



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.
- 19 Speaker, Sydney Forum, 26 July 2006.
- 20 *Health Insurance Act 1973* (Cth), s 10. See also Medicare Australia, *About the Medicare Safety Net*, http://www.medicareaustralia.gov.au/yourhealth/our_services/msn/about_msn.htm, viewed 20 March 2007.
- 21 Medicare Australia, *About the Medicare Safety Net*, http://www.medicareaustralia.gov.au/yourhealth/our_services/msn/about_msn.htm, viewed 20 March 2007.
- 22 *Health Insurance Act 1973* (Cth), s 10(2)(b). See also Health Insurance Commission Australia, *Glossary of Commonly Used Terms*, <http://www.hica.com.au/commonterms.html#mbsfee>, viewed 27 February 2007.
- 23 *Health Insurance Act 1973* (Cth), s 10(2)(aa); See also Liberal Party Election 2004 Policy document, *100% Medicare Making GP Services More Affordable Than Ever Before*, p5, http://www.liberal.org.au/2004_policy/sept06_100_percent_Medicare.pdf, viewed 23 March 2007.
- 24 *Health Insurance Act 1973* (Cth), ss 10ACA(3), 10ADA(4). See also Medicare Australia, *About the Medicare Safety Net*, http://www.medicareaustralia.gov.au/yourhealth/our_services/msn/about_msn.htm, viewed 29 November 2006.
- 25 *Health Insurance Act 1973* (Cth), ss 10ADA, 10ACA. See also Medicare Australia, *How does the Medicare Safety net work?*, p2, <http://www.medicare.gov.au/resources/medicare/1747-how-does-the-medicare-safety-net-work.pdf>, viewed 10 January 2007.
- 26 *Health Insurance Act 1973* (Cth), ss 10-10A. See also Medicare Australia, *How does the Medicare Safety net work?*, p4, <http://www.medicare.gov.au/resources/medicare/1747-how-does-the-medicare-safety-net-work.pdf>, viewed 10 January 2007.

- 27 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 2007. This rate was current as at 10 January 2007.
- 28 Medicare usually rebates 100% of the schedule fee for GP services and 85% of the schedule fee for other out-of-hospital services: Medicare Australia, *About the Medicare Safety Net*, http://www.medicareaustralia.gov.au/yourhealth/our_services/msn/about_msn.htm, viewed 10 January 2007.
- 29 *Health Insurance Act 1973* (Cth), ss 10ACA-10ADA.
- 30 Medicare Australia, *How does the Medicare Safety net work?*, <http://www.medicareaustralia.gov.au/resources/medicare/1747-how-does-the-medicare-safety-net-work.pdf>, viewed 8 February 2007. This rate was current as at 10 January 2007.
- 31 A concessional family is a combination of at least one adult plus another family member who is entitled to a Commonwealth concession card. Only these concession card holders' out-of-pocket costs count toward the concession Medicare Safety-Net threshold: Medicare Australia, *How does the Medicare Safety net work?*, pp2-3, <http://www.medicareaustralia.gov.au/resources/medicare/1747-how-does-the-medicare-safety-net-work.pdf>, viewed 8 February 2007.
- 32 Chapter 9 Social Security, section 9.7.
- 33 John Goldbaum, Submission 15.
- 34 All the amounts used in this table are estimates and not actual costs and rebates.
- 35 For example, women undergoing ART can spend anywhere from \$2141 for assisted insemination to \$8700 for one IVF cycle. A 2006 study found that the average health care cost per non-donor ART live-birth was \$32 903: G Chambers, M Ho and E Sullivan, 'Assisted reproductive technology treatment costs of a live birth: an age-stratified cost-outcome study of treatment in Australia', *The Medical Journal of Australia*, vol 184, no 4, 2006, pp155-158, http://www.mja.com.au/public/issues/184_04_200206/cha10890_fm.html, viewed 23 March 2007.
- 36 G Chambers, M Ho and E Sullivan, 'Assisted reproductive technology treatment costs of a live birth: an age-stratified cost-outcome study of treatment in Australia', *The Medical Journal of Australia*, vol 184, no 4, 2006, pp155-158, http://www.mja.com.au/public/issues/184_04_200206/cha10890_fm.html, viewed 23 March 2007.
- 37 Sharon Isle and Natasha Miller, Submission 182.
- 38 Kelly and Samantha Pilgrim-Byrne, Submission 13.
- 39 Kelly and Samantha Pilgrim-Byrne, Opening Statement, Perth Hearing, 9 August 2006.
- 40 Felicity Martin and Sarah Lowe, Submission 145.
- 41 *National Health Act 1953* (Cth), ss 84C, 92, 94, 99F. The PBS Safety Net threshold may be reached by accumulating PBS prescriptions through community pharmacies and/or public hospitals: Department of Health and Ageing, *The Safety Net Scheme*, <http://www.pbs.gov.au/html/healthpro/browseby/explanatory-notes?ref=section1-safetynet>, viewed 23 March 2007.
- 42 Gay and Lesbian Rights Lobby (NSW), Submission 333.
- 43 Medicare Australia, *PBS Safety Net*, http://www.medicareaustralia.gov.au/yourhealth/our_services/pbs_safety_net.htm#what_to_do, viewed 23 March 2007. Pharmaceutical benefit items can only be included for the Safety Net threshold when prescribed and supplied according to the PBS Schedule. The PBS Schedule lists the medicines that are eligible under the PBS Scheme and provides guidelines for the administration of the PBS scheme: see Department of Health and Ageing, <http://www.pbs.gov.au/html/home>, viewed 23 March 2007.
- 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.
- 48 Name Withheld, Submission 267.
- 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.
- 50 The Australian Federation of AIDS Organisations, Submission 285.
- 51 Blue Mountains Public Forum, 16 November 2006.
- 52 Jodie, Submission 248.
- 53 Jenny Archer, Submission 164.
- 54 Gay and Lesbian Rights Lobby (NSW), Submission 333.
- 55 Eilis Hughes, Submission 37.
- 56 See, Townsville Forum, 12 October 2006; Wollongong Forum, 12 October 2006; Sue McNamara and Leanne Nearmy, Adelaide Hearing, 28 August 2006; Aly M, Submission 184; Name Withheld, Submission 138; PFLAG Brisbane, Submission 68; South Australia Equal Opportunity Commission, Submission 316; Peter Taylor and Hans Boeswinkel, Submission 94; The Hon Ian Hunter MLC, Submission 306 and Young Lawyers Human Rights Committee, Submission 311.
- 57 See for example, *Guardianship Act 1987* (NSW), ss 33A, 36; *Guardianship and Administration Act 1986* (Vic), ss 37, 39; *Guardianship and Administration Act 1995* (Tas), ss 4, 39; *Guardianship and Administration Act 1990* (WA), s 119.
- 58 Murray Bridge Consultation, 29 August 2006.
- 59 Name Withheld, Submission 150.
- 60 Bryce Petersen, Launceston Forum, 25 September 2006.
- 61 Newcastle Consultation, 24 October 2006.
- 62 Dr Samantha Hardy, Dr Sarah Middleton and Dr Lisa Butler, Submission 125.
- 63 Parliament of Tasmania, Joint Standing Committee on Community Development, *Report on the Legal Recognition of Significant Personal Relationships*, 2001, pp38-40, <http://www.parliament.tas.gov.au/ctee/REPORTS/significantpersreport.pdf>, viewed 8 March 2007.
- 64 M Pitts, A Smith, A Mitchell, S Patel, *Private Lives: A Report on the Health and Wellbeing of GLBTI Australians*, Australian Research Centre in Sex, Health and Society, La Trobe University, Melbourne, 2006, p31.
- 65 J Irwin, *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, 2002, p43.
- 66 ACON, Submission 281.