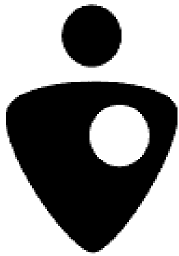

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Same-Sex: Same Entitlements

A submission to the Human Rights and Equal Opportunity Commission by the Victorian Gay and Lesbian Rights Lobby
June 2006

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Introduction

About the Victorian Gay and Lesbian Rights Lobby

The Victorian Gay and Lesbian Rights Lobby (**VGLRL**) aims to achieve equality and social justice for lesbians and gay men. We do this by working with the media, undertaking and supporting research, conducting community education and directly lobbying politicians across all levels of government. We have a financial membership of over 150 people, a network of over 1300 people, and are an incorporated association in Victoria. The VGLRL Committee is designed to ensure representation of both gay men and lesbians, while still allowing space for members who do not identify as either gay or lesbian. The VGLRL focuses on key issues of relevance to the lesbian and gay communities by continually canvassing community needs and assessing the political landscape.

The Inquiry

The VGLRL welcomes the opportunity to make this submission to the Human Rights and Equal Opportunity Commission (the **Commission**) in relation to the *National Inquiry into Discrimination against People in Same-Sex Relationships: Financial and Work-Related Entitlements and Benefits* (the **Inquiry**).

The VGLRL strongly supports the principles of non-discrimination and equality before the law. These are fundamental principles of international human rights law and are set out in articles 2 and 26 of the International Covenant on Civil and Political Rights (**ICCPR**). The United Nations Human Rights Committee (the **UN Committee**), which is the body charged with interpreting and applying the ICCPR, has confirmed that discrimination against gay men and lesbians is prohibited by article 26.[1]

In *Young v Australia,* Mr Young was found to have been discriminated against on the basis of his sex or sexual orientation when his application for a pension was rejected because of the clear and unambiguous definition of 'member of a couple' in the *Veterans' Entitlements Act 1986* (Cth) ('the **VEA'**) as a 'person of the opposite sex'. This meant that Mr. Young's thirty-eight year relationship with his war veteran partner was not recognised as a valid relationship under the Act.

The VGLRL welcomes the inquiry as a first step to address the discrimination experienced by Mr Young and many people in similar positions throughout Australia. The Inquiry, by conducting a comprehensive audit of Commonwealth legislation that gives rise to discrimination against people in same-sex relationships, will provide the actions required by Government to overcome such discrimination.

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[1] *Young v Australia,* Human Rights Committee, Communication No. 941/2000, UN Doc. CCPR/C/78/D/941/2000, 12 August 2003.

This submission

This submission provides a detailed analysis of a range of areas of Commonwealth legislation that discriminates against people in same-sex relationships. While not highlighting all areas, the submission provides information about the effects of such discrimination and makes suggestions about how to rectify the discriminatory aspects of the Commonwealth laws. In particular, this submission examines:

- Workplace relations laws;
- Workers' compensation;
- Taxation;
- Social security (welfare) benefits;
- Superannuation;
- Health concessions;
- Families and children; and
- Formal relationship recognition.

In addition, we provide some analysis about recent amendments to Victorian laws that aimed to reduce discrimination against people in same-sex couples.

The VGLRL believes that non-discrimination means that people in same-sex relationships be treated on a like basis as those in mixed-sex relationships. While the VGLRL acknowledges there are various ways of achieving this outcome, we suggest that in order to achieve full equality in all federal legislation, terms such as 'spouse', 'partner', 'dependent', 'family' and 'couple' should be redefined to include same sex partners and, where relevant, their children.

The VGLRL would also welcome meeting with the Commission in person to discuss this submission and other aspects of the inquiry.

Workplace Leave and other entitlements

Overview

Australians in same-sex relationships do not have parity with their heterosexual colleagues in relation to personal/carer's leave and compassionate leave at their workplace. Nor do they, in particular lesbians, have an equivalent entitlement to "paternity leave" at their workplace. This disparity is as a result of the present drafting of the *Workplace Relations Act 1996* (Cth) (the **Workplace Relations Act**). It is suggested that any form of discrimination against an employee in a same-sex relationship could not have been intended as it is contrary to the principal object of the Act.

Example of discrimination in parental leave:

I am lucky to work in a progressive workplace which offers both maternity leave and non-birth-parent leave. When the time comes for us to have our child, I will able to take leave at that time. My partner, on the other hand, works for a small business owned by a family with conservative values. She expects not to be granted parental leave and is in fact nervous about the impact of coming out to her employers under these circumstances. While anti-discrimination laws prevent her from being sacked directly for her sexuality, it is now easy for her employer to find another reason to sack her if they don't agree with her values or if they don't wish to grant her parental leave. If our relationship was recognised formally by the Government then we would have more protection in these circumstances.

The Workplace Relations Act 1996

The Workplace Relations Act sets out, amongst other things, the minimum workplace entitlements and standards for Australian employees.

The Workplace Relation Act stipulates at section 3 that the principal object of the Act is, amongst other things:

> *"…to provide a framework for cooperative workplace relations which promotes the economic prosperity and welfare of the people of Australia by:*
>
> *…*
>
> *(f) ensuring compliance with minimum standards, industrial instruments and bargaining processes by providing effective means for the investigation and enforcement of:*
>
> *(i) employee entitlements; and*
>
> *(ii) the rights and obligations of employers and employees, and their organisations; and*
>
> *…*

(l) assisting employees to balance their work and family responsibilities effectively through the development of mutually beneficial work practices with employers; and

(m) respecting and valuing the diversity of the work force by helping to prevent and eliminate discrimination on the basis of race, colour, sex, sexual preference, age, physical or mental disability, marital status, family responsibilities, pregnancy, religion, political opinion, national extraction or social origin; and

(n) assisting in giving effect to Australia international obligations in relations to labour standards."

Relevant Entitlements for this Submission

This submission focuses on the following entitlements as they affect people in same-sex relationships. The entitlements are:

1. Paid or unpaid personal/carer's leave (Division 5 of Part 7 of the Act);
2. Compassionate Leave (Division 5 of Part 7 of the Act); and
3. Parental leave and more specifically, paternity leave (Division 6 of Part 7 of the Act).

Below are set out the relevant sections of the Workplace Relations Act concerning the above leave entitlements.

1 Paid or unpaid Personal/Carer's leave.

Section 244 defines personal/carer's leave as follows:

"Section 244 Meaning of personal/carer's leave

For the purposes of this Division, personal/carer's leave is:

(a) paid leave (sick leave) taken by an employee because of a personal illness, or injury, of the employee; or

(b) paid or unpaid leave (carer's leave) taken by an employee to provide care or support to a member of the employee's immediate family, or a member of the employee's household, who requires care or support because of:

(i) a personal illness, or injury, of the member; or

(ii) an unexpected emergency affecting the member."

Section 245 sets out the guarantee to paid personal/carer's leave as follows:

"Section 245-The Guarantee

> *(1) Subject to this Subdivision, an employee is entitled to paid personal/carer's leave if the employee complies with the notice documentation under Subdivision D, to the extent which they apply to the employee."*

Section 250 sets out the guarantee to unpaid personal/carer's leave as follows:

"Section 250-The Guarantee

> *(2) Subject to this Subdivision, an employee is entitled to a period of up to 2 days unpaid carer's leave for each occasion (a permissible occasion) when a member of the employee's immediate family, or a member of the employee's household, requires care or support during such a period because of:*
>
> > *(a) a personal illness, or injury, of the member; or*
> >
> > *(b) an unexpected emergency affecting the member."*

2 Compassionate leave.

Section 257 sets out the guarantee to compassionate leave as follows:

"Section 257 The Guarantee

> *(1) For the purposes of this Division, compassionate leave is paid leave taken by an employee:*
>
> > *(a) for the purposes of spending time with a person who:*
> >
> > > *(i) is a member of the employee's immediate family or a member of the employee's household; and*
> > >
> > > *(ii) has a personal illness, or injury, that poses a serious threat to his or her life; or*
> >
> > *(b) after the death of a member of the employee's immediate family or a member of the employee's household."*

3 Parental Leave (Part 7 Division 6) and more particularly for the purposes of this submission the entitlement to paternity leave is provided at Subdivision E of Division 6 under Part 7.

Section 282 sets out the guarantee to paternity leave as follows:

"Section 282 The Guarantee

(1) For the purposes of this Division, paternity leave is:

(a) a single, unbroken period of unpaid leave (short paternity leave) of up to one week taken by a male employee within the week starting on the day his spouse begins to give birth; or

(b) a single, unbroken period of unpaid leave (long paternity leave), other than short paternity leave, taken by a male employee after his spouse gives birth to a living child so that the employee can be the child's primary care-giver."

(2) Subject to this Subdivision …, and employee is entitled to paternity leave if:

(a) He complies with the documentation requirements under Subdivision F, to the extent that they apply to him; and

(b) Immediately before the first day on which the paternity leave is, or is to be, taken;"

Relevant Definitions

Sections 240 and 263 provide definitions for "spouse", "de facto spouse" and "immediate family" for the purposes of the above entitlements. The definitions are as follows:

"**De facto spouse**, of an employee, means a person of the opposite sex to the employee who lives with the employee as the employee's husband or wife on a genuine domestic basis although not legally married to the employee."

"**Immediate family**: the following are members of an employee's immediate family:

(a) a spouse, child, parent, grandparent, grandchild or sibling of the employee;
(b) a child, parent, grandparent, grandchild or sibling of a spouse of the employee."

"**Spouse** includes the following:
(a) a former spouse;
(b) a de facto spouse;
(c) a former de facto spouse."

The expression "**member of [the employee's] household**" used in sections 244, 250 and 257, is not defined under the Act. The courts however, have considered what this phrase means. In the matter of *Benney v Jones* (1991) 23

NSWLR 559, the plaintiff, Benny, was seeking entitlements from the estate of Read under the *Family Provision Act 1982*. Benney and Read, both men, lived together. Benney asserted that they were in a relationship. One of the criteria for Benny to be successful under the *Family Provisions Act*, was that Benny was a “member of [Read’s] household”. Priestly JA of the NSW Supreme Court of Appeal, provided that “I do not see that there is any meaning of the phrase “member of a household of which another person was a member” which would not encompass the way in which the plaintiff lived in the small house as his friend for three and a half years”. The Trial judge did not find that there was a homosexual relationship between the men (evidence had been lead that there was). Priestly JA did not make a determination on whether or not the men were in a homosexual relationship.

Further, in the *Personal/Carer’s Leave Test Case Stage 2* – Nov 1995, (1995) 62 IR 48, the Australian Industrial Relations Commission provided (at page 57) that “…the broad category of household member covers same sex relationships.”

Therefore, in accordance with the definitions set out above, an employee’s same-sex partner is not a “spouse”, nor a “de facto spouse”, nor a “member of the employee’s immediate family” for the purposes of the Act. However, an employee’s same-sex partner would be considered a “member of the employee’s household” if they resided together.

Summary of Entitlements

Entitlement to Personal/Carer’s Leave and Compassionate Leave

Because of the use of the phrase “member of household” in sections 244, 250 and 257, and the way that it has been judicially considered as referred to above, it would appear that an employee in a same-sex relationship would be entitled to personal/carer’s leave and compassionate leave if their same-sex partner was the cause of the need for the leave and if their same-sex partner also resided with them. Further there would appear not to be a requirement for them to be in a sexual relationship.

However, an employee in a same-sex relationship could not claim personal/carer’s leave or compassionate leave if their same-sex partner’s “immediate family” was the cause of the need for the leave as the definition of “immediate family” does not include an employee’s same-sex partner’s “child, parent, grandparent, grandchild or sibling”. This is in contrast to a heterosexual employee’s entitlements as paragraph (b) of the definition of “immediate family” does encompass a (heterosexual) employee’s spouse’s “child, parent, grandparent, grandchild or sibling”. For example, an employee in a same-sex relationship would not be entitled to carer’s leave to care for their same-sex partner’s ill parent, or be entitled to compassionate leave to say attend the funeral of their same-sex partner’s parent, grandparent, sibling etc. These entitlements would otherwise be available to a heterosexual employee.

By the specific inclusion of the employee's spouse's "immediate family" in the categories of persons who could be the cause of the need for the personal leave, the Act is achieving one of its objectives as set out in section 3(l) that is, to assist employees to balance work and family "responsibilities". If there is to be parity in the legislation to afford employees in same-sex relationships the same entitlements and there to be an understanding and respect for the diversity of the workforce (section 3(m)), then the entitlement to personal/carer's leave and compassionate leave should extend to include the "immediate family" of an employee's same-sex partner. To not afford this entitlement means that an employee in a same-sex relationship does not have the same rights at their heterosexual colleagues.

Paternity Leave

Section 282 has the effect of discriminating against same sex-couples. This entitlement is not available to a female employee because she is not a "male" as the Act proscribes and even though she may reside with a woman on a genuine domestic basis and who gives birth, she is not the employee's "spouse" which is the other requirement to be entitled to the leave afforded under section 282.

By providing paternity leave, the Workplace Relations Act achieves its objective at set out in section 3(l) (to assist employees to balance their home and work responsibilities) but does not achieve its other stated aim as set out in section 3(m) of "respecting and valuing diversity of the work force" as it does not accommodate the circumstance where two women co-habit and commence a family.

It is a long established principal of legal construction that references to the masculine included the feminie. However, there is no comfort to be found by this principal of interpreting the Workplace Relations Act because:

(a) of the clear intention of the Act to be gender specific by referring to "**male** employee" (emphasis added); and

(b) describing the leave as "paternity" leave, that is, pertaining to a male parent, combined with the use of the word "maternity" in section 265, signifying a heterosexual relationship.

(In *Automobile Fire and General Insurance Co of Australia Ltd v Davey* (1936) 54 CLR 534 the court drew a distinction between the general use of "he" or "she" and the use of words that were both gender specific and signified a relationship; In *Re Brown and Commissioner for Superannuation* (1995) 38 ALD 344 the Administrative Appeals Tribunal held that the terms "husband" and "wife" could not include people in a homosexual relationship.)

Further limitation is placed on employees in same-sex relationships being entitled to "paternity leave" because the person giving birth must be the employee's "spouse". As referred to above, the same-sex partner of an employee is not included in the definition of spouse for the purposes of the Act.

How can it be rectified?

The above problems can be rectified by:

1. Deleting the words "of the opposite sex to the employee" and "as the employee's husband or wife" from the definition of "de facto spouse" found at sections 240 and 263.

2. Replace the word "paternity" with a non-gender specific word (such as "co-parent") in section 282.

3. Delete the word "male" from section 282.

Workers compensation

Overview

Workers' compensation entitlements for the Commonwealth are determined under the *Safety, Rehabilitation & Compensation Act 1988* (Cth) (the **SRC Act**). This Act, amongst other things, provides for a lump sum death benefit for a worker who dies in compensable circumstances – payable to a 'dependant' of the deceased (rather than to the estate of the deceased).

'Dependant' is defined:

> *"dependant", in relation to a deceased employee, means:*
>
> *(a) the spouse, father, mother, step-father, step-mother, father-in-law, mother-in-law, grandfather, grandmother, son, daughter, step-son, step-daughter, grandson, grand-daughter, brother, sister, half-brother or half-sister of the employee; or*
>
> *(b) a person in relation to whom the employee stood in the position of a parent or who stood in the position of a parent to the employee;*
>
> *being a person who was wholly or partly dependent on the employee at the date of the employee's death;*

'Spouse" is also defined:

> *"spouse" includes:*
>
> *(a) in relation to an employee or a deceased employee - a person of the opposite sex to the employee who lives with, or immediately before the date of the employee's death lived with, the employee as the spouse of the employee on a bona fide domestic basis although not legally married to the employee; and*
>
> *(b) in relation to an employee or a deceased employee who is or was a member of the Aboriginal race of Australia or a descendant of indigenous inhabitants of the Torres Strait Islands - a person who is or was recognised as the employee's husband or wife by the custom prevailing in the tribe or group to which the employee belongs or belonged;*

The definition excludes same-sex partners (unless, perhaps, there is an aboriginal community out there with custom that does recognise such a union).

The SRC Act applies to all Commonwealth public servants, employees of Government Business Agencies (Telstra, Australia Post, ADI, CSL etc) and, since 30 June, 2005 – applies to any private sector company that is granted a licence to self-insure under the scheme. To date, Optus, Linfox, Linfox Armaguard and K&S Freight have been granted a licence (K&S has not actually

entered the scheme yet, but the others have). There are many other private sector companies interested in SRC Act coverage. The SRC Act was also the basis on which the Military Compensation Scheme was based (it actually applied directly to the military up until 2004) – and virtually identical legislation to the SRC Act (the *Seafarers Rehabilitation and Compensation Act 1992* (Cth)) applies to all seafarers on prescribed ships in Australian waters.

Whilst Commonwealth public servants have never had same-sex recognition for compensation purposes, a growing number of workers who have been transferred out of state-based WorkCover schemes which may have covered same-sex relationships and have lost benefits in the process.

Inability to negotiate favourable AWA

The VGLRL has been approached by members who have experienced difficulty in negotiating a favourable Australian Workplace Agreement (**AWA**) with a Commonwealth employer. The following is an example of correspondence between a VGLRL member and his Commonwealth employer which highlights discrimination in negotiating an AWA in relation to workers compensation benefits.

Letter from employee to manager:

Dear [name deleted],

I would like to put forward a submission for a non-standard AWA when my current agreement expires on 1 August. There are two changes sought [financial information deleted].

Workers compensation death benefits payable to my partner in the (unlikely) event that I die in compensable circumstances.

I am proposing that my AWA includes a clause that [Employer] undertakes to make an ex-gratia payment equivalent to the SRC Act death benefit applicable at the time to my partner, in the event of my death under compensable circumstances. Currently, the SRC Act does not recognise a same-sex partner as a spouse for the purposes of this payment, which means that I do not currently have the same level of benefits as my colleagues. This clause in my AWA would not grant me a benefit that my colleagues do not already have, it would simply put me on the same conditions of service as them.

I feel that this is a relatively low-risk low-cost addition, as I obviously have no intention of dying any time soon, but I do undertake a lot of travel, and my untimely death would cause severe financial hardship for my partner. This would also be in keeping with the Anti-Discrimination clauses in the standard AWA respecting diversity and helping to prevent discrimination at the enterprise level on the basis of …sexual preference, and also consistent with [Employer]'s progressive stance in defining 'immediate family' and 'close relative' to include the 'partner' of the employee.

Yours sincerely

X

Response from manager

Dear [X]

Thank you for your detailed and thoughtful submission re inclusions into your AWA.

I note you seek two changes; [financial information deleted].

The other enhancement you sought in your AWA was workers compensation death benefits payable to your partner in the event that you died in compensable circumstances. In relation to this request I understand that AWAs (and Certified Agreements) cannot override or displace provisions under Commonwealth legislation unless specifically authorised by regulations made under the Workplace Relations Act (I understand such regulations have only ever been made for very specific, limited circumstances). Insofar as the SRC Act sets out the rights and entitlements of APS employees in relation to workers' compensation, it is not possible to change these entitlements through an AWA. Therefore, those specific benefits you have sought cannot be provided through your AWA.

regards

[name deleted for privacy purposes]

General Manager

Income taxation

Background

The federal government has power to legislate for and administer income taxation (most provisions are in the *Income Tax Assessment Act 1936 and Income Tax Assessment Act 1997* and related legislation). This submission refers to the relevant statutes as the ***income tax law***. There are a number of benefits in the income tax law for couples that are not available for same-sex couples because of the failure to recognise same-sex couples as spouses, or to fully recognise the children of same-sex couples.

Spouse

The term 'spouse' is defined in section 995-1 of the *Income Tax Assessment Act 1997* to be:

> *'spouse' in relation to a person, includes another person who, although not legally married to the person, lives with the person on a genuine domestic basis as the husband or wife of the person.*

The same definition applies in section 136(1) of the *Fringe Benefits Tax Assessment Act 1986.* This definition includes legally married (opposite-sex) spouses and de facto opposite-sex spouses. While there has been no judicial decision or binding ruling issued from the Australian Taxation Office interpreting this definition expressly to exclude same-sex couples, the Commissioner of Taxation takes the position in a number of non-binding Interpretive Decisions that 'spouse' does not include same-sex couples. See specifically:

- Same-sex partner is not a spouse for superannuation death benefit purposes: ATO ID 2002/731;
- Same-sex partner is not a spouse for superannuation contribution purposes: ATO ID 2002/649;
- Same-sex partner does not generate entitlement to a dependant spouse rebate: ATO ID 2002/211;
- No transfer of baby bonus to same-sex partner: ATO ID 2002/826;
- Same-sex partner is not an 'associate' for purposes of Fringe Benefits Tax: ATO ID 2003/7.

We return to the applicability of these concessions below.

Dependent spouse rebate and spouse maintenance payments

An individual taxpayer is not entitled to claim a tax rebate (also known as an offset or credit) against their income tax, in respect of a dependent same-sex partner, in contrast to a taxpayer who has a dependent opposite-sex de jure or de fact spouse: section 159J *Income Tax Assessment Act 1936*; the ATO position is stated in Interpretive Decision ATO ID 2002/211.

While the dependant spouse rebate has declined in significance in recent years, as it has been replaced by the welfare payments *Family Tax Benefit A and B* (see below), it remains a significant social tax expenditure of the government. In 2004, it was estimated to cost $330 million revenue foregone in 2004-05 (*Treasury,* Tax Expenditure Statements).

A dependant spouse rebate may be claimed by a taxpayer even where they live separately and apart from the spouse (though not if they are divorced).

Maintenance payments to a spouse would not be tax-deductible for a taxpayer as they are private expenses (section 8-1(2) *Income Tax Assessment Act 1997*). However, an individual who receives maintenance payments from an opposite-sex spouse is entitled to an *exemption* from tax for those payments: section 51-50 *Income Tax Assessment Act 1997*. This exemption would not apply for same-sex partners in recept of periodical maintenance payments.

Impact of 'spouse' definition on other income tax rebates

A range of other tax rebates may apply in respect of the opposite-sex spouse of a taxpayer, or the spouse's family. These would not apply in respect of the same-sex partner of a taxpayer.

- A *housekeeper* rebate may apply for a housekeeper employed full-time to care for a spouse on a disability support pension: section 159L of Income Tax Assessment Act 1936.

- A *parent* rebate may apply where a taxpayer financially supports a spouse's parents: section 159J Income Tax Assessment Act 1936.

- A *medical expenses* rebate may apply for a taxpayer in respect of medical expenses paid by or on behalf of a spouse: section 159P Income Tax Assessment Act 1936.

In addition, a number of income tax rebates are calculated at more generous rates or using a concessional income test, where the taxpayer has a spouse; a taxpayer with a same-sex partner would not be eligible for these concessional rules.

- The *pensioner tax rebate* for a taxpayer who receives a pension from the government at a *partnered* rate, entitles the taxpayer to earn more income in addition to the pension before becoming liable to pay income tax (see below for discussion of the pension tests). The rebate is also paid at a higher partnered rate if the taxpayer has a spouse and may be transferred to the spouse in some cases: section 160AAA Income Tax Assessment Act 1936.

- The *senior Australians tax offset* (or *low income aged persons rebate*) for a taxpayer with a spouse is calculated on a higher effective combined

income of the couple and may be transferred to the spouse in some cases: section 160AAAA *Income Tax Assessment Act 1936*.

- The *private health insurance tax offset* is calculated for couples and families on the basis of a higher combined taxable income ceiling than for individuals: section 61-305 *Income Tax Assessment Act 1997*.

- *Zone rebates* for people living in rural or remote areas, the *overseas defence force rebate* and the *civilian UN force rebate* are all determined at a higher rate where the taxpayer has a dependant spouse: sections 79A, 79B, 23AB(7) Income Tax Assessment Act 1936.

Capital gains tax

A transfer of assets to a spouse or former spouse following a court order or maintenance agreement will attract capital gains tax concessions: section 126-5 Income Tax Assessment Act 1997. Effectively, any capital gain in the assets transferred to the spouse is taxable only on the subsequent disposal of those assets by the spouse. This concession is not applicable to the transfer of an asset to a same-sex partner.

Example Jane and Sarah have been in a relationship for 8 years. On breakdown of the relationship, under state relationship property laws, Jane transfers some shares to Sarah. The shares cost $3000 in the year 2000 and are currently worth $7000.

The transfer of the shares from Jane to Sarah will lead to a capital gains tax liability for Jane, calculated on the amount of appreciation in value of the shares, being $7000 – $3000 = $4000, even if the shares are transferred as a gift, as the transfer will be deemed to take place for market value consideration.

In contrast, if Jane and Sarah were an opposite-sex couple and Jane agreed to transfer the shares as part of a court order or maintenance agreement under either the *Family Law Act 1975 (Cth)* or state property relationship legislation, the transfer of the shares would not attract capital gains tax at that time. Instead, Sarah would be deemed to acquire the shares at a cost of $3,000 (Jane's original cost). Capital gains tax would only apply at a time in the future when Sarah decides to sell the shares.

Income tax and children

There are a range of income tax provisions that provide concessions or rebates in respect of the child of a taxpayer or his or her spouse. For income tax purposes, 'child' is defined, essentially, to be the biological, adoptive or step-child of a taxpayer: section 995-1 Income Tax Assessment Act 1997. As a result, tax concessions will generally be available for the biological parent of a child. However, in many same-sex families, one member of the couple is the biological parent of a child of the relationship. In this situation, the non-biological parent of the child will not generally be eligible to claim these tax concessions.

Nor will the biological parent of the child be able to transfer the tax concession to the non-biological parent in the same-sex couple, as the latter is not recognised as the spouse of the biological parent.

The failure to recognise the child-parent relationship in respect of non-biological parents of children of same-sex relationships will have ramifications throughout the income tax law where provisions refer to a ‘child’ of a taxpayer. Some key provisions are discussed here.

- *First child tax offset* (baby bonus)

The baby bonus was a tax rebate applicable for a taxpayer who became legally responsible for a child (by giving birth, adopting or in some other circumstances) between 1 July 2001 and 1 July 2004: Subdiivision 61-I *Income Tax Assessment Act 1997*. The bonus was applicable only where an taxpayer was the biological, adoptive or step-parent of a child; it could be transferred between the taxpayer and a spouse; this was not possible for same-sex couples.

- *Child care tax offset*

As of 1 July 2005, a new childcare tax offset applies in respect of certain approved childcare costs for a child of a taxpayer: Subdivision 61-IA *Income Tax Assessment Act 1997*. Eligibility for the tax offset depends on eligibility for *Childcare Benefit* which is discussed below. It will apply based on childcare fees incurred by an individual or his or her partner; however, this will not apply for same-sex partners: section 61-490 *Income Tax Assessment Act 1997*.

Where a taxpayer entitled to the childcare tax offset cannot use it up in a tax year, the taxpayer is entitled to transfer it to a spouse: section 61-496 *Income Tax Assessment Act 1997*. Same-sex couples are not eligible for this benefit.

- *Child maintenance trusts*

On breakdown of an opposite-sex marriage or de facto couple relationship, a taxpayer may establish a child maintenance trust for the financial support of children of the relationship. The income of such a trust are exempted from the penal “children’s tax” rules that usually apply in respect of income of minor children: Division 6AA *Income Tax Assessment Act 1936*; Taxation Ruling TR 98/4. The income from such trusts is taxable at normal marginal tax rates to the trustee; where the child has no or little other income, this means that a low rate of tax will frequently apply. This is thus a concessional way in which a taxpayer can provide financially for a child on family breakdown.

For a child maintenance trust to be eligible for this tax concession, the contributing parent must have maintenance obligations in respect of the child and the contributions must be made because of a family breakdown (there are also a range of other conditions). A family breakdown is defined in section 102AGA *Income Tax Assessment Act 1936* to encompass the separation or divorce of married or de facto spouses. It also applies to children of 'other

relationships', where a child is born to parents who are not living together as spouses at the time. However, in this case, the ATO makes clear that the child to whom property is to pass beneficially must be the (biological or adoptive) child of *both parents*: Taxation Ruling TR 98/4. As a result, same-sex couples where one member of the couple is a non-biological parent would not be eligible to qualify to contribute to a child maintenance trust on breakdown of the relationship.

- *Child-housekeeper rebate*

Where a child of a taxpayer is wholly engaged in keeping house for the taxpayer, the taxpayer is entitled to a tax rebate: section 159J *Income Tax Assessment Act 1936*. This requires that the housekeeper be the biological, adoptive or step-child of a taxpayer; a non-biological child of a parent in a same-sex couple would not qualify.

Other provisions

A range of other provisions in the income tax law refer to the spouse or family of a taxpayer. Many of these provisions are integrity or anti-avoidance provisions. For example, a taxpayer is not entitled to deduct a payment to a “relative” that exceeds a reasonable amount: section 26-35 *Income Tax Assessment Act 1997*. A “relative” includes a taxpayer’s spouse; a parent, grandparent, brother, sister, uncle, aunt, nephew, niece, lineal descendent or adopted child of the person; or such a relative of the taxpayer’s sposue; or the spouse of one of such specified relatives: section 995-1 *Income Tax Assessment Act 1997*.

For completeness, it must be noted that a same-sex partner, or relatives of that same-sex partner, would not be included in this list of relatives. It is most important to note, however, that until equal treatment under the law is extended to same-sex couples it would be unfair and doubly discriminatory for the notion of spouse or family to be extended include a member of a same-sex couple for purpose of integrity provisions such as that described above.

Social security (welfare) benefits

Background

The federal government has power to legislate for and administer social security benefits legislation, primarily under the *Social Security Act 1991 (Cth)*, the *A New Tax System (Family Assistance) Act 1999 (Cth)* (the ***Family Assistance Act***) and associated legislation and regulations. Benefits are administered by the federal agencies Centrelink and the Family Assistance Office.

As for income tax law, same-sex couples are not recognised in social security law. However, the terminology for social security benefits is different from the income tax terminology, referring primarily to the notion of a 'member of a couple' and 'partner' being a member of a couple.

Many social security and family assistance benefits are premised on the recipient being a *parent* rather than a *spouse* or member of a *couple.* Consequently, a lesbian or gay man who is recognised as a parent of a child will usually be eligible for those benefits. However, discriminatory treatment may still arise in respect of the non-biological parent of a child, or where benefits are tested on couple income, or calculated at a different rate where there is a couple relationship.

Member of a couple

The social security system is premised on the basis that living costs for a single adult individual are more than for each member of a couple. Many pensions, allowances and other benefits under the social security system are affected by whether the individual claiming the benefit is a 'member of a couple', or a 'partner' of an individual with whom they are in a 'couple' relationship.

Under section 4 of the *Social Security Act 1991 (Cth)*, a 'member of a couple' is someone who is:

- A legally married person who is not living separately and apart from the other person on a permanent or indefinite basis; or
- A person who is having a relationship with another person of the opposite sex which, in the opinion of Centrelink, is a 'marriage-like relationship'.

The same definition applies under section 3 of the *Family Assistance Act*.

A range of factors are taken into account in ascertaining a 'marriage-like relationship': section 4(3) Social Security Act 1991 (Cth). However, it has been made clear that individuals who are in a same-sex relationship cannot be regarded as 'members of a couple' for purposes of this definition.

Lesbians and gay men are not eligible for a range of social security benefits because same-sex relationships are not recognised for this purpose. For example, the widow pension and allowance are not available to lesbians, as they are applicable only to women who were in an opposite-sex couple relationship and who have been widowed, deserted or divorced. The bereavement allowance is only payable to an individual whose opposite-sex spouse or partner has died, unless the surviving individual has been in receipt of a carer allowance in respect of the deceased individual.

Other social security benefits are tested on the income of the couple; as same-sex couples are not recognised, the income of a same-sex partner may not be taken into account in ascertaining eligibility or rate of benefits. The rate of many benefits is higher where there is a couple; again, this would not apply where the recipient of the benefit has a same-sex partner.

Family Tax Benefit A and B

The primary welfare benefit for families is Family Tax Benefit Parts A and B. These are applied under the *Family Assistance Act*. Eligibility for the benefits depends on there being a ‘FTB child’, on residence requirements and on income tests. In general, a child will be an ‘FTB child’ of a biological parent, an adoptive or step-parent, or of a non-biological parent where there is a parenting order under the *Family Law Act 1965 (Cth)*: section 22 *Family Assistance Act*.

An FTB child is generally a child under 16 for whom the individual is legally responsible or a dependent full-time student aged 15 to 24, who is not receiving certain student welfare benefits.

Where there is a ‘couple’, a child will be treated as the FTB child of the primary carer in the couple. Where no ‘couple’ is recognised, as for same-sex relationships, the family is essentially seen as a ‘single parent’ family. A range of specific provisions apply to ‘couple’ relationships where there is a ‘blended family’ involving children of former relationships; these provisions will not generally apply to same-sex couples (see, e.g., sections 27-29, 60-61 *Family Assistance Act*).

FTB A is tested on ‘family income’ which includes the income of both members of a couple (or of the primary carer and the primary carer’s ‘partner’). This does not include a member of a same-sex couple.

For opposite-sex couples, FTB B is tested on the income of the individual earning the lesser income in the couple. Usually, this is the primary carer. For lesbian or gay families, however, the eligible parent is usually treated as a single parent household (because the couple relationship is not recognised). Consequently, the income of a partner is not relevant to entitlement.

Other benefits

A range of other benefits and concessions, such as childcare benefits, concession cards for health or transport, depend on eligibility of an individual for the core social security or family tax assistance benefits. Consequently, any discriminatory impact resulting from the failure to recognise same-sex couples in the core rules may flow on to affect entitlement to those other concessions.

Superannuation

Background

Superannuation is governed by Federal legislation, namely, the *Superannuation Industry (Supervision) Act 1993* (the ***SIS Act***), corresponding Regulations and other associated legislation.

There are a range of discriminatory outcomes caused by the failure to recognise same-sex couples in superannuation legislation. In addition, there are a range of income tax concessions for superannuation that will not apply to same-sex couples or their children because of this discriminatory lack of recognition. These issues are discussed below.

In the 2005-06 Budget, the government announced far-reaching changes to the superannuation regime and taxation of superannuation (*A plan to simplify and streamline superannuation*, 9 May 2006; and see http://simplersuper.treasury.gov.au). These changes will have an impact on the superannuation consequences for same-sex couples, but until legislation is introduced it is difficult to state exactly what that impact will be. However, the fundamental discrimination in the superannuation law, arising from a failure to recognise same-sex couples in almost all circumstances, seems likely to remain after those changes are implemented.

Spouse

The term 'spouse' takes its general law meaning as including lawfully married spouses and is extended in the SIS Act as it is in the income tax law, to include de facto opposite-sex spouses (section 10(1) SIS Act).

> *'spouse' in relation to a person, includes another person who, although not legally married to the person, lives with the person on a genuine domestic basis as the husband or wife of the person.*

While it has never been the subject of a judicial decision, this definition is interpreted by the Australian Prudential Regulatory Authority (***APRA***), the primary regulatory body, not to include same-sex relationships. The basis for that interpretation is an Administrative Appeals Tribunal decision on a similar, but not identical, provision in the *Superannuation Act1976 (Cth)* (*Re Brown and Commissioner for Superannuation* (1995) 21 AAR 378 para [57]); see *Superannuation Circular No. I.C.2* (March 1999).

Spouse Contribution Splitting

On 1 January 2006, amendments were introduced to the SIS Act to permit a member to split his or her employer contributions or personal contributions with

their spouse. With respect to personal contributions, up to 85% of a member's deductible contributions and 100% of his/her non-deductible contributions can be split to the spouse.

The key benefits from contribution splitting are that the couple (comprising the member spouse and the receiving spouse) will each have access to their individual Eligible Termination Payment (**ETP**) low-rate threshold and a Reasonable Benefit Limit (**RBL**) threshold. In other words, spouses who split their superannuation contributions receive beneficial tax treatment. This is not available to same-sex couples, as they do not fall within the definition of spouse, notwithstanding that same-sex couples, particularly those who are in committed long term relationships, are emotionally and financially interdependent on each other and arrange their financial affairs in very much the same way as married or de-facto opposite-sex couples.

The 2006 budget announcement by Mr Costello proposes to abolish all tax payable on superannuation benefits if cashed after age 60, including the abolition of the RBL for all individuals. Assuming that this proposal is passed, the tax benefits obtained from spousal contribution splitting may become less valuable. Nonetheless, they remain in the SIS Act and provide a means for an individual to provide a superannuation balance for his or her low-income spouse, a concession which will not apply for same-sex couples. Same-sex couples do not have the freedom of choice to financially assist their partners by contributing towards their retirement funds. This is of particular significance where one partner is a homemaker and raising children or where one partner is on a significantly lower income.

Examples are provided below to demonstrate the discriminatory nature of the pre-budget superannuation regime which places same-sex couples at a financial disadvantage compared to their heterosexual counterparts.

(A) ETP low-rate threshold

John Smith's superannuation contributions are split with his wife, Jane who is a low income earner. Given that the taxation rules are quite complex, let's assume that all of the contributions were made after July 1983 and that the contributions were taxed at the time they were made. Let's also assume that after 1 January 2006, John splits his superannuation with Jane who already has $40,000 in super. Over a period of time, let's assume that John accumulates $360,000 in his account and Jane accumulates an extra $89,000, bringing Jane's total superannuation to $129,000. In 2006, and at age 65, John and Jane become entitled to receive their lump sum benefits. 100% of their lump sum benefit consists of taxed components.

Lump sum payments from a superannuation fund are commonly treated as an ETP by the Australian Tax Office and as such, receive concessional tax treatment. This means that for the first $129,751, the lump sum will attract no tax and any amount above $129,751 will be taxed at 15%. Thus, the tax payable by John and Jane in his scenario will be $34,537.35 and nil

respectively, as they have the benefit of using the ETP twice. As a household, they paid a total of $34,537.35 by way of tax on their superannuation benefits.

In contrast, same-sex couples cannot split their contributions to their partner. Thus, if John had been in a same-sex relationship in exactly the same scenario as above, John's superannuation benefit would have been $449,000 (ie. $360,000 + $89,000) and he would have had to pay tax of $47,887.35. As a household, the total tax liability would be $47,887.35, which is $13,350 more than a heterosexual couple in the same position.

(B) Tax Deductions and Rebates

Currently, under federal superannuation law, a person who is married or in a heterosexual de facto relationship may claim an 18% tax offset on their personal income tax in respect of superannuation contributions of up to $3,000 made to a fund on behalf of their low income or non-working spouse. However, same sex couples are unfairly excluded from receiving any tax rebate under this legislation, since contributions made in respect of a same sex partner do not constitute contribute contributions made in respect of a "spouse" for the purposes of the legislation.

The impact of this inequality is that same sex couples are unable to take advantage of a particular avenue for the efficient management of their financial affairs which is available to opposite sex couples. A taxpayer in a same sex relationship who would otherwise have been able to take advantage of the co-contributions legislation will therefore be forced to pay more tax than another taxpayer in an equivalent opposite sex relationship.

(C) RBL threshold

Under the superannuation regime pre-2006 budget, the concessional tax of 15% applied up to an amount called the Reasonable Benefit Limit (**RBL**) threshold. Spousal contribution splitting permitted a heterosexual couple to have the benefit two RBL thresholds instead of one, thereby providing them with a more advantageous tax position than what is otherwise available to same-sex couples.

Superannuation death benefits paid to a 'dependant'

When a person dies, there may be payable from their superannuation fund a death benefit amount. The trustee of the superannuation fund will either have (1) complete discretion in determining who should receive how much of the death benefit (although the deceased could, while alive, nominate their preferred beneficiaries for the trustee's consideration) or (2) be bound to distribute the benefit in the manner specified by the deceased (this is called a binding death nomination).

Whether or not a person can submit a binding death nomination varies from fund to fund; many fund trust deeds allow nomination of a preferred beneficiary but, because of the restrictions on trustee power, do not allow binding death

benefit nominations. Even if the trust deed of a superannuation fund permits binding death nominations, the trust deed will at all times still be subject to the provisions of the SIS Act and Regulations. Under the SIS Act, a binding death nomination will only be valid and thus binding on the trustee if the nominated beneficiary is the member's legal personal representative or a dependant. Dependant is defined in the SIS Act as being (1) a spouse (ie. a heterosexual married or de-facto couple), (2) a child or (3) a person with whom the member has an interdependency relationship.

The concept of 'interdependency relationship' is defined in the SIS Act as having the following characteristics: (1) close personal relationship, (2) living together, (3) provision of financial support and (4) provision of domestic support and personal care (section 10(1) 'dependant', SIS Act; section 10A SIS Act; Sec 27A(1) 'dependant' para (b) and section 27AAB of Income Tax Assessment Act 1936). The Regulations also specify certain factors that are relevant in determining whether two people are in an Interdependency Relationship (Regulation 8A, Income Tax Regulations 1936; Regulation 1.04AAAA, Superannuation Industry (Supervision) Regulations 1994).

The new concept of 'interdependency relationship' has been stated by the government to cover same-sex couples,[2] however, it is clear that it is not intended to, and does not, produce equality between same-sex couples and either *de jure* or *de facto* opposite-sex spouses. All of the elements of the definition must be proved by a member of a same-sex couple seeking to establish an entitlement to a superannuation death benefit and accompanying income tax exemption. A member of a same-sex couple could alternatively seek to prove that they were financially dependent on the deceased and so would be eligible to receive part or all of a death benefit; again, this depends on the surviving member proving to satisfaction of a trustee that he or she was financially dependent (see further below for analysis on the concept of "interdependency relationships".

Same-sex partners who are nominated as a beneficiary under either a binding or non-binding death nomination will still have to prove to the trustee's satisfaction that they were in an interdependency relationship with the deceased in order for their entitlements to be binding on the trustee. This is in stark contrast to opposite-sex spouses, who are automatically recognised as dependants and who do not have to endure the intrusive process of having to provide private information in order to establish a claim to the death benefits. Further, until the interdependency relationship is proven, a same-sex partner's entitlement to the death benefit remains in doubt and is at greater risk of challenge by relatives of the deceased.

Many superannuation funds do not permit binding death nominations. In such a situation, the trustee of the fund has absolute discretion in determining who should receive the death benefit and in what proportions. In reality, trustees

[2] Minister for Revenue and Assistant Treasurer Senator Helen Coonan, *Press Release C046/2004* 'Fairer Treatment for Interdependent Relationship', 27 May 2004.

often exercise their discretion in favour of a deceased's husband or wife (whether married or de-facto) because of the status attached to such relationships (see, e.g. Superannuation Complaints Tribunal Determination No. D00-01\103). On the other hand, same-sex relationships are open to more scrutiny and a greater degree of proof is required to persuade the trustee to exercise its discretion in favour of the same-sex partner. This results in greater uncertainty and injustice for the surviving same-sex partner, especially where the deceased's family is hostile and makes a competing claim for the death benefits (see, e.g. Superannuation Complaints Tribunal Determinations D01-02\212 (28 February 2002); D05-06\061 (30 May 2005)).

Another advantage of being recognised as a dependant lies in the fact that death benefits are free of income tax (up to the deceased's pension RBL threshold) if the benefit is received by a dependant. A non-dependant beneficiary will be subject to a higher rate of tax. Again, there is potential for a financially discriminatory outcome against persons in same-sex relationships.

Example. Allan and Joe are long-term domestic partners who live together. They each have superannuation and independent sources of income. They each have made wills that specify the other as Legal Personal Representative and have nominated each other as preferred beneficiary with their superannuation funds. Allan is not recognised as Joe's spouse under the superannuation regulatory regime. On Joe's death, as Joe has no other dependants and Allan is specified as Joe's LPR, it may be possible for the trustee to pay Allan a death benefit from Joe's superannuation fund. However, unless Allan can establish that he was in an 'interdependency relationship' with Joe, or that he was financially dependent (which seems unlikely on these facts), the death benefit would not be tax-exempt. Instead, it would be included in Allan's assessable income and the taxable component will be taxed in Allan's hands at a 15% rate.

"Interdependency" relationships

Although trustees of private superannuation schemes are now able to pay a member's death benefit to the member's same sex partner, the legislative change enabling this to occur does not result in equal treatment for members of superannuation funds in same sex relationships. This is because in order to pay a death benefit to a deceased member's same sex spouse, superannuation law requires that the paying trustee must satisfy itself of various factual criteria to ensure that the deceased member and the member's same sex partners were in an "interdependency relationship" at this time of the member's death. These criteria are:

- that the couple had a close personal relationship;
- that the couple lived together;
- that one or both members of the couple provided the other with financial support; and
- that one or both members of the couple provided the other with domestic support and personal care.

The fact that these (and potentially other) criteria need to be satisfied to prove that a deceased superannuation fund member's relationship constituted an "interdependency relationship" creates inequality in comparison with what is required for the payment of a death benefit to a deceased member's opposite sex spouse.

The only factual requirement contained in the relevant legislative definition of "spouse" is that the person "lives with the person on a genuine domestic basis as the husband or wife of the person". This is obviously a different and simpler test to meet than that which is required to make out an interdependency relationship.

The impact of this evidentiary disparity may result in a scenario in which a same sex partner of a deceased superannuation fund member may be unable to receive a death benefit that would have been payable if the partner had been of the opposite sex.

Accordingly, it is important to note that introducing the concept of "interdependency" into superannuation law has not removed all potential inequality in respect of the payment of death benefits to a member's same sex partner, due to the fact that it is easier to qualify as a fund member's "spouse" than it is to prove that you were in an equivalent interdependent relationship with the person, if you are of the same sex as the person.

Public sector superannuation

Many of the changes to the SIS Act to not apply to Commonwealth public sector employees, particularly in relation to death benefits, where those employees are in the Commonwealth Superannuation Scheme (CSS) and in the Public Sector Superannuation Scheme defined benefit plan (PSS). In particular, in both of those plans, death benefits are restricted to opposite sex 'spouses' who are in a 'marital relationship' with the deceased member of the fund (*Commonwealth Superannuation Act 1976 (Cth)* sec. 8A, 8B and Part VI;PSS Trust Deed, Cl B.1.2.1, definition of 'marital relationship' and Part B.7 of Sch. B). The 'interdependency relationship' definition is not extended to this legislation. As such, public sector employees continue to suffer discrimination in the area of superannuation compared to opposite-sex spouses, and furthermore are in a worse position than lesbian or gay employees in most private sector funds.

A similar restriction to opposite-sex spouses in a 'marital relationship' applies for Defence Force personnel (sections 6A and 6B *Defence Force Retirement and Death Benefits Act 1973 (Cth)*; 'spouse', in Sch. to *Military Superannuation and Benefits Act 1991 (Cth)*). The most recent Defence Force superannuation regime explicitly provides in relation to member contributions that 'a person is not, for the purposes of these Rules, a spouse in relation to another person if he or she is of the same sex as that other person.' (*Military Superannuation and Benefits Act 1991 (Cth)*, Sch., Form of Trust Deed, Part 2 Rule 7).

Public superannuation scheme members should have as much right as members of privately operated superannuation funds to elect a same sex partner to receive a death benefit paid from their superannuation fund. There is

no reason why a member of such a scheme who is in a same sex relationship should be prevented from ensuring their partner is provided for financially upon their death, and the fact that this option is not available to them due to the rules of their superannuation fund refusing to recognise their relationship, is highly discriminatory. Given that the Commonwealth public service is one of Australia's largest employers, it follows that a large number of Victorians (and other residents of other Australian jurisdictions) are directly affected by this discrimination.

The following email received by a VGLRL member highlights this.

Email from PSS

Dear Mr X,

Thank you for your email received on 02 June 2005 regarding superannuation legislation.

The PSS is covered by the *Superannuation Industry (Supervision) Act 1993* (the **SIS Act**), amongst other legal instruments. The most important legislation governing the PSS is the Superannuation Act 1990 and its associated rules and regulations, which is legislation prescribed specifically for the PSS scheme. Whilst the SIS Act prescribes general guidelines regarding beneficiaries, it is the Superannuation Act 1990 which defines how benefits are payable to beneficiaries in the event of a member's death.

Generally, benefits would be payable in the first instance to any eligible spouse and/or any eligible children, but would be paid to your estate in the absence of such persons. An eligible spouse is a person of the opposite sex to that of the member, who, at the time of death:

- was living in a marital relationship with the deceased member; and
- had been living in that relationship for a continuous period of three years or more.

Same-sex partners are not considered to be eligible spouses under the Rules. In the PSS scheme, the benefit that would be payable to your estate in the event of your death as a contributor would be the same as the lump sum that would have been payable to any eligible spouse. One difference would be that your estate is only entitled to a lump sum, whereas an eligible spouse could have elected to convert some or all of that lump sum into an ongoing pension. I regret that ComSuper, on behalf of the PSS Board of Trustees, is not able to pay benefits otherwise than in accordance with the scheme's legislation. Any changes to the Rules would need to be approved by the Minister of Finance and Administration through a disallowable instrument.

I hope that this information is useful and addresses any concerns you may have regarding your PSS benefits. If you have any further questions or concerns, please feel free to contact our information service on 1323 66 or by return e-mail.

Reversionary pensions

Most superannuation trust deeds only allow for reversion of a pension to a *de jure* or *de facto* spouse, which does not include a partner in a same-sex relationship; as a result, trustees have refused to pay reversionary pensions to surviving members of same-sex relationships. Under the recent proposals to reform superannuation, reversionary pensions would be limited by statute to spouses and would therefore not be allowed for a surviving member in a same-sex couple.

Health concessions and insurance

Background

The VGLRL believes that the discriminatory operation of the Medicare Safety Net and the Pharmaceutical Benefits Scheme (**PBS**), two of the primary public health initiatives of the Federal Government, is one of the worst public policies of the Federal Government. The discriminatory application of these schemes unfairly increases out-of-pocket medical expenses for same-sex couples and their families.

Medicare Levy and Medicare Levy Surcharge

The income threshold for payment of the Medicare Levy is higher, and relief for low-income earners is greater, if the taxpayer has a dependant spouse: section 7 *Medicare Levy Act* 1986, sections 251R-251Y Income Tax Assessment Act 1936. These concessions are not applicable for same-sex couples.

Likewise, same-sex couples are not included as households for purposes of the Medicare Levy surcharge.

Discriminatory operation of health concessions

Example – PBS:

Rohan and Lara are a de facto heterosexual family with two dependent children. The Federal Government considers them as one family for the Medicare and PBS safety nets.

This family would only need to spend $874.90 to reach the PBS safety net threshold. This is about 31 prescriptions at the standard $28.60 price. All prescriptions for any of the family members after this point would only be $4.60 – a saving of $24 per prescription.

In comparison, Sarah and Emily are a same-sex family with two dependent children. The Federal Government does not consider all four of them together as a family for the safety nets.

Sarah has decided to register herself and the two children as a family. This leaves Emily as an individual. Sarah and the children have one $874.90 threshold, while Emily has her own $874.90 threshold.

As Emily is not recognised as part of the family, she cannot help the family reach one threshold, nor can she take advantage of the reduced price for medicines if her partner and children reach the threshold. She must reach her own threshold, which is about 31 full priced prescriptions.

This inequality to same-sex families and couples is a burden of up to $744 per

year – the difference between the full price and concession prices for up to 31 prescriptions.

The Medicare Safety Net operates in a similar fashion. For most people (singles, couples and higher-income families), the Medicare Safety Net threshold is $746.10 each year (the safety net for those with concession entitlement is $306.90). This means that 80 per cent of out-of-pocket expenses above this amount are covered by Medicare. However, due to the above definition of couple, members of same-sex couples are each required to reach the threshold before this rebate can be applied.

As outlined above, the discrimination in the operation of the Medicare Safety Net and PBS is unfair and unwarranted. It causes same-sex headed families suffer financially when they most need assistance – when there is a member of the family that has fallen ill.

Relevant legislation

PBS – National Health Act 1953

As outlined in the Discussion Paper, the *National Health Act 1953* (Cth) sets up the PBS, which provides subsidised medicines. If individuals, couples or families spend more than a certain amount per year on prescription medicines, they are entitled to a *safety net concession card*.[3] When a card is issued to a person, it also covers members of that person's family.[4] Prescriptions will then be discounted for all members of the family.

Further, individuals, couples or families who have pensioner, seniors, veterans, or defence concession cards are eligible for a *pharmaceutical benefit entitlement card* once they spend over a specified amount.[5] With this card, further medications for the entire family are provided for free.

However, for the purposes of qualifying for *safety net concession cards* and *pharmaceutical benefit entitlement cards*, a family is defined to include the person's 'spouse' and children.[6] The definition of 'spouse' includes a 'de facto spouse' but a 'de facto spouse' must be of the opposite sex.[7] As such, same-sex couple are denied access to these health concessions.

Medicare Safety Net – Health Insurance Act 1973

Like the PBS, the Medicare Safety Net meets the medical expenses of individuals, couples or families who spend above the relevant threshold.

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[3] *National Health Act 1953*, s84C.
[4] *National Health Act 1953*, s84G.
[5] *National Health Act 1953*, s84C.
[6] *National Health Act 1953*, s84B.
[7] *National Health Act 1953*, ss4, 84B.

Medicare benefits are set out in the *Health Insurance Act 1973* (Cth). The Medicare Safety Net covers the gap between the cost of a medical service and the Medicare Schedule fee.[8] An 'extended safety-net' for out-of-pocket medical expenses provides that after a family has spent a certain amount in a year, further expenses are reduced by 80 per cent.[9]

Under the *Health Insurance Act,* a family can only be made up of a person, their 'spouse' and their children.[10] A 'spouse' is a person legally married to, and living together with, the other person; or 'a de facto spouse of that person'.[11] 'De facto spouse' is not defined but has been interpreted by courts to exclude same-sex couples.

VGLRL campaign to remove such discrimination

During 2005, the VGLRL launched a campaign to encourage parliamentarians to remove discrimination in the Medicare and PBS safety-nets. The VGLRL believes that these laws mean that same-sex headed families suffer financially when they most need assistance – when there is a member of the family that has fallen ill.

The VGLRL encouraged its members and supporters to write to their local parliamentarians to remove this discrimination. Responses from MPs varied, but many (from varying political parties) acknowledged the discriminatory application of the legislation. The VGLRL is continuing this campaign.

[8] *Health Insurance Act 1973*, s10AC.
[9] *Health Insurance Act 1973*, s10ACA.
[10] *Health Insurance Act 1973*, s10AA(1).
[11] *Health Insurance Act 1973*, s10AA(7).

Families and children

Overview

The VGLRL believe that the law ought to treat lesbian and gay couples and their children equally with heterosexual couples and their children and wish to provide some additional comments in this regard.

Lesbian, gay and single people have the right to raise a family and access reproductive services. We note that Australia has signed international agreements that support this right including:

- International Covenant on Civil and Political Rights (**ICCPR**)
  - article 17: protects privacy
  - article 24: protects the right to have a family
- Convention on the Elimination of All forms of Discrimination Against Women (**CEDAW**).
  - article 1: provisions extend to all women regardless of sexuality and irrespective of marital status
  - article 4: protects right to maternity
  - article 16: “shall ensure that women have the same rights to decide freely and responsibly on the number and spacing of their children…”

We are particularly concerned that any reforms provide legal recognition of parental status to the partner of the birth parent in lesbian and gay families. The current failure in law to recognise the relationship between non-birth parents and children results in considerable practical, social and financial hardship for lesbian and gay parents and their children.

Current non-recognition means that the non-birth parent is highly vulnerable, and therefore so is the child.

Some particular areas of discrimination

A non-legally recognised parent cannot:

- be placed on the birth certificate;
- provide consent to medical treatment for a child; or
- provide permission to attend a school excursion.

A child born into or living with same sex parents cannot:

- automatically benefit from the estate of a non-legally recognised ‘parent’ upon the parent’s death if they die intestate (without a will);
- receive entitlement to superannuation benefit of non-legally recognised parent; or
- receive entitlements to Workcover payment in the event of the death of non-legally recognised parent.

The VGLRL believes that both Commonwealth and State law should, in the words of the Victorian Law Reform Commission, 'aim to eliminate discrimination against children and parents based on their family type and relationship status'.

While we recognise this issue is complex, the VGLRL believe that to overcome discrimination, full legal recognition must be given to the relationship between a non-biological parent and child.

An example of discrimination: child support payments

The *Child Support (Assessment) Act 1989 (Cth)* only contemplates the liability of recognised biological parents of the child. If a child of a same-sex couple remains with the biological parent on breakdown of the relationship, the *Child Support* scheme cannot be used to seek financial support for the child from the separated, non-biological co-parent. On the other hand, if the child remains with the non-biological parent, the *Child Support* system can be used to seek support from the biological parent.

This means that same-sex couples may be required to fall back on the law of equity (see, e.g., *W v G* (1996) 20 *Fam LR* 49), or on state relationship laws, to seek property or financial support for children on breakdown of the relationship (see below). This had the significant disadvantage that there is no state enforcement of child support payments, as there is by the ATO under the *Child Support* scheme.

Family law

The *Family Law Act 1975* (Cth) applies to all children, whether their parents are heterosexual or homosexual, married or not. The same issues are considered in cases involving same-sex couples as are considered in relation to mixed sex couples. The sexual orientation of a parent of a parent is not in itself relevant to the care of children. The paramount consideration is the best interests of the children.

However, a non-biological parent does not automatically have parental responsibility under the *Family Law Act*. This means a non-biological parent does not have the same capacity to make decisions and give legal authorisation as a biological or adoptive parent does. The same-sex partner of a biological parent can apply to the Family Court for an order that shares or specifies responsibility between the couple. This can happen during the relationship or, if the relationship breaks down, after the couple separates.

Such orders, however, are necessarily limited by the fact that they will only apply until a child turns 18. Other disadvantages include:

- seeking court orders, even when everyone involved consents, can be time-consuming and expensive;
- if a review of the parenting agreement means it is changed significantly, the orders may need to be changed to reflect this, meaning a return to the Family Court;

- the cost of doing this could act as a disincentive to properly reviewing the parenting agreement;
- obtaining a court order may shift everyone's focus to gaining and holding on to 'rights' and away from meeting everyone's needs.

Relationship breakdown

At present Part 9 of the *Property Law Act 1958* (Vic) regulates property disputes between domestic partners. Unfortunately it does so in a narrow, old-fashioned and inaccessible way, requiring the expensive involvement of the Supreme Court. This creates barriers for same-sex couples to access rights under the legislation, and the relevant provisions of Part 9 should be replaced by a scheme as near as practicable to that of the *Family Law Act.*

In 2004, the Victorian Government attempted to refer its powers to legislate with respect to the breakdown of same-sex relationships to the Federal Government.[12] The Federal Government has so far refused to accept this referral.

[12] *Commonwealth Powers (De Facto Relationships) Act 2004* (Vic).

Relationship recognition

Background

In 2005, the VGLRL undertook a survey to document the experiences of people in same sex relationships within the lesbian, gay, bisexual, intersex and queer (**LGBTIQ**) community in Victoria. The results of the survey were detailed in *Not Yet Equal: Report of the VGLRL Same Sex Relationships Survey 2005* (the **Not Yet Equal Report**).[13] The Not Yet Equal Report found:

- over 98 per cent of respondents supported legal recognition of same sex relationships[14];
- over three quarters felt that domestic partnership (currently available in Victoria) and federal same sex marriage should be available to same sex couples; and
- 60 per cent felt that registration of same sex relationships should be available.

Following this survey, the VGLRL decided that, in addition to lobbying the Federal Government on federal laws about relationship recognition it would lobby the Victorian Government for the establishment of civil unions and/or partnership registration in Victorian law. This policy elaborated upon the VGLRL's earlier position urging 'that, as an overriding principle, same sex domestic partnerships be recognised in law on an equal level with heterosexual partnerships'.

In March 2006, the Australian Research Centre in Sex, Health and Society released the results of a survey report, *Private Lives: A report of the health and wellbeing of GLBTI Australians* (**Private Lives**).[15] The results included the following:

Q: "Have you and your partner formalised your commitment through marriage or some other ceremony?"

- 10.3% females and 5.1% males had done so;
- 34.6% females and 25.8% males had not but planned to/would like to; and
- 39.3% females and 52.1% males had no intention to do so.

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[13] Ruth McNair and Nikos Thomacos, *Not Yet Equal: Report of the VGLRL Same Sex Relationships Survey 2005*, August 2005. (Accessible at http://www.vglrl.org.au/files/VGLRL%202005%20-%20SSRS%20Report.pdf)

[14] This level has been demonstrated repeatedly in Victorian LGBTIQ surveys over the past four years.

[15] Australian Research Centre in Sex, Health and Society and Gay and Lesbian Health Victoria, *Private Lives: A report of the health and wellbeing of LGBTI Victorians,* March 2006.

At first sight, these statistics are in contrast to the results from the Not Yet Equal Report. The question in Private Lives, however, was about marriage (not available to same-sex couples) and a 'ceremony', which has no legal status. This may shows that a significant proportion of same sex couples don't want to do something that provides them with no legal rights. As in Not Yet Equal, however, a significant number want formal recognition.

Victorian laws recognising relationships

The VGLRL was instrumental in the development and introduction of the *Statute Law Amendment (Relationships) Act 2001* (Vic) and the *Statute Law Further Amendment (Relationships) Act 2001* (Vic) which replaced the concept of ‘de facto spouse’ with the concept of ‘domestic partner’ for both same-sex and heterosexual couples in Victoria. This change recognised ‘the rights and responsibilities of partners in domestic relationships . . . irrespective of gender’.

These amendments were effective in removing discrimination against same-sex couples in a range of areas governed by Victorian law, including inheritance, property division and other entitlements.

While the VGLRL of course strongly supports these laws, we do recognise their inherent limitations. In particular, difficulties in proving a ‘domestic partnership’ in some circumstances can prevent same-sex couples from accessing legal entitlements. A same-sex couple will ordinarily have to provide evidence to establish their ‘domestic partnership’ for the purposes of matters such as property and estate settlement, life insurance and (state government) superannuation, or where the parties do not live together. The lack of a simple way of proving their relationship serves as an inhibitor to people claiming the rights that accrue to their relationship status. Married couples have a marriage certificate.

Furthermore, the requirements a same-sex couple must satisfy in order to access rights under the domestic partnership laws are greater than those required of a mixed sex couple who can marry. To be considered a ‘domestic partner’, the following circumstances must be considered:

- the duration of the relationship;
- the nature and extent of common residence;
- whether or not a sexual relationship exists;
- the degree of financial dependence or interdependence, and any arrangements for financial support, between the parties;
- the ownership, use and acquisition of property;
- the degree of mutual commitment to a shared life;
- the care and support of children; and
- the reputation and public aspects of the relationship.

By contrast, a married couple can marry and have their relationship recognised where there is free consent and their relationship is not prohibited by a familial relationship.

Finally, for the purposes of some rights, for example, inheritance on an intestacy, or property division upon a breakdown in a relationship, there is a requirement that domestic partners have lived together for two years before they have rights under that legislation. This means that domestic partners are not treated on the same basis as married couples who do not have to wait a two year period.

The VGLRL recognises that *Relationships Act 2003* (Tas) in Tasmania and the recently passed *Civil Unions Act 2005* (ACT) in the Australian Capital Territory (**ACT**) enable same-sex couples in those states to overcome the evidential burden in proving their relationship that exists in Victoria.[16] By having their relationship registered in Tasmania, or by entering into a civil union in the ACT, same-sex couples can access the rights by producing the registration extract or civil union certificate. Furthermore, in both those jurisdictions, same-sex couples can have their relationship registered or enter a civil union without having to satisfy the criteria outlined above. Instead, same-sex couples are treated on a like basis with mixed-sex couples who can marry. These schemes assist in overcoming many of the hurdles that currently operate in relation to same-sex couples wishing to have their relationship recognised.

VGLRL's policy on relationship recognition

VGLRL's preferred model for formal relationship recognition at the Federal level is marriage; that is, the marriage under the *Marriage Act 1961* (Cth) should be available to all those in same-sex relationships. We believe that this is the simplest and administratively the most effective way of ensuring equality of relationships whether they be same-sex or mixed-sex.

That said, we welcome the legislation of civil union arrangements in the ACT and in overseas jurisdictions as being a legitimate way of achieving equality and social justice for lesbians and gay men. We recognise that the various reasons some jurisdictions have elected to inscribe equality and social justice in legislation through the mechanism of civil unions rather than marriage. The VGLRL supports this, and supports the legislation of civil unions at the federal level, as a means to remove discrimination against same-sex couples.

[16] We note that the Federal Government has disallowed the ACT's Civil Unions Act pursuant to the *Australian Capital Territory (Self-Government) Act 1988* (Cth).