



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 \$111 244.⁴⁷
- 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/Widowers 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/Widowers 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.

