partner’ (insert new definition)</p> <p>‘de facto relationship’ (insert new definition)</p> <p>‘death benefits dependant’ (s 302-195 – no need to amend if ‘spouse’ is amended and ‘child’ may recognise the child of a lesbian co-mother or gay co-father through reformed parenting presumptions, adoption laws or a new definition of ‘step-child’)</p> <p>‘interdependency relationship’ (s 302-200 – no need to amend if ‘spouse’ is amended)</p> <p>‘legally responsible’ (s 995-1(1) – amend to clarify that a parenting order is evidence of legal responsibility)</p> <p>‘partner’ (s 61-490(1)(b) – no need to amend if ‘member of a couple’ is amended in the Social Security Act)</p> <p>‘relative’ (s 995-1(1) – no need to amend if ‘spouse’ is amended and a lesbian co-mother or gay co-father may be recognised as a parent through reformed parenting presumptions or adoption laws)</p>

LEGAL INSTRUMENT	DEFINITIONS
	<p>‘spouse’ (s 995-1(1) – amend to include a ‘de facto partner’)</p> <p>‘step-child’ (insert new definition)</p>
Income Tax Regulations 1936 (Cth)	‘interdependency relationship’ (reg 8A(1) – no need to amend if ‘spouse’ is amended in the Income Tax Assessment Act 1997)
Insurance Acquisitions and Takeovers Act 1991 (Cth)	<p>‘associate’ (s 7 – no need to amend if a new definition of ‘spouse’; and ‘parent’, ‘son’ or ‘daughter’ may include a lesbian co-mother or gay co-father and her or his children through reformed parenting presumptions or adoption laws)</p> <p>‘de facto partner’ (insert new definition)</p> <p>‘de facto relationship’ (insert new definition)</p> <p>‘relative’ (s 4 – no need to amend if a new definition of ‘spouse’; and ‘parent’, ‘son’ or ‘daughter’ may include a lesbian co-mother or gay co-father and her or his children through reformed parenting presumptions or adoption laws)</p> <p>‘spouse’ (insert new definition including a ‘de facto partner’)</p>
International Organisations (Privileges and Immunities) Act 1963 (Cth)	<p>‘children’ (no need to insert definition if the children of a lesbian co-mother or gay co-father may be recognised through reformed parenting presumptions or adoption laws)</p> <p>‘de facto partner’ (insert new definition)</p> <p>‘de facto relationship’ (insert new definition)</p> <p>‘dependent relatives’ (insert new definition including a ‘spouse’ and ‘children’)</p> <p>‘spouse’ (insert new definition including a ‘de facto partner’)</p>
Judges’ Pensions Act 1968 (Cth)	<p>‘de facto relationship’ (insert new definition)</p> <p>‘eligible child’ (s 4AA – amend to clarify the role of a parenting order; otherwise no need to amend if the child of a lesbian co-mother or gay co-father may also be recognised through reformed parenting presumptions or adoption laws)</p> <p>‘marital relationship’ (s 4AB(1) – amend to include ‘de facto relationship’)</p> <p>‘spouse who survives a deceased judge’ (s 4AC(2) – no need to amend if ‘marital relationship’ is amended)</p>
Judicial and Statutory Officers (Remuneration and Allowances) Act 1984 (Cth)	<p>‘de facto partner’ (insert new definition)</p> <p>‘de facto relationship’ (insert new definition)</p> <p>‘spouse’ (insert new definition including a ‘de facto partner’)</p>
Life Insurance Act 1995 (Cth)	‘child’ (no need to insert definition if the child of a lesbian co-mother or gay co-father may be recognised through reformed parenting presumptions or adoption laws)

LEGAL INSTRUMENT	DEFINITIONS
	<p>‘de facto partner’ (insert new definition)</p> <p>‘de facto relationship’ (insert new definition)</p> <p>‘spouse’ (sch 1 – amend to include ‘de facto partner’)</p>
Medicare Levy Act 1986 (Cth)	<p>The <i>Medicare Levy Act 1986</i> (Cth) does not define the relevant terms, but relies on definitions in the <i>Income Tax Assessment Act 1936</i> (Cth) (s 3(1)). Changes to that Act will automatically change definitions in the Medicare Levy Act.</p>
Members of Parliament (Life Gold Pass) Act 2002 (Cth)	<p>‘de facto partner’ (insert new definition)</p> <p>‘de facto relationship’ (insert new definition)</p> <p>‘spouse’ (s 4 – amend to include a ‘de facto partner’)</p> <p>‘widow’ (s 4 – amend to remove gender specific language, otherwise no need to amend if ‘spouse’ is amended)</p> <p>‘widower’ (s 4 – amend to remove gender specific language, otherwise no need to amend if ‘spouse’ is amended)</p>
Migration Regulations 1994 (Cth)	<p>‘member of the family unit’ (reg 1.12 – no need to amend if ‘spouse’ is amended)</p> <p>‘member of the immediate family’ (reg 1.12AA – no need to amend if ‘spouse’ is amended)</p> <p>‘spouse’ (reg 1.15A(2) – amend criteria of ‘de facto relationship’ to include same-sex couples)</p>
Military Rehabilitation and Compensation Act 2004 (Cth)	<p>‘de facto partner’ (insert new definition)</p> <p>‘de facto relationship’ (insert new definition)</p> <p>‘dependant’ (s 15(2) – amend to clarify the role of a parenting order and to change the reference to a ‘step-son’, ‘step-daughter’, ‘step-mother’ and ‘step-father’ to ‘step-child’ and ‘step-parent’ respectively. Otherwise no need to amend if ‘partner’ is amended and a lesbian co-mother or gay co-father and her or his children may also be recognised through reformed parenting presumptions, adoption laws or a new definition of ‘step-child’ and ‘step-parent’)</p> <p>‘eligible young person’ (s 5 – no need to amend)</p> <p>‘partner’ (s 5 – amend to include a ‘de facto partner’)</p> <p>‘step-child’ (insert new definition)</p> <p>‘step-parent’ (insert new definition)</p> <p>‘wholly dependent partner’ (s 5 – no need to amend if ‘partner’ is amended)</p>

LEGAL INSTRUMENT	DEFINITIONS
<p>Military Superannuation and Benefits Trust Deed (made under s 5(1) of Military Superannuation and Benefits Act 1991 (Cth))</p>	<p>‘child’ (sch 1, r 1 – no need to amend if ‘spouse’ is amended and the child of a lesbian co-mother or gay co-father may be recognised through reformed parenting presumptions, adoption laws or a new definition of ‘step-child’)</p> <p>‘de facto relationship’ (insert new definition)</p> <p>‘eligible child’ (sch 1, r 1 – no need to amend if the child of a lesbian co-mother or gay co-father may be recognised through reformed parenting presumptions, adoption laws or a new definition of ‘step-child’)</p> <p>‘marital relationship’ (sch 1, r 1A – amend to include ‘de facto relationship’)</p> <p>‘spouse’ (sch 1, r 12 – delete)</p> <p>‘spouse’ (sch 1, r 9 – no need to amend if ‘marital relationship’ is amended)</p> <p>‘step-child’ (insert new definition)</p>
<p>National Health Act 1953 (Cth)</p>	<p>‘de facto relationship’ (insert new definition)</p> <p>‘de facto spouse’ (s 4 – replace with new definition of ‘de facto partner’)</p> <p>‘dependent child’ (s 84B(4) – amend to clarify the role of a parenting order; otherwise no need to amend if the child of a lesbian co-mother or gay co-father may also be recognised through reformed parenting presumptions or adoption laws)</p> <p>‘member of a person’s family’ (s 84B(1) – no need to amend if ‘spouse’ is amended and ‘dependent child’ recognises the child of a lesbian co-mother or gay co-father through reformed parenting presumptions or adoption laws)</p> <p>‘spouse’ (s 84B(4) - replace the term ‘de facto spouse’ with the term ‘de facto partner’)</p>
<p>Parliamentary Contributory Superannuation Act 1948 (Cth)</p>	<p>‘child’ (s 19AA(5) – no need to amend if the child of a lesbian co-mother or gay co-father may be recognised through reformed parenting presumptions or adoption laws)</p> <p>‘de facto relationship’ (insert new definition)</p> <p>‘eligible child’ (s 19AA(5) – no need to amend if the child of a lesbian co-mother or gay co-father may be recognised through reformed parenting presumptions or adoption laws)</p> <p>‘marital relationship’ (s 4B – amend to include ‘de facto relationship’)</p> <p>‘spouse’ (s 4C(2) – no need to amend if ‘marital relationship’ is amended)</p>
<p>Parliamentary Entitlements Act 1990 (Cth)</p>	<p>‘de facto partner’ (insert new definition)</p> <p>‘de facto relationship’ (insert new definition)</p> <p>‘spouse’ (s 3 – amend to include a ‘de facto partner’)</p>

LEGAL INSTRUMENT	DEFINITIONS
<i>Passenger Movement Charge Collection Act 1978 (Cth)</i>	<p>‘child’ (s 3 – no need to amend if the child of a lesbian co-mother or gay co-father may be recognised through reformed parenting presumptions, adoption laws or a new definition of ‘step-child’)</p> <p>‘de facto partner’ (insert new definition)</p> <p>‘de facto relationship’ (insert new definition)</p> <p>‘spouse’ (s 3 – amend to include ‘de facto partner’)</p> <p>‘step-child’ (insert new definition)</p>
<i>Pooled Development Funds Act 1992 (Cth)</i>	<p>‘associate’ (s 31 – no need to amend if ‘de facto spouse’ is amended and if a lesbian co-mother or gay co-father and her or his children may be recognised as a ‘parent’ or ‘child’ through reformed parenting presumptions or adoption laws)</p> <p>‘de facto partner’ (insert new definition)</p> <p>‘de facto relationship’ (insert new definition)</p> <p>‘de facto spouse’ (s 4(1) – amend to include ‘de facto partner’)</p>
<i>Proceeds of Crime Act 2002 (Cth)</i>	<p>‘de facto partner’ (insert new definition)</p> <p>‘de facto relationship’ (insert new definition)</p> <p>‘de facto spouse’ (insert new definition including a ‘de facto partner’)</p> <p>‘dependant’ (s 338 – no need to amend if new definition of ‘de facto partner’ and if the child of a lesbian co-mother or gay co-father may be recognised as a ‘child’ through reformed parenting presumptions or adoption laws)</p>
<i>Remuneration Tribunal Determination 2006/14: Members of Parliament – Travelling Allowance</i>	<p>‘de facto partner’ (insert new definition)</p> <p>‘de facto relationship’ (insert new definition)</p> <p>‘spouse’ (insert new definition including a ‘de facto partner’)</p>
<i>Remuneration Tribunal Determination 2006/18: Members of Parliament – Entitlements</i>	<p>‘de facto partner’ (insert new definition)</p> <p>‘de facto relationship’ (insert new definition)</p> <p>‘spouse’ (insert new definition including a ‘de facto partner’)</p>
<i>Retirement Savings Accounts Act 1997 (Cth)</i>	<p>‘child’ (s 20(3) – no need to amend if the child of a lesbian co-mother or gay co-father may be recognised through reformed parenting presumptions, adoption laws or a new definition of ‘step-child’)</p> <p>‘de facto partner’ (insert new definition)</p> <p>‘de facto relationship’ (insert new definition)</p> <p>‘dependant’ (s 20(1) – no need to amend if ‘spouse’ is amended and ‘child’ may recognise the child of a lesbian co-mother or gay co-father through reformed parenting presumptions, adoption laws or a new definition of ‘step-child’)</p>

LEGAL INSTRUMENT	DEFINITIONS
	<p>‘interdependency relationship’ (s 20A – no need to amend if ‘spouse’ is amended)</p> <p>‘spouse’ (s 20(2) – amend to include a ‘de facto partner’)</p> <p>‘step-child’ (insert new definition)</p>
<p><i>Safety, Rehabilitation and Compensation Act 1988 (Cth)</i></p>	<p>‘de facto partner’ (insert new definition)</p> <p>‘de facto relationship’ (insert new definition)</p> <p>‘dependant’ (s 4(1) – amend to clarify the role of a parenting order and to change references to a ‘step-son’, ‘step-daughter’, ‘step-mother’ and ‘step-father’ to ‘step-child’ and ‘step-parent’ respectively. Otherwise no need to amend if ‘spouse’ is amended and a lesbian co-mother or gay co-father and her or his children may also be recognised through reformed parenting presumptions, adoption laws or a new definition of ‘step-child’ and ‘step-parent’)</p> <p>‘prescribed child’ (s 4(1) – no need to amend)</p> <p>‘prescribed person’ (s 19(12) – amend to clarify the role of a parenting order and to change references to a ‘step-son’, ‘step-daughter’, ‘step-mother’ and ‘step-father’ to ‘step-child’ and ‘step-parent’ respectively. Otherwise no need to amend if ‘spouse’ is amended and a lesbian co-mother or gay co-father and her or his children may also be recognised through reformed parenting presumptions, adoption laws or a new definition of ‘step-child’ and ‘step-parent’)</p> <p>‘spouse’ (s 4(1) – amend to include a ‘de facto partner’)</p> <p>‘step-child’ (insert new definition)</p> <p>‘step-parent’ (insert new definition)</p>
<p><i>Seafarers Rehabilitation and Compensation Act 1992 (Cth)</i></p>	<p>‘de facto partner’ (insert new definition)</p> <p>‘de facto relationship’ (insert new definition)</p> <p>‘dependant’ (s 3 – amend to clarify the role of a parenting order and to change references to a ‘step-son’, ‘step-daughter’, ‘step-mother’ and ‘step-father’ to ‘step-child’ and ‘step-parent’ respectively. Otherwise no need to amend if ‘spouse’ is amended and a lesbian co-mother or gay co-father and her or his children may also be recognised through reformed parenting presumptions, adoption laws or a new definition of ‘step-child’ and ‘step-parent’)</p> <p>‘prescribed child’ (s 3 – no need to amend)</p> <p>‘prescribed person’ (s 3 – amend to clarify the role of a parenting order and to change references to a ‘step-son’, ‘step-daughter’, ‘step-mother’ and ‘step-father’ to ‘step-child’ and ‘step-parent’ respectively. Otherwise no need to amend if ‘spouse’ is amended and a lesbian co-mother or gay co-father and her or his children may also be recognised through reformed parenting presumptions, adoption laws or a new definition of ‘step-child’ and ‘step-parent’)</p> <p>‘spouse’ (s 3 – amend to include a ‘de facto partner’)</p>

LEGAL INSTRUMENT	DEFINITIONS
	<p>‘step-child’ (insert new definition)</p> <p>‘step-parent’ (insert new definition)</p>
<p>Social Security Act 1991 (Cth)</p>	<p>‘de facto partner’ (insert new definition)</p> <p>‘de facto relationship’ (insert new definition)</p> <p>‘dependant’ (s 6A(1) – no need to amend if ‘partner’ and ‘dependent child’ are amended and ‘FTB child’ (in <i>A New Tax System (Family Assistance) Act 1999</i> (Cth)) may also recognise the child of a lesbian co-mother or gay co-father through reformed parenting presumptions or adoption laws)</p> <p>‘dependent child’ (s 5(2), (4) – amend to clarify the role of a parenting order; otherwise no need to amend if the child of a lesbian co-mother or gay co-father may also be recognised through reformed parenting presumptions or adoption laws)</p> <p>‘independent’ (s 1067A – no need to amend if ‘partner’ and ‘member of a Youth Allowance couple’ is amended and the child of a lesbian co-mother or gay co-father may be recognised through reformed parenting presumptions or adoption laws)</p> <p>‘marriage-like relationship’ (s 4(2), (3), (3A) – replace with ‘de facto relationship’)</p> <p>‘member of a couple’ (s 4(2)(b) – amend to include a ‘de facto partner’ and ‘de facto relationship’)</p> <p>‘member of a Youth Allowance couple’ (s 1067C – amend to include a ‘de facto partner’ and replace ‘marriage-like relationship’ with ‘de facto relationship’)</p> <p>‘parent’ (s 5(1)(a) – amend to ensure that a lesbian co-mother or gay co-father may be recognised through reformed parenting presumptions or adoption laws)</p> <p>‘parent’ (s 5(1)(b) – no need to amend if ‘member of couple’ is amended)</p> <p>‘partner’ (s 4(1) – no need to amend if ‘member of a couple’ is amended)</p> <p>‘principal carer’ (s 5(15) – no need to amend if ‘dependent child’ is amended)</p> <p>‘widow’ (s 23 – amend to remove a reference to partner of ‘a man’, otherwise no need to amend if ‘member of a couple’ is amended)</p> <p>‘young person’ (s 5(1B) – no need to amend)</p>
<p>Superannuation (Public Sector Superannuation Accumulation Plan) Trust Deed (made under s 10 of the Superannuation Act 2005 (Cth))</p>	<p>‘dependant’ (div 2, r 1.2.1 – no need to amend if ‘spouse’ is amended in the <i>Superannuation Industry (Supervision) Act 1993</i> (Cth) (Superannuation Industry Act))</p>

LEGAL INSTRUMENT	DEFINITIONS
<p><i>Superannuation Act 1976 (Cth)</i></p>	<p>‘child’ (s 3(1) – no need to amend if the child of a lesbian co-mother or gay co-father may be recognised through reformed parenting presumptions, adoption laws or a new definition of ‘step-child’)</p> <p>‘de facto relationship’ (insert new definition)</p> <p>‘eligible child’ (s 3(1) – no need to amend if the child of a lesbian co-mother or gay co-father may also be recognised through reformed parenting presumptions, adoption laws or a new definition of ‘step-child’)</p> <p>‘marital relationship’ (s 8A – amend to include ‘de facto relationship’)</p> <p>‘partially dependent child’ (s 3(1) – no need to amend if the child of a lesbian co-mother or gay co-father may also be recognised through reformed parenting presumptions, adoption laws or a new definition of ‘step-child’)</p> <p>‘spouse’ (s 8B(2) – no need to amend if ‘marital relationship’ is amended)</p> <p>‘step-child’ (insert new definition)</p>
<p><i>Superannuation Act 1990 (Cth)</i></p>	<p>‘child’ (sch 1, r 1.1.1 – no need to amend if ‘spouse’ is amended and the child of a lesbian co-mother or gay co-father may be recognised through reformed parenting presumptions, adoption laws or a new definition of ‘step-child’)</p> <p>‘de facto partner’ (insert new definition)</p> <p>‘de facto relationship’ (insert new definition)</p> <p>‘eligible child’ (sch 1, r 1.1.1 – no need to amend if the child of a lesbian co-mother or gay co-father may also be recognised through reformed parenting presumptions, adoption laws or a new definition of ‘step-child’)</p> <p>‘partially dependent child’ (sch 1, r 1.1.1 – no need to amend if the child of a lesbian co-mother or gay co-father may also be recognised through reformed parenting presumptions, adoption laws or a new definition of ‘step-child’)</p> <p>‘spouse’ (sch 1, r 1.1.1 – amend to include a ‘de facto partner’)</p> <p>‘step-child’ (insert new definition)</p>
<p><i>Superannuation Industry (Supervision) Act 1993 (Cth)</i></p>	<p>‘child’ (s 10(1) – no need to amend if the child of a lesbian co-mother or gay co-father may be recognised through reformed parenting presumptions, adoption laws or a new definition of ‘step-child’)</p> <p>‘de facto partner’ (insert new definition)</p> <p>‘de facto relationship’ (insert new definition)</p> <p>‘dependant’ (s 10 – no need to amend if ‘spouse’ is amended and the child of a lesbian co-mother or gay co-father may be recognised through reformed parenting presumptions, adoption laws or a new definition of ‘step-child’)</p>

LEGAL INSTRUMENT	DEFINITIONS
	<p>‘interdependency relationship’ (s 10A - no need to amend if ‘spouse’ is amended)</p> <p>‘spouse’ (s 10(1) – amend to include a ‘de facto partner’)</p> <p>‘step-child’ (insert new definition)</p>
<p>Superannuation Industry (Supervision) Regulations 1994 (Cth)</p>	<p>‘interdependency relationship’ (reg 1.04AAAA - no need to amend if ‘spouse’ is amended in the Superannuation Industry Act)</p>
<p>Veterans’ Entitlements Act 1986 (Cth)</p>	<p>‘child of a veteran’ (s 10 – amend to clarify the role of a parenting order; otherwise no need to amend if the child of a lesbian co-mother or gay co-father may also be recognised through reformed parenting presumptions or adoption laws)</p> <p>‘child’ (s 5F(1) – no need to amend)</p> <p>‘de facto partner’ (insert new definition)</p> <p>‘de-facto relationship’ (insert new definition)</p> <p>‘dependant’ (s 11(1) – no need to amend if ‘member of a couple’, ‘widow’, ‘widower’, ‘non-illness separated spouse’ are amended)</p> <p>‘dependent child’ (s 5F – no need to amend if s 5(2), (4) is amended in the Social Security Act)</p> <p>‘marriage-like relationship’ (s 11A – replace with ‘de facto relationship’)</p> <p>‘member of a couple’ (s 5E(2)(b) – amend to include a ‘de facto partner’ and replace ‘marriage-like relationship’ with ‘de-facto relationship’)</p> <p>‘non-illness separated spouse’ (s 5E(1) – amend to include a ‘de facto partner’)</p> <p>‘partner’ (s 5E(1) – no need to amend if ‘member of a couple’ is amended)</p> <p>‘war widow’ (s 5E(1) – no need to amend if ‘member of a couple’ is amended)</p> <p>‘war widower’ (s 5E(1) – no need to amend if ‘member of a couple’ is amended)</p> <p>‘widow’ (s 5E(1) – amend to remove a reference to partner of ‘a man’, otherwise no need to amend if ‘member of a couple’ is amended)</p> <p>‘widower’ (s 5E(1) – amend to remove a reference to partner of ‘a woman’, otherwise no need to amend if ‘member of a couple’ is amended)</p>

LEGAL INSTRUMENT	DEFINITIONS
<p><i>Workplace Relations Act 1996 (Cth)</i></p>	<p>‘child’ (s 240 – no need to amend if the child of a lesbian co-mother or gay co-father are recognised through reformed parenting presumptions, adoption laws or a new definition of ‘step-child’)</p> <p>‘de facto relationship’ (insert new definition)</p> <p>‘de facto spouse’ (ss 240, 263 – replace with new definition of ‘de facto partner’)</p> <p>‘immediate family’ (s 240 – no need to amend if ‘spouse’ is amended and a lesbian co-mother or gay co-father and her or his children may be recognised through reformed parenting presumptions, adoption laws or a new definition of ‘step-child’)</p> <p>‘paternity leave’ (s 282(1) – amend to remove gender specific language, otherwise no need to amend if ‘spouse’ is amended)</p> <p>‘spouse’ (ss 240, 263 – amend to replace all references to ‘de facto spouse’ with ‘de facto partner’)</p> <p>‘step-child’ (insert new definition)</p>



APPENDIX 2:

Selected Personal Stories

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The Inquiry collected a large number of stories outlining the personal experiences of discrimination faced by same-sex couples and their children.

The following is a selection of extracts from these stories.¹ The stories demonstrate the compound effect of discrimination against same-sex families in the area of financial and work-related entitlements.

Many more personal stories can also be found on the Human Rights and Equal Opportunity Commission's website:

- *Submissions*: <http://www.humanrights.gov.au/samesex/submissions.html>.
- *Hearings*: <http://www.humanrights.gov.au/samesex/hearings.html>.

ANTHONY PANNUZZO AND DANIEL MILANO:

Discrimination in visas, Medicare, tax, social security and family law²

In the year 2000 I was ready to settle down. As they say 'get married, buy a house and have some kids'. I was a 26 year old Australian travelling the world who had met his American partner in New York City.

My American partner in all pretences is my husband and my wife. He has been my domestic partner in New York City, my de facto partner in Victoria, my interdependent relationship under Australian immigration law, my husband under Canadian law, and finally not recognised under Australian [f]ederal [l]aw.

We knew from the beginning that we would have to jump many legal hurdles just to stay together. Neither of our countries recognises our relationship to the extent of our heterosexual unmarried citizens.

The interdependency path [to obtaining a visa] would take at least a year before we could even consider it. Recognition was only an option after a whole year of, in effect, living together and sharing a life, even though neither of our countries offered such a visa. We had made the decision to be together forever but did not have the option of a fiancés visa like ... heterosexual [couples].

We started collecting information from the beginning, information that would prove our interdependency. We collected letters and cards addressed to us both (including envelopes as the [I]mmigration [D]epartment loves to see post marks – legal proof), we collected legal documents, bank statements, leases, wills drawn up in each others names. What we would have given for a marriage licence. Or any form of federally recognised paperwork stating we were a couple who shared each other's lives...

I cried tears of joy [when] the Victoria State Government ... passed legislation recognising same sex relationships to the level of de facto... This gave me hope; the Victorian government had made wonderful progress. My home country was making progress.

So after a year of living together in New York City we posted our 9lbs or 4.5kgs of paperwork to the immigration officer in Washington DC. Within 2 months, a near record, Daniel had received his Australian temporary residency status. We had to tick the box of interdependency. All the paperwork was the same as for the de facto couples but we had a different box to tick...

The next discrimination we faced was being left out of the changes to the [F]amily [L]aw [A]ct, such that unmarried heterosexual couples were now able to use the family court to settle disputes. As a homosexual couple we can not access the [F]amily [C]ourt if we break up but instead have to use the civil courts.

The federal government next passed some laws allowing families to access the Medicare safety net for medical bills, [and] pharmaceutical benefits. We are not a family under this legislation, and have to spend twice as much as a heterosexual unmarried couple, to receive such a benefit. I administer such benefits everyday as a pharmacist. Families listed on a Medicare card or registered with Medicare are able to access these ... safety nets. Homosexual families can not. My family can not.

Next came our visit to our accountant. When we have to submit our tax forms or consider our superannuation options we have to employ specialist accountants or legal professionals to get the right advice. The advice that we got in this regard is that we just don't have any rights in either regard...

[W]hen Daniel applied for AusStudy, he informed Centrelink of my income only to be told that he would not be eligible for AusStudy as my earnings were too high. He then told them I was a man, and they informed him that he was recognised as a single and was entitled to AusStudy.

Unfortunately you are never quite sure [which box to tick]. [O]ften legal advice is required or you face breaking the law or being told you are not entitled to this or that, only to be told something untrue or incorrect...

Are we married or are we single? [A]re we de facto or domestic partners? That depends on the level of government we have to deal with.

Thankfully we are now recognised by federal government legislation when it comes to terrorism and superannuation (unless you have a federal fund).

Discrimination is an insidious thing. It eats away at your determination. You can fight for it for only so long. A country like Canada which gives us full marriage rights is one which is calling for immigrants like us. Like us, gay and lesbian married couples, are recognised and respected the same way everyone else is. Australia's lack of law reform in this area will see us consider our future in this country. We can only hope that an [I]nquiry like this one will result in changes that make for an improvement of recognition of our rights as citizens of this nation.

BRYCE PETERSEN:

A parent's perspective of the discrimination faced by his daughter in family law, parental leave, Medicare, tax and social security³

I am here as a father of four. [My] eldest daughter Sacha lives in Melbourne with her partner Anna and they [have] a daughter, Mabel who is 11 months old.

I intend this submission to be based on what ... I consider the differences between my daughter [Sacha] and her sister Lauren, who also has a [male] partner and they have 2 children, a son 4 and a daughter 19 months.

Firstly, to have a baby, my daughter [Sacha], the biological mother, after much research of the options available, opted for Artificial Insemination. This procedure is not available to gay couples or single women that are not in a committed relationship in Victoria, unless they have a problem with fertility, so they had to go interstate. This procedure is an expensive and mentally draining exercise. Part of the procedure is to have counselling of at least 2 sessions to prove you are ready and suitable to have children.

How many parents male/female would even consider this as an option before starting a family, and what would be their reaction to such a suggestion?

Sacha was treated as a single mother throughout the pregnancy, but was totally supported by Anna the entire time. Many of the costs involved are not claimable, either due to the nature of the procedure or threshold limits.

My other daughter [Lauren] and her partner have had their two children, the fact that he is male [means] no explanations are required, therefore their relationship is proof enough to satisfy the system. [Y]et Sacha has to constantly explain the situation, which shouldn't be an issue.

After the birth of Mabel, Sacha and Anna, to ensure the future welfare and care of their daughter, had papers drawn up to cover a, b or c etc. [This] cost \$1500.

Another major purpose of these papers is to show Anna is just as much a parent as Sacha but that is still not acceptable to the system. Adoption by Anna is not possible...

While these papers go a long way towards helping solve some of the problems that may or may not occur, if they are put to the test, how credible are they? If separation occurs, my daughter could be left totally supporting herself and Mabel, and if something happens to Sacha where does that leave Anna as a parent, let alone financially. Ironically even fathers who don't pay maintenance are still recognised as parents...

[O]ne of the plus sides of the situation is that [Sacha] is entitled to all [social security] benefits as a single mother, regardless of her living circumstances. [H]er partner could be a millionaire but in the system this is not considered. I guess while this can be seen as a plus, I know they would swap these benefits if it meant they were both recognised and treated as parents with [the] same rights as male/female parents.

Anna has supported their family financially and was entitled to 2 days maternity leave and took annual leave after the birth.

As far as Medicare is concerned they are treated as a family for Sacha and Mabel, and a single for Anna. [T]herefore the combination of costs if they reach the Medicare threshold is not possible.

This also applies to tax rebates; Anna is not entitled to claim either of them as dependants, unlike my other daughter's partner. If you choose to stay at home once your paid maternity leave has run out, surely as a couple you should be entitled to the same rebates.

Recently while visiting my daughter, Anna came home from work in pain and distressed with a bad ear infection. [B]efore departing to go to the emergency room, I couldn't but notice sadly that Sacha gathered together all papers that states their relationship. [Y]et when we got there, that was one of the first questions asked, their relationship status, to be able to

tick the right category, to which my daughter replied they are a couple and it was up to them to which category they thought was applicable.

My other daughter only has to be there with her partner, no further questions are needed, and the Medicare card says it all.

Due to their relationship these papers are taken everywhere there is a remote possibility they may be needed. [A]s we all know not all families totally support their gay children, so couples need to be able to make decisions for each other if required without fear of a legal or family ramification...

[A]s parents we want the best for our children and admire them for their academic/career and personal triumphs in life and don't want to see them disadvantaged because of their sexuality.

While Sacha and Anna do come across sympathetic people in the system and with a strong network in the gay community, this all certainly helps; this doesn't compensate the injustices brought about by the system.

As a parent and a grandparent when talking to family, friends and colleagues about these things, many of them are unaware ... but agree that the inconsistencies should be righted and are pleased they don't have to face the same problems.

What a pity people don't see what my grandson [Lauren's son] sees, while he may not be old enough to be able to understand the whole situation, he just sees a cousin with two mums.

Why should Mabel grow up with any less right either legal or financial than her cousins?

Are we pushing the cause for equal rights for all regardless of sexuality?

EILIS HUGHES:

Discrimination in parental leave, workplace agreements, social security and the law more generally⁴

My name is Eilis Hughes, and my partner Kristen and I will celebrate three years together next week.

We're now entering a new phase in our lives and our relationship where we hope and expect to become parents within the next year or so. That is one of my motivations for making a submission to this Inquiry – I don't want our baby to be born into an invisible family.

As 'out' as I may believe myself to be, the truth is we all have to make decisions every day about coming out in different circumstances. In the community the default assumption is heterosexual, and we are always having to mak[e] decisions about whether to correct that assumption and make ourselves more visible and expose ourselves to discrimination...

The best example of this happening in my life – and it's not one led by the federal government – is our employment contract at my workplace. It gives us an entitlement to 'non-birth-parent leave' as opposed to 'paternity leave'. There is no unnecessary gender-specific language like father, husband or wife in our contract. Of course, these entitlements

are important and we're grateful for them. But even more important is the tone or culture that they set for the workplace. It makes our family visible and equal. This meant that I knew – before I even sat at my desk on my first day – that it was [okay] to be open and proud about my family at work. I put Kristen's photo on my desk, and my boss smiled and asked 'Is that your family?' I didn't have to make that coming out decision.

I was also grateful for the people who came before me to negotiate that agreement. What happens when we have to negotiate individual agreements? Do we feel confident and safe to negotiate 'non-birth-parent leave' and similar on our own? This should have been protected in WorkChoices, rather than keeping the old-fashioned paternity leave.

My workplace contrasts with Kristen's workplace earlier this year. She worked for a very small family business where she was the only employee who wasn't a member of the strongly Christian family. The many pictures of Jesus smiling down at her from the walls kept her silent about our family. She would never have asked for carer's leave to look after me if I was sick. She had no idea how she would ever ask for non-birth-parent leave if and when the need should arise. And there was no way she was going to put a photo of me on her desk and tell them I was her family.

Society needs leadership to change culture.

Kristen has since left that job to start her own business via the NEIS scheme, which involves applying for Newstart from Centrelink. Factors affecting eligibility include whether she lives with someone of the opposite sex. My ability (or inability) to support Kristen financially is not recognised. Similarly, when I give birth to our child I will be seen as a single parent and will be eligible for single parent payment.

This is the aspect of this Inquiry about which I had mixed feelings. I was worried about drawing attention to the apparent advantage we can enjoy in these circumstances. I know that there are people who don't want to lose these benefits, and there are cynics amongst us who think that this [I]nquiry might end up with Centrelink recognising our relationships to reduce the welfare payments they need to make, but that other areas of disadvantage won't change as quickly.

But let me tell you, those small Centrelink benefits are poor compensation for the disadvantages we face in taxation, Medicare and other areas you're investigating in this Inquiry. We'd rather have equality...

Put simply, I want the same rights and responsibilities as all of my straight friends – to form a family and support it and nurture it. I want Kristen to feel as secure in her parenting role as any other parent – without the uncertainty that comes with not being on the birth certificate, not being able to be on the same Medicare card, not being able to be seen as a family for tax purposes and so on. And I want our child to be born into a visible family – where there are categories for us on forms and our type of family is named in policies and the general community follows that example and accepts our family alongside everyone else's and coming out becomes a moot point. And this needs to start with some leadership by our federal government which says it believes in human rights and equal opportunity.

JAMES KIM AND BRIAN MCKINLAY:

Discrimination in federal superannuation schemes⁵

We are old enough to remember when ... it was very much more difficult for gay and lesbian people than it is today. We experience little in the way of overt discrimination against us in our life together – which, for us, makes superannuation a glaring anomaly.

We are 60 and 58 years of age. We are both members of the Australian Public Service and contributors to the Public Sector Superannuation Scheme. We wish to provide security for each other. However, we are unable to do this through superannuation death benefits.

We have been together for over eight years. We are certain that we will be together ‘until death us do part’ and we are planning accordingly. We hold all our debts and assets in common – house, mortgage, car, bank accounts, furniture, insurance, etc. We are the principal beneficiaries of each other’s wills. Superannuation is the only asset of importance that we cannot share.

Changes to Commonwealth legislation have allowed members of same-sex couples contributing to some schemes to nominate their partners to receive superannuation death benefits. However, as this Inquiry is very well aware, this does not apply to Australian Government employees. We find this an extraordinary and hurtful discrimination by the Australian Government against its own employees. Are we any less committed to each other than members of a *de facto* opposite-sex couple or people employed in the private sector? ...

The Government’s policy is to encourage retirees to take pensions rather than lump sums – if for no other reason than to reduce the call on Social Security. But the present situation forces CSS and PSS members in permanent same-sex relationships to do just the opposite – to take lump sums and reinvest them. This doesn’t make much sense.

This inconsistency between policy and law creates a considerable problem for James and me. What is the best way for us to ensure each other’s financial future?

At some stage the Government may permit us to move to another scheme that pays benefits to same-sex couples. But the financial cost of this to us could be considerable.

We could take our PSS benefits as lump sums and reinvest them. But, again, the whole-of-life financial loss could be considerable.

We could seek out redundancies, cash-out our benefits and then return to work.

These options would be to [our] advantage if we knew that one of us was to die young. But if, as we both confidently expect, we are to have long lives, they would be financially disastrous. Pensions would be preferable; *if* there was a reversionary death benefit, which there is not. Should we be forced to make such choices, simply because we are two people of the same sex?

But there are even more uncertainties for us to worry about.

The 2003 legislation allows trustees to pay reversionary benefits to members of same sex couples, but only at the trustees’ discretion. Thus, even if James and I were able each to transfer to a non-government scheme, it would by no means be certain that death benefits would be payable. These arrangements for private funds are most unfair and discriminatory

– they allow (even require) trustees to make moral and other assessments of the quality of relationships...

Commonwealth superannuation recognises *de facto* opposite-sex couples. It would be rudimentary to legislate to recognise same-sex couples in exactly the same manner..

The Government has long promised to address anomalies in superannuation for same-sex couples but has singularly failed to do so.

JANET JUKES:

Discrimination against children, workplace leave, Medicare, tax and child care⁶

My partner and I have been in a committed relationship for 13 years. We have two children, Hannah aged 3, and Ava aged 1.

I wanted to make a submission to this Inquiry to outline some of the areas of law that my family experience discrimination because our same-sex partnership is not legally recognised. Specifically, I wanted to focus my submission on discrimination that my children may experience.

Firstly, it is important to note that because we each conceived one of our daughters, we are not considered the legal parents of both our children. In Victoria we are not allowed to adopt our children to remedy this fact. In order to minimise the discrimination that this causes we have obtained court orders that give residency and contact responsibilities to us as a couple and limits the donor's responsibilities. Although this remedy has been invaluable in dealing with the hospital system, childcare and other service systems, it is inadequate because it does not and cannot make Hannah my daughter nor Ava Marion's daughter **in law**. Further, a court order is only relevant while the girls are minors, once Hannah is 18 years old she will have no legal relationship to me, nor Ava to Marion. Although our daughters have the same father, they are not considered sisters by law and their birth certificates do not recognise the existence of each other...

Workplace leave entitlements

When Ava was born, Marion was required to use her holidays so that she could attend the birth and support me in the days that followed. If Marion had been my husband, then she would have been able to claim paternity leave.

Nine months after Hannah was born I resigned from my work to care for her full time while Marion returned to work. If we were in a heterosexual relationship I would have been entitled to take unpaid parental leave up to her first birthday under my award. In my case it was up to the discretion of my employer if they would allow unpaid leave.

Medicare and PBS

As the federal government does not recognise our family, and considers each of us as single mothers, we are not able to financially benefit fully from the Medicare Safety Net or the PBS. One of us can register with both dependent children and the other must be considered as

an individual. This means that the individual cannot contribute to the family reaching the safety net threshold, and [has] to spend considerably more money before they are able to benefit from the two schemes.

Child care

Childcare is another area where our family is not recognised. Both of our children attend childcare three days a week, however, we are treated by the childcare centre as two families. This is because the federal government does not recognise our family structure. This means that, because Marion is working full time, we receive almost no government assistance for Hannah's child care. As I work 3 days a week we receive about 78% benefit. I don't know if this results in our being better or worse off financially than if we were considered in the same way as a heterosexual couple. In any case we experience, yet again, a lack of recognition of our family structure that has resulted in confusion at the childcare centre and a reminder of our legal non recognition.

Tax

Because we are treated as singles, we also experience financial disadvantage in the tax system... [W]e are not able to claim each other as a dependent spouse. This was particularly relevant while each of us took a year off to have our children and was fully supported by our partner. During this time, our partner was not able to claim us as dependent.

In dealing with government agencies and service providers we have to explain our family structure and try to work out what the best arrangement would be for our family. At times we have received incorrect or conflicting advice because some government officers are not clear about the level of recognition in this area. This is a constant stress other families don't even have to consider. Indeed when heterosexual friends and work colleagues are told about these problems they are shocked that discrimination continues to affect our relationship and our children.

JIM WOULFE:

General discrimination in the law and aged care⁷

At the outset I'd like to say that quite frankly, it confounds me that we need to be going through this process in Australia, in 2006. We live in an essentially tolerant and inclusive society, so you've got to wonder why people like my partner Andreas and me are still waiting for equality...

We're productive members of our society. We're both employed, so we contribute to society with our taxes, and with our work we contribute to the organisations that employ us. We serve the community in other ways as well...

We've been together now for nineteen years, so like every couple we've had the opportunity to share some incredibly joyful times, and to support each other through painful ones. We fully intend to spend the rest of our lives together, and our commitment to each other is deep, genuine and ongoing.

Just like our straight friends we contribute to the life of our society, our families and each other. Just like our straight friends, our relationship, and our expressing it by living together, is utterly lawful...

Yet, in spite of this we face arbitrary discrimination in a number of areas, almost all of them because our Federal Government refuses to recognise our relationship...

It's not like the government gives us a choice in these matters. We can't opt out of the Medicare Levy or superannuation. Given the compulsion in the tax, Medicare and superannuation systems, it's reasonable to expect that having contributed at the same rate as everyone else, we'll get the same benefits – but we don't. Very simply we believe that forcing us to contribute to a system which discriminates against us is just plain wrong.

Just one more example from the aged care system that to us, underscores the meanness in this discrimination: where a member of an opposite-sex couple is incapacitated and requires nursing home care, the means test for an accommodation bond excludes the family home. However, if one member of a same-sex couple requires residential nursing care, then that person's share of the family home is treated as an asset. What this means for us is that if either of us were ever incapacitated, we would face the possibility of being forced to sell our home out from under the other one.

Fortunately, it looks like there will be plenty of time to fix this problem before it affects us, if ever. But of course it's happening to other couples now...

Andreas and I strongly believe that by retaining the inequalities, and refusing to recognise same-sex relationships, our Federal Government maintains an environment in which hate and homophobia can thrive. It validates the views of the very few in our society who would attack us because of our sexuality. The government treats gays and lesbians differently, they say, so why shouldn't we?...

A great power to end the discrimination and neutralise the homophobes resides with our Federal Government. Granting equality for same-sex relationships would rob the people who attack us of their phoney justification – it's the single biggest step our government could take against homophobic harassment and violence....

KELLY AND SAMANTHA PILGRIM-BYRNE:

Discrimination in Medicare, superannuation, tax and family law⁸

The issue of Medicare will be addressed specifically as it affects us as a couple...

Areas which have personally had a negative financial impact on us (other than Medicare) include superannuation and taxation.

We have been unable to take up our employer's recent offer of superannuation splitting as it is available to heterosexual de facto couples only, not homosexual de facto couples. This will prevent us from enjoying financial benefits now and in our retirement. We have also been unable to gain from taxation provisions which allow for off-sets and the like...

Because we are not recognised as a couple for the Medicare Safety Net, we are required to meet out-of-pocket expenses as two single people. In 2006 this figure will be \$1,000 each

(effectively \$2,000 combined). If we were a heterosexual couple we would be considered a family and this figure would be \$1,000 combined (\$500 each). The variance in this Safety Net would allow us to be able to claim a higher rebate much earlier if we were considered a couple ... We are also unable to register as a couple for the pharmaceutical benefits scheme and once again pay twice the amount a heterosexual couple pays for medications.

This is clearly discriminatory in nature and manifestly unjust. Not only are we unable to gain financial benefits through taxation or superannuation, we are required to pay **twice** the medical expenses as heterosexual de facto couples.

We cannot understand what possible justification there is for such blatant discrimination. In Western Australia we are considered a de facto couple for all state legislation; however, federally we exist only as two single people.

Not only is this financially damaging, it is also an emotional burden that we shouldn't be required to carry...

We have cared for one another for over a decade, we have legally changed our surname to adequately reflect our family status within our community and still the Government steadfastly refuses to acknowledge us as being interdependent emotionally and financially.

Our concern extends to any children we may be fortunate enough to have. Although in Western Australia we will both legally be parents, federally only the birth mother will be considered the child's parent. Social [s]ecurity will categorise us not as a family but as a single mother with child. The non-birth mother will cease to have any relationship with the child for all federal legislation. This is financially and emotionally crippling to all concerned.

We **are** a family unit – our family acknowledges it, our work colleagues acknowledge it and our community acknowledge it; why then, can't the Australian Government do the same by affording us the same rights as heterosexual de facto couples?

We sincerely hope that the Government will, as a priority, rectify the areas of federal legislation where same-sex couples are consistently treated as second-class citizens of Australia. Same-sex, same rights.

MICHAEL:

Discrimination in veterans' entitlements and superannuation⁹

I am a serving member of the ADF [Australian Defence Force], and whilst there have been significant changes to entitlements following the decision to recognise interdependent relationships in the military in December 2005, I am still concerned regarding the lack of change to superannuation and Department of Veterans Affairs (DVA) benefits should something happen to me on an overseas deployment.

I am very pleased with the fact that the military has finally recognised the partners of gay and lesbian serving members ... Prior to the change occurring, I certainly had been materially and financially disadvantaged in terms of postings, housing, allowances, travel, and work opportunities, let alone the effect on my relationship.

The remaining barriers to be overcome are in superannuation and DVA benefits. Whilst life is better in the military as a serving member, should I die in service, then my partner will be financially disadvantaged compared to if we were in a recognised heterosexual relationship.

I am continually bemused at the federal government's concern that giving recognition to same-sex couples is going to disintegrate the moral fabric of society. The implementation of changes in the military came with a minimum of fanfare...

The same could apply for the general community, and I would hope that the outcome of this Inquiry will identify the futility of continued discrimination against gay and lesbian couples. We're not asking for new and unusual benefits, just to be treated in equality with those in heterosexual relationships.

SHARON AND NATASHA:

Discrimination against children in family law, Medicare and federal superannuation¹⁰

We are ... a same-sex couple and the parents of a 1-year old boy...

Just by way of some background – we have been partners for 4 years. We cohabit in our mortgaged home, are financially interdependent, and share equally all decisions about our family. We are a genuinely happy and unified couple and believe that we contribute positively to the fabric of our community. However, there are many areas in which we do not receive equitable treatment under federal law.

Before our son was born, someone told us that we'd never experience the impact of discrimination as acutely as when it affected our children and how right they were. I'd like to start by saying that in the eyes of the law, our son has only one legal parent – his birth mother, Natasha. We have recently undergone lengthy and expensive legal proceedings (incl. the hiring of a [s]olicitor) to have parenting orders granted via the [Family Court]. Although we are very proud of this successful application, the order simply tells us what we knew already to be true – that our son is loved and cared for by his two mums, that he resides with us in our home, that we are both economically responsible for him, that we share every single decision about his care, welfare and development.

To secure the order we had to lay bare information about how Natasha and I met, our living arrangement, our financial position, our professions and working hours, how we came to have a son, how we decided who was going to be the birth mother, how we look after him given our working commitments, our plans for our son's education, not to mention the materials our house is constructed from, and after all of that our son has ended up with less legal security than his counterparts with heterosexual parents. At the end of this process Natasha and I have been granted a watered down version of what heterosexual couples acquire automatically...

We don't think we can underestimate the importance of the State and Territory based legislative gains that our community has fought so hard for – we'd like to illustrate this by reference to another personal example. Unlike in Western Australia where Parent 1 and Parent 2 appear on a child's birth certificate thus recognising the diversity of families,

in QLD Natasha and I were unable to both appear on our son's birth certificate. We were allowed to leave the 'father' section blank (vs. having the word 'unknown' inserted in there) after Natasha swore an affidavit, again providing intensely personal details that are no-one else's business.

Every time I look at that document I feel angry – upset that I'm invisible as a parent to my son because it denies my rights, upset at the pressure that it puts on Natasha because it denies my responsibilities, but the real pain comes in thinking that every time our son looks at that document he is going to be reminded that he and his family are pariahs in the eyes of the law.

And this is where these issues hit home the hardest – when we look at our precious son at this age where he's no longer a baby but still not quite old enough to be called a toddler and think 'this little boy is being discriminated against' and we wonder how on earth we're going to begin to explain this to him. No explanation makes sense because denying same-sex families rights is not a decision based on good evidence or sound practice or logic or even what is or who we are. It's based on the personal conviction of conservative politicians...

Two areas that have impacted on us significantly are the Medicare and Pharmaceutical safety nets. Again our relationship is not recognised under [f]ederal law and this means we spend twice as much as heterosexual couples before we get any rebates.

This has had a significant financial effect on us as I am undergoing IVF procedures in order to conceive our second child, which is a very expensive process involving significant amounts of medication and medical procedures...

[Natasha continues]

For almost 6 years Sharon worked as [a psychologist] for the Royal Australian Navy... [T]he bulk of Sharon's Superannuation is with the Commonwealth scheme. In the event of her death and as the nominated beneficiary I will incur a 30% tax rate on our money as I am not recognised as her spouse.

All of these constraints place enormous pressure on same-sex families and we are of the belief that this contributes to the break down of relationships in our community...

Endnotes

- 1 Many of these stories have been edited for length.
- 2 Anthony Pannuzzo and Daniel Milano, Submission 72.
- 3 Bryce Petersen, Opening Statement, Launceston Forum, 25 September 2006.
- 4 Eilis Hughes, Opening Statement, Melbourne Hearing, 27 September 2006.
- 5 James Kim and Brian McKinlay, Opening Statement, Canberra Hearing, 20 October 2006.
- 6 Janet Jukes, Submission 276.
- 7 Jim Woulfe, Opening Statement, Sydney Hearing, 26 July 2006.
- 8 Kelly and Samantha Pilgrim-Byrne, Submission 13.
- 9 Name Withheld, Submission 55. The author has given the Inquiry permission to publish this submission under his first name.
- 10 Sharon and Natasha, Opening Statement, Townsville Forum, 12 October 2006.



APPENDIX 3:

Written Submissions

The Inquiry received submissions from 680 different individuals and organisations. Some provided submissions in response to both the first and second round discussion papers.

For more information about the submissions process see Chapter 2 on Methodology.

Most of the submissions received from organisations can be found on the Inquiry's website at: <http://www.humanrights.gov.au/samesex/submissions.html>. Many of the submissions from individuals can also be found on the Inquiry website.

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ACON	281, 281a
ACT Human Rights Office	315, 315(a), 315(b)
Action Reform Change Queensland and Queensland AIDS Council	270, 270(a)
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ALSO Foundation	307, 307a, 307b, 307c, 307d, 307e, 307f, 307g, 307h, 307i
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Andersen, Deborah and Lockhardt, Helen	271
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Stewart, Dr Kate	82
Stewart, Miranda	266
Stirling, Nicole	482
Strachan, Judie	407
Students' Association of the University of Adelaide (SAUA)	170, 170a
Superannuated Commonwealth Officers' Association Inc. (SCOA)	320
Sutton, Rosemary	551
Swann, Malcolm	443
Swanton, Wendy	588
Tabrizi, Shakira	599
Takamisawa, Jiro	129
Tan, Cheryl	545
Tan, Sonnie	546
Tasmanian Gay and Lesbian Rights Group	233, 233a
Tawil-Doussis, Victor and Stello	386
Taylor, Cynthia	377
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The Blackshirts	9
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Tib, Henry and Mortimer, Barry	113
Tivendale, Gail	554
Tomasich, Barney and Gillian	566
Townend, Don and Gwen	527
Treacy, Michael	656
Treanor, Alison and Scott, Liz	136

SUBMISSION NAME	SUBMISSION NUMBER
Uniting Justice Australia	351
Uniting Network in the Uniting Church in Australia (NSW Synod)	277
University of Western Australia	185
Van den Bosch, Rodney	529
Van Leeuwen, Dick and Jenny	215
Van Rossum, Cornelis	559
Van Zyl, Dr Natasha	167
Vander Linden, Nicole	120
Varcoe, Shane	498
Victoria Legal Aid	312, 312a
Victorian Gay and Lesbian Rights Lobby	256, 256a
Vivienne, Sonja	148
Volkofsky, Peter	439
Voss, Hugh and Dorothy	659
WA Gender Project	165
Wagner, Amy	592
Wagner, Walter	586
Walker, Paul	657
Walsh, Tony J	321
Waters, Jacqueline	380
Watson MLC, Giz	262
Watt, Peter	363
Way, David	191, 629
Wealands, Rebecca	132
Webb, Bill	447
Webber, Senator Ruth	280
Westminster Presbyterian Church – Belconnen	367
Whately, Jenny	500
Wheel, Cathy	400
Wheeler, Alan	583
Whelan, Tony	20
Whitby, Sarah A	40
White, Michelle	508
Wigman, Yvonne	70
Williams, Deborah	596
Willis, Karla	176
Willmott, Dr Peter	75
Wilson, Adam	573
Wilson, Michael and Kings, Robert	169

SUBMISSION NAME	SUBMISSION NUMBER
Withers, Josh	579
Women in Social and Economic Research (WISER)	221
Women's Health Victoria	318
Woulfe, Jim	50
Wright, Sheryl	86
Wykes, Ruth	46
Yates, Heidi	283
Young Lawyers Human Rights Committee	311
Young, Edward	330
Young, Mark	690
Young, Tim	440
Yu, Paul	575



APPENDIX 4:

Public Hearings

The Inquiry held seven formal public hearings around Australia between 26 July 2006 and 20 October 2006. Overall, 32 organisations and 44 individuals appeared at the public hearings.

Audio and written notes from the hearings are available on the Inquiry website at <http://www.humanrights.gov.au/samesex/hearings.html>.

For further information about the hearings see Chapter 2 on Methodology.

The following is a list of witnesses who appeared at each of the hearings, in the order of appearance.

SYDNEY: 26 July 2006

ACON, Stevie Clayton, Chief Executive Officer; Anna Bacik, Senior Policy Advisor; Geoff Honnor, President and Adrian Lovney, Board Member

Australian Federation of AIDS Organisations, Abigail Groves, Policy Analyst and Bridget Haire, Media Officer

Jim Woulfe

Susan Everingham

Michael Burge

Lynne Martin

Jiro Takamisawa

Gay and Lesbian Rights Lobby (NSW), David Scamell, and Vicki Harding, Co-Convenors

NSW Law Reform Commission, Professor Michael Tilbury, Commissioner and Peter Hennessy, Executive Director

Association of Superannuation Funds of Australia, Dr Michaela Anderson, Director of Policy and Research

Inner City Legal Centre, Natalie Ross, Principal Solicitor

Australian Services Union, Jo Justo, National Industrial Officer

Community and Public Sector Union, Lisa Newman, Deputy National President and Peter Feltham, Project Officer

Gilbert and Tobin Centre of Public Law, Dr Andrew Lynch

Public Interest Advocacy Centre, Vijaya Raman, Policy Officer and Jo Schulman, Equality Solicitor

NSW Anti-Discrimination Board, Fiona Kerr, Legal Officer

PERTH: 9 August 2006

Brian Greig, Former Federal MP

The Hon Giz Watson MLC

Kelly and Samantha Pilgrim-Byrne

Gay and Lesbian Equality WA, Rod Swift, Convener

Australian Coalition for Equality, Rod Swift, Secretary

University of Western Australia, Beverley Hill, Manager – Equity and Diversity

Equal Opportunity Commission of Western Australia, Yvonne Henderson, Equal Opportunity Commissioner

Women in Social and Economic Research, Dr Rob Guthrie, Head of School – School of Business Law, Curtin University

ADELAIDE: 28 August 2006

The Hon Ian Hunter MLC

Sue McNamara and Leanne Nearmy

Barry Mortimer and Henry Tibb

Let's Get Equal, Matthew Loader

Dr Jo Harrison, Fellow of the Australian Association of Gerontology

Margie Collins

Equal Opportunity Commission of South Australia, Linda Matthews, Commissioner for Equal Opportunity

HOBART: 25 September 2006

Roger Lovell

Jonathan Hodgkin

David Samson and Kevin O'Loughlin

Tasmanian Gay and Lesbian Rights Group, Martine Delaney, Jen Van Acherton and Rodney Croome – Spokespersons

Gay and Lesbian Community Centre, Richard Hale

MELBOURNE: 26 September 2006

Janet Jukes and Monica Ferrari

Lee Matthews and Tony Wood

Felicity Martin and Sarah Lowe

Victorian Gay and Lesbian Rights Lobby, Gerard Brody, Policy Working Group Convener and Aly M, Co-Convener

Equal Opportunity Commission of Victoria, Ben Rice, Acting Manager – Legal, Policy and Systemic Initiatives and Jamie Gardiner, Member of the Equal Opportunity Commission of Victoria

Law Institute of Victoria, Leigh Johns, Former Chair and Current Executive Committee Member, Workplace Relations Section and Joanne Kummrow, Solicitor, Administrative Law and Human Rights Section

Women's Health Victoria, Kerrilie Rice, Policy and Research Officer

MELBOURNE: 27 September 2006

Eilis Hughes

Doug Pollard

Grant Goodwin

ALSO Foundation, Nan McGregor, Board Member

Australian Chamber of Commerce and Industry, Peter Anderson, Director – Workplace Policy

Miranda Stewart, Senior Lecturer in Law

Australian Council of Trade Unions, Cath Bowtell, Industrial Officer

Human Rights Law Resource Centre, Philip Lynch, Director and Principal Solicitor

BRISBANE: 11 October 2006

Kaz Heffernan, Male Queer Sexuality Officer, University of Queensland Union 2006

Parents and Friends of Lesbians And Gays (PFLAG) Brisbane, Shelley Argent OAM and Grainne Ridd

Anti-Discrimination Commission Queensland, Susan Booth, Anti-Discrimination Commissioner

Action Reform Change Queensland and *Queensland AIDS Council*, Carman Parsons, Member – Action Reform Change Queensland

CANBERRA: 20 October 2006

Gary Fan and Wayne Lodge

John Curmi

Penelope Morton

Brian McKinlay and James Kim

Tony Whelan

Heidi Yates

Good Process, Heidi Yates and Llewellyn Reynders

Simon Corbell MLA, *Attorney-General*, Minister for Planning, Minister for Police and Emergency Services in the ACT and Renee Leon, *Department of Justice and Community Safety*

Australian Lawyers for Human Rights, Amy Kilpatrick, ACT Convener and Andrew Thomas

ACT Human Rights Office, Jenny Earle, Human Rights and Discrimination Law Policy Officer and Julie Whitmore, Senior Conciliator

Superannuated Commonwealth Officers Association, John Coleman, Federal Secretary



APPENDIX 5:

Community Forums

The Inquiry held 18 community forums around Australia between 26 July 2006 and 16 November 2006.

Overall 488 participants attended the community forums. Their ages ranged from the late teens to the late seventies.

Written summaries and some audio files from the forums can be found on the Inquiry website at <http://www.humanrights.gov.au/samesex/index.html>.

For further information about the community forums, see Chapter 2 on Methodology.

New South Wales

Sydney	37 participants	26 July 2006
Wollongong	20 participants	12 October 2006
Newcastle	25 participants	24 October 2006
Lismore	40 participants	11 November 2006
Blue Mountains	25 participants	16 November 2006

Western Australia

Perth	25 participants	10 August 2006
Busselton	25 participants	11 August 2006

South Australia

Adelaide	40 participants	28 August 2006
Murray Bridge	7 participants	29 August 2006

Tasmania

Hobart	17 participants	24 September 2006
Launceston	14 participants	25 September 2006

Victoria

Melbourne	50 participants	26 September 2006
Daylesford	16 participants	28 September 2006

Queensland

Brisbane	53 participants	10 October 2006
Townsville	26 participants	12 October 2006

Australian Capital Territory

Canberra	26 participants	19 October 2006
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Northern Territory

Darwin	20 participants	2 November 2006
Alice Springs	22 participants	3 November 2006



Acknowledgements

President	The Hon John von Doussa QC
Human Rights Commissioner	Graeme Innes AM
The Inquiry Team	Vanessa Lesnie, Kate Temby, Susan Newell, Samantha Edmonds, Kate Fitzgerald, Emily Gray, Frances Simmons, Alessandra Krilis, Jemma Hollonds, Avril Cox
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Consultants	Professor Terry Carney, Professor Jenni Millbank, Associate Professor Miranda Stewart
Media	Paul Oliver, Louise McDermott, Janine MacDonald
Website	Leon Wild, Connie Chung, Gina Sanna

The Inquiry team would also like to thank the many other staff members in the Human Rights and Equal Opportunity Commission (HREOC) who helped the team from launch until publication.

HREOC also thanks all those organisations who helped the Inquiry conduct hearings and forums around Australia.

Most importantly, HREOC thanks the many hundreds of people around Australia who wrote submissions, testified at public hearings and told their stories at community forums.

The *Same-Sex: Same Entitlements* Inquiry commenced in April 2006. This report is the result of a public submission process, national consultations and ongoing research. The report examines discrimination against same-sex couples and families regarding financial and work-related entitlements under federal, state and territory laws.

For more information about the Inquiry and an electronic version of this document see the Human Rights and Equal Opportunity Commission's website at www.humanrights.gov.au



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