

Same-Sex: Same Entitlements

Discussion Paper 2006



Human Rights and Equal Opportunity Commission

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

**Discussion Paper
April 2006**

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



*Human Rights and
Equal Opportunity
Commission*

Entitlements and Benefits

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1 What is this Inquiry about?

This is an Inquiry into discrimination against same-sex couples regarding access to financial and work-related entitlements and benefits.

Many of Australia's laws exclude same-sex couples from financial and work-related entitlements and benefits that are enjoyed by heterosexual couples. For example, same-sex couples do not enjoy the same tax and health concessions as other de facto couples and they may not have the same rights to pensions and other social security benefits as heterosexual couples.

While the issue of marriage between same-sex partners has already attracted significant public discussion, there has been less public focus on the practical impact of Commonwealth, State and Territory laws on the daily lives of same-sex couples.

The primary purposes of this Inquiry are to:

- (a) conduct an audit of Commonwealth, State and Territory laws in order to develop a full list of circumstances in which there may be discrimination against same-sex couples, and any children of a same-sex couple, in the context of financial and work-related benefits and entitlements;
- (b) collect information about the impact of such laws on people in same-sex couples and any children of a same-sex couple; and
- (c) make recommendations to the Attorney-General and Parliament as to how to address any discrimination.

This is a vital step towards achieving equality before the law for all Australians.

2 What are the Terms of Reference for the Inquiry?

1. The President, Mr John William von Doussa QC, and the Human Rights Commissioner, Mr Graeme Gordon Innes AM, will conduct an inquiry (the Inquiry), on behalf of the Human Rights and Equal Opportunity Commission, into laws regarding financial and employment-related entitlements and benefits to consider the impact of those laws on:
 - (a) the equal enjoyment of human rights by people who are, or have been, a member of a same-sex couple and any children of a same-sex couple; and
 - (b) equality of opportunity and treatment in employment or occupation for people who are, or have been, a member of a same-sex couple.

2. The Inquiry's goals are to:
 - (a) ascertain whether relevant Commonwealth laws may be or are inconsistent with or contrary to any human right of people who are, or have been, a member of a same-sex couple and any children of a same-sex couple;
 - (b) ascertain whether relevant Commonwealth laws may have the effect of nullifying or impairing equality of opportunity and treatment in employment or occupation of people who are, or have been, a member of a same-sex couple;
 - (c) consider what effect relevant State and Territory laws have on the human rights of people who are, or have been, a member of a same-sex couple and any children of a same-sex couple;
 - (d) consider what effect relevant State and Territory laws have on the equality of opportunity and treatment in employment or occupation of people who are, or have been, a member of a same-sex couple.
3. The President and the Human Rights Commissioner will report, on behalf of the Commission, to the Minister the results of the Inquiry. That report may include recommendations as to action that should be taken by the Commonwealth and/or laws that should be made by the Parliament, in order to:
 - (a) protect and promote the equal enjoyment of human rights;
 - (b) protect and promote equality of opportunity and treatment in employment; and
 - (c) ensure that Australia is in compliance with the provisions of the *International Covenant on Civil and Political Rights*, the *Convention on the Rights of the Child* and the *Discrimination (Employment and Occupation) Convention 1958*.
4. For the purposes of the Inquiry, 'laws regarding financial and employment-related entitlements and benefits' shall be taken to include, but not be limited to, laws relating to taxation, social security, Medicare, concessions available under the Pharmaceutical Benefits Scheme, conditions of employment such as leave entitlements, compensation for workplace injuries, pensions, retirement benefits, superannuation, benefits payable to veterans of the Australian armed forces and intestacy.

3 What are the powers of the Commission to conduct this Inquiry?

The Commission was established by the *Human Rights and Equal Opportunity Commission Act 1986* (Cth) (*HREOC Act*). It is Australia's national human rights institution.

The functions of the Commission under the *HREOC Act*, relevant to this Inquiry, include:

- Examining Commonwealth laws to determine whether they:
 - may be or are inconsistent with or contrary to any human right (section 11(1)(e)); and/or
 - may be or have the effect of nullifying or impairing equality of opportunity and treatment in employment or occupation (section 31(a)).
- Promoting understanding, acceptance and public discussion of:
 - human rights in Australia (section 11(1)(g)); and
 - equality of opportunity and treatment in employment and occupation in Australia (section 31(c)).
- Reporting to the Attorney-General as to the laws that should be made, or action that should be taken, regarding:
 - matters relating to human rights (section 11(1)(j));
 - compliance with the provisions of the International Covenant on Civil and Political Rights (ICCPR) and the Convention on the Rights of the Child (CRC) (section 11(1)(k));
 - matters relating to equality of opportunity and treatment in employment and occupation (section 31(e)); and/or
 - compliance with the provisions of International Labour Organisation *Discrimination (Employment and Occupation) Convention* (ILO 111) (section 31(f)).

4 What is the Inquiry's intended methodology?

The primary mechanisms to gather information for this Inquiry will be through a call for submissions, holding of community forums and close consultation with government, non-government organisations, community groups and State and Territory Equal Opportunity Commissions and Anti-Discrimination Boards.

The submission process will be initiated by the launch of the Inquiry, on 3 April 2006, and the release of this Discussion Paper which identifies possible areas of discrimination and seeks public comment. The deadline for submissions has been extended until 16 June 2006.

In order to encourage the maximum possible participation from the public, individuals and organisations will have the opportunity to provide public or confidential submissions.

The Commission also intends to conduct forums around Australia to give the community the opportunity to make oral submissions and to allow individuals to relate their personal stories.

Following the close of the submission and consultation processes, the Inquiry will prepare a report containing findings and recommendations. The report will be tabled in Federal Parliament by the Attorney-General.

The Inquiry aims to transmit this report to the Attorney-General by the end of 2006.

A webpage on the Commission's website – <http://www.humanrights.gov.au/samesex/> – will provide updated information about the Inquiry and its progress. Submissions may also be posted on that website, unless there is a specific request not to do so.

5 How do I make a submission or tell my story?

The Commission strongly encourages submissions via email, preferably as a Word or text file.

However, comments can be provided to the Commission in any format, including email, floppy disk, hard copy, audio tape, video tape, CD or DVD.

5.1 What information should a submission include?

A variety of questions relating to financial and employment-related entitlements and benefits are listed throughout this Discussion Paper. Those questions are copied below for ease of reference.

However, the questions are intended as a guide only.

The Commission is interested in receiving any information relevant to discrimination against same-sex couples in the context of financial and work-related benefits and entitlements.

In particular, the Commission is interested in personal stories, general observations and legal analysis regarding any Australian laws that relate to financial and work-related benefits and entitlements.

Personal stories: guide for submissions

1. *The Commission encourages the submission of personal stories that describe:*

(a) situations where members of a same-sex couple have been denied financial or employment-related entitlements or benefits that are available to people in heterosexual relationships (married or de facto) because of Australian laws

(b) the impact on same-sex couples, and any children of same-sex couples, of being denied access to financial or employment-related entitlements or benefits that are available to heterosexual couples.

Relevant human rights principles: guide for submissions

2. *The Inquiry encourages submissions that discuss:*

(a) the application of the ICCPR, CRC and ILO 111 to same-sex couples, and any children of same-sex couples, regarding financial and work-related entitlements

(b) any other human rights principles which should be addressed by the Inquiry in the context of laws relating to financial and work-related entitlements of same-sex couples.

Commonwealth laws: guide for submissions

3. *The Inquiry encourages submissions that:*

(a) provide further information and analysis regarding the Commonwealth laws identified in Section 7 of this Discussion Paper

(b) identify additional Commonwealth laws which may discriminate against same-sex couples, and any children of same-sex couples, in the context of financial and work-related entitlements and benefits

(c) discuss examples of the impact that Commonwealth laws have had on the lives of same-sex couples and any children of same-sex couples

(d) make suggestions about how to rectify the discriminatory aspects of Commonwealth laws.

State and Territory laws: guide for submissions

4. *The Inquiry encourages submissions that provide:*

(a) information and analysis about State and Territory laws which discriminate against same-sex couples, and any children of same-sex couples, in the context of financial and work-related benefits and entitlements

(b) examples of the impact that discriminatory State and Territory laws have had on the lives of same-sex couples and any children of same-sex couples

(c) suggestions about how to rectify the discriminatory aspects of the State and Territory laws.

5.2 When are submissions due?

The deadline for submissions has been extended until **Friday, 16 June 2006**.

5.3 What will happen to my submission or story?

The Inquiry has a strong emphasis on transparency and would therefore like to publish as many of the submissions and stories as it can.

When you send your submission you will receive an acknowledgement of receipt. At that time you will be notified that submissions received in electronic format may be posted on the Inquiry's website unless you specifically indicate that you would like your name or your comments to be kept confidential (see below).

5.4 Can I make a confidential submission?

If you would like to tell the Inquiry about your views or experiences but do not want to do so publicly, you may either:

- (a) ask the Inquiry to keep your name confidential but allow the Inquiry to publish or use all of the content of your submission. Any references to your submission will then be identified by a number and the title: 'Name Withheld'.
- (b) ask the Inquiry to keep your name as well as some, or all, of the content of your submission confidential.
 - If some of the content of your submission is to remain confidential, your submission will be edited according to your instructions before publication. Any references to your submission will then be identified by a number and the title: 'Name Withheld'.
 - If all of the content of your submission is to remain confidential, your submission will not be published. No quotes will be made from your submission without your specific permission and any references to your submission will be identified by a number and the title: 'Confidential'.

Be sure to indicate your concerns clearly and be specific about what you would like the Inquiry to do with regards to confidentiality when you send in your submission.

As a matter of course, the Inquiry will edit your submission to protect the identity of any third parties you may refer to. The Inquiry will also remove personal contact details such as phone numbers, email and postal/street addresses from the body of your submission.

5.5 Where do I send my submission or story?

The Inquiry strongly encourages lodgement of submissions by email. You can email your submission to: samesex@humanrights.gov.au

However, submissions may also be sent in hard copy, floppy disk, audio tape, video tape, CD or DVD to:

Same-Sex Inquiry
Human Rights Unit
Human Rights and Equal Opportunity Commission
GPO Box 5218
Sydney NSW 2001

Further information about the Inquiry can be found at:
<http://www.humanrights.gov.au/samesex/>

If you have a question please email samesex@humanrights.gov.au

If you would like to speak to somebody in person, please call the Commission on (02) 9284 9600 or 1800 620 241 (TTY).

6 What are the human rights relevant to same-sex couples?

For the purposes of the *HREOC Act*, 'human rights' includes those rights set out in the *International Covenant on Civil and Political Rights* (ICCPR), the *Convention on the Rights of the Child* (CRC) and the *International Labour Organisation Discrimination (Employment and Occupation) Convention* (ILO 111).

Relevant human rights principles: guide for submissions

2. The Inquiry encourages submissions that discuss:

(a) the application of the ICCPR, CRC and ILO 111 to same-sex couples, and any children of same-sex couples, regarding financial and work-related entitlements

(b) any other human rights principles which should be addressed by the Inquiry in the context of laws relating to financial and work-related entitlements of same-sex couples.

6.1 Human rights protections under the ICCPR

The right to non-discrimination and the right to equality before the law are fundamental principles of international human rights law. Those principles are set out in articles 2 and 26 of the ICCPR.

Article 2(1) of the ICCPR requires Australia to respect and ensure the enjoyment of all the rights recognised in the ICCPR to all people without distinction of any kind:

Article 2(1)

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

Article 26 provides an even broader protection in that it applies to all laws and any field regulated by public authorities, regardless of whether those rights are specifically provided for in the ICCPR:¹

Article 26

All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or *other status*. (emphasis added)

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 26.²

However, it is not entirely clear whether discrimination on the basis of sexual preference comes under the ground of 'sex' discrimination or discrimination on the grounds of 'other status'. Some commentators suggest that 'sexual orientation' 'seems more properly classified as 'an other status', rather than as an aspect of one's gender'.³

Two of the cases heard by the UN Committee regarding discrimination on the basis of sexual preference relate to complaints made by Australians.

In *Toonen v Australia*, the UN Committee held that Tasmanian laws which prohibited homosexual behaviour breached the ICCPR. The Committee found

¹ General Comment 18, [12]

² *Young v Australia*, (941/00), at [10.4]

³ Joseph, Castan and Schultz, *The International Covenant on Civil and Political Rights: Cases, Materials and Commentary*, 2nd ed (2004), 691 [23.25].

that discrimination on the grounds of 'sex' in article 26 includes sexual orientation.⁴ The Tasmanian laws have now been repealed.

In *Young v Australia*, the UN Committee found that Australia's laws regarding veteran's benefits breach the ICCPR. The Committee stated that 'the prohibition against discrimination under article 26 comprises also discrimination based on sexual orientation'.⁵ The Committee made it clear that there was no reasonable and objective criteria to differentiate between same-sex and heterosexual couples when talking about the payment of veteran's entitlements.⁶ Those laws are still in force in Australia.

6.2 Human rights protections under the CRC

The CRC requires Australia to ensure that all children can enjoy their rights without discrimination. In particular, Australian children should not suffer any discrimination on the basis of the 'status' of their parents:

Article 2(2)

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

Where laws relating to financial and work-related entitlements have the effect of disadvantaging any children of same-sex couples, when compared with children of heterosexual couples, those laws may breach article 2(2) of the CRC.

6.3 Human rights protections under ILO 111

ILO 111 requires Australia to ensure 'equality of opportunity and treatment in respect of employment and occupation, with a view to eliminating any discrimination in respect thereof.'

Section 31 of the *HREOC Act* seeks to implement ILO 111 by granting the Commission a variety of functions to address equal opportunity and or treatment in employment and occupation.

While the definition of discrimination in ILO 111 does not specifically include discrimination on the basis of sexual preference, the *Human Rights and Equal Opportunity Regulations* make it clear that for the purposes of the *HREOC Act*, 'discrimination' includes discrimination on the grounds of sexual preference.

⁴ *Toonen v Australia* (488/92),

⁵ *Young v Australia* (941/00), at [10.4]

⁶ *General Comment 18*, [7]; see also *Broeks v The Netherlands* 172/84, [13]

7 Which Commonwealth laws may discriminate against same-sex couples in the context of this Inquiry?

Laws that differentiate between same-sex couples and heterosexual couples are not necessarily discriminatory. However, the UN Human Rights Committee has observed that where there is a differentiation between two groups, the criteria for such differentiation must be 'reasonable and objective' and 'the aim is to achieve a purpose which is legitimate'.⁷

In the context of financial and work-related benefits and entitlements there are a variety of laws that exclude same-sex couples for no readily apparent reason.

Much of the discriminatory effect of the legislation identified below stems from definitions of the term 'spouse', 'partner' or 'dependent' which explicitly exclude people in same-sex relationships. Where those terms are not defined in legislation, the common law has interpreted those terms to exclude same-sex couples.⁸

The following is a preliminary list and discussion of Commonwealth laws that seem to be discriminatory against same-sex couples, and in some cases their children, in the context of financial and work-related entitlements. *This is not intended to be an exhaustive list.* Rather, the information in this section is intended to provide some background for those individuals and organisations interested in making a submission to the Inquiry.

The Inquiry encourages submissions which discuss further discriminatory aspects of the laws mentioned below and identify additional discriminatory laws. The Inquiry also encourages individuals to provide examples of how the laws have impacted on their daily lives.

⁷ General Comment No. 18 (1989), [13].

⁸ See, for example, *Commonwealth v Human Rights and Equal Opportunity Commission* (1998) 52 ALD 507.

Commonwealth laws: guide for submissions

3. *The Inquiry encourages submissions that:*

(a) *provide further information and analysis regarding the Commonwealth laws identified in Section 7 of this Discussion Paper*

(b) *identify additional Commonwealth laws which may discriminate against same-sex couples, and any children of same-sex couples, in the context of financial and work-related entitlements and benefits*

(c) *discuss examples of the impact that Commonwealth laws have had on the lives of same-sex couples and any children of same-sex couples*

(d) *make suggestions about how to rectify the discriminatory aspects of Commonwealth laws.*

7.1 Workplace leave and other entitlements

One of the objects of the *Workplace Relations Act 1996* (*Workplace Relations Act*) is to help 'to prevent and eliminate discrimination on the basis of ... sexual preference.'⁹ However, the Commission is concerned that discriminatory provisions may still exist in the legislation.

Changes to the *Workplace Relations Act*, which were introduced in 2005 in the *Workplace Relations Amendment (Work Choices) Act 2005* (*Work Choices Act*), commenced operation on 27 March 2006. These changes do not appear to have substantially changed provisions that discriminate against people in same-sex couples.

For example, those provisions providing for a 'guarantee of paternity leave' apply only to a 'male employee' who is the 'spouse' of a woman giving birth.¹⁰ This would seem to exclude female partners of women giving birth to children.

Other areas of discrimination in certain awards may include:

- entitlements to carer's leave and bereavement leave for a same-sex partner
- entitlements to take leave at the same time as a 'spouse'
- health insurance – some employer-nominated schemes may only be open to employees and 'spouses'
- additional employment benefits included in a salary package, such as work travel or staff discounts for an employee's 'immediate family'.

⁹ *Workplace Relations Act 1996*, s3(m).

¹⁰ *Workplace Relations Act 1996*, s.282(1)

7.2 Social security benefits

The eligibility criteria for many of the benefits and entitlements under the *Social Security Act 1991* refer to the existence of assets of a 'partner' or 'member of a couple.' The *Social Security Act* defines a 'partner' as the other 'member of a couple'.¹¹ And a person is only a 'member of a couple' if he or she is of the opposite sex.¹²

Some types of social security benefit appear to be limited to 'members of a couple' (or former members of a couple), including:

- partner bereavement payments by which a person's pension or entitlement continues to be paid to their partner for the duration of a bereavement period¹³
- widow allowance,¹⁴ which entitles the woman in a couple to an employment or education entry payment if she commences employment¹⁵ or study¹⁶
- access to health care cards and pensioner concession cards.¹⁷

Further, qualification criteria for a parenting payment will be different for members of a same-sex partnership because neither is a 'member of a couple'.¹⁸ And a woman in a same-sex couple will not get the benefit of the simpler qualification criteria for an age pension on the death of her partner.¹⁹

7.3 Tax concessions

There are a range of tax concessions which are available to heterosexual couples but not same-sex couples.

7.3.1 Tax rebates

The definition of 'spouse' under the *Income Tax Assessment Act 1936* (the *Income Tax Act*) excludes same-sex couples from the benefit of a variety of tax rebates.

The *Income Tax Act* defines a 'spouse' to include 'another person who, although not legally married to the person, lives with the person on a *bona*

¹¹ *Social Security Act 1991*, s4(1).

¹² *Social Security Act 1991*, s4(2)(b)(i),.

¹³ *Social Security Act 1991*, ss83, 146G, 189, 238, 315, 514B, 567A, 592A, 660LB, 660XKB, 660YKD, 728PB, 768B, 771NU, 771NW and 823.

¹⁴ *Social Security Act 1991*, s408BA

¹⁵ *Social Security Act 1991*, s664AAA

¹⁶ *Social Security Act 1991*, s665ZC

¹⁷ *Social Security Act 1991*, s6A

¹⁸ *Social Security Act 1991*, s500B, 500C and 500V.

¹⁹ *Social Security Act 1991*, s43(1A).

fide domestic basis as the husband or wife of the person.²⁰ The definition of 'relative' includes a 'spouse' and the definition of 'resident' also relies on the definition of 'spouse'. Further, for the purpose of eligibility for rebates, a 'dependent' includes the taxpayer's 'spouse' or the parent of their 'spouse'.²¹

Since a same-sex partner is not understood to be a 'husband' or 'wife', same-sex couples will fall outside the definition of 'spouse', 'resident', 'relative' and 'dependent.' They are thereby excluded from accessing the following rebates, amongst others:

- rebates for 'dependents'²²
- rebates for a housekeeper caring for certain 'dependents' of the taxpayer²³
- rebates for medical expenses incurred by the taxpayer's 'dependents'²⁴
- rebates for superannuation made on behalf of a low income or non-working 'spouse'²⁵
- pensioner rebate, including pensions which same-sex couples are not eligible to receive.²⁶

Same-sex couples may also be denied access to the child care rebate. Under the *A New Tax System (Family Assistance) Act 1999*, the terms 'partner' and 'member of a couple' are defined in the same way as they are in the *Social Security Act 1991* (see section 7.2 above).

The *Family Assistance Act* only permits individuals and their 'partners' to receive the child care rebate. Therefore a person in a same-sex relationship may not be reimbursed for any payment of his or her partner's child care costs.²⁷

7.3.2 Medicare levy

The *Medicare Levy Act 1986* provides that married couples and people entitled to certain rebates under the *Income Tax Act* can pay a reduced Medicare levy if their combined income is beneath the family income thresholds.²⁸ The relevant definitions of 'spouse' and 'dependent' exclude same-sex partners.²⁹

²⁰ *Income Tax Assessment Act 1936*, s6

²¹ *Income Tax Assessment Act 1936*, s159J.

²² *Income Tax Assessment Act 1936*, s159J.

²³ *Income Tax Assessment Act 1936*, s159L.

²⁴ *Income Tax Assessment Act 1936*, s159P.

²⁵ *Income Tax Assessment Act 1936*, s159T.

²⁶ *Income Tax Assessment Act 1936*, ss159T, 160AAA

²⁷ *A New Tax System (Family Assistance) Act 1999*, s42.

²⁸ *Medicare Levy Act 1986*, s8.

²⁹ *Income Tax Assessment Act 1936*, ss6, 251R; *Medicare Levy Act 1986*, s3.

A New Tax System (Medicare Levy Surcharge – Fringe Benefits) Act 1999 calculates a Medicare levy surcharge payable on a person's fringe benefits. The threshold amount will be discounted if that person is married to someone who also has a taxable income.³⁰ The Act provides that de facto couples are treated as if married, but only if they consist of a man and a woman who have lived together as husband and wife on a bona fide domestic basis for a period.³¹

Finally, the Medicare levy is charged at different rates to persons without private health cover depending on their income and whether they are married and have 'dependents'.³² Again, people in same-sex relationships are excluded from consideration for these variable rates.

7.4 Health concessions

Laws dealing with the Pharmaceutical Benefits Scheme (PBS) and Medicare provide certain benefits to heterosexual couples but not same-sex couples.

7.4.1 Pharmaceutical Benefits Scheme

The *National Health Act 1953* 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*.³³ When a card is issued to a person, it also covers members of that person's family.³⁴ 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.³⁵ 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.³⁶ The definition of 'spouse' includes a 'de facto spouse' but a 'de facto spouse' must be of the opposite sex.³⁷ It therefore appears that a same-sex couple will be denied access to these health concessions.

³⁰ *A New Tax System (Medicare Levy Surcharge – Fringe Benefits) Act 1999*, s14.

³¹ *A New Tax System (Medicare Levy Surcharge – Fringe Benefits) Act 1999*, s7.

³² *Medicare Levy Act 1986*, ss8B-8D; *A New Tax System (Medicare Levy Surcharge – Fringe Benefits) Act 1999*, ss13-15.

³³ *National Health Act 1953*, s84C.

³⁴ *National Health Act 1953*, s84G.

³⁵ *National Health Act 1953*, s84C.

³⁶ *National Health Act 1953*, s84B.

³⁷ *National Health Act 1953*, ss4, 84B.

7.4.2 Medicare safety nets

Like the PBS, the Medicare safety-net meets the medical expenses of individuals, couples or families who spend above the relevant threshold.

Medicare benefits are set out in the *Health Insurance Act 1973*. The Medicare safety-net covers the gap between the cost of a medical service and the Medicare Schedule fee.³⁸ 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.³⁹

Under the *Health Insurance Act*, a family can only be made up of a person, their 'spouse' and their children.⁴⁰ A 'spouse' is a person legally married to, and living together with, the other person; or 'a de facto spouse of that person'.⁴¹ 'De facto spouse' is not defined but has been interpreted by courts to exclude same-sex couples.

7.5 Superannuation entitlements

In 2004, the *Superannuation Industry (Supervision) Act 1993* was amended by broadening the definition of 'dependent' to include 'interdependency relationships'.⁴² That definition reads as follows:

- ... for the purposes of this Act, 2 persons (whether or not related by family) have an *interdependency relationship* if:
- (a) they have a close personal relationship; and
 - (b) they live together; and
 - (c) one or each of them provides the other with financial support; and
 - (d) one or each of them provides the other with domestic support and personal care.⁴³

These amendments mean that, generally speaking, same-sex partners are entitled to receive the same superannuation benefits as married or heterosexual de facto partners. The amendments also equalise the tax treatment of superannuation death benefits.⁴⁴

However, specific legislation applicable to Commonwealth employees, members of the Australian Defence Force and parliamentarians still appears to discriminate against same-sex partners.

³⁸ *Health Insurance Act 1973*, s10AC.

³⁹ *Health Insurance Act 1973*, s10ACA.

⁴⁰ *Health Insurance Act 1973*, s10AA(1).

⁴¹ *Health Insurance Act 1973*, s10AA(7).

⁴² *Superannuation Industry (Supervision) Act 1993*, ss10 and10A.

⁴³ *Superannuation Industry (Supervision) Act 1993*, s10A

⁴⁴ *Income Tax Assessment Act 1936*, ss27A, 27AAB.

7.5.1 Superannuation for Commonwealth employees

The *Superannuation Act 1976* (Cth) states that, on the death of an eligible Commonwealth employee, his or her 'spouse' is entitled to a lump sum or pension benefit.⁴⁵

The legislation defines a 'spouse who survives a deceased person' as someone who had a 'marital relationship' with the person at the time of death.⁴⁶ A 'marital relationship' is one where 'the person ordinarily lived with that other person as that other person's husband or wife on a permanent and *bona fide* domestic basis at that time.'⁴⁷ This appears to exclude same-sex couples.

Further, under the *Superannuation Act 1990*, a 'spouse' is entitled to a reversionary pension on the death of a retirement pensioner.⁴⁸ Again, a 'spouse' is defined as someone who was either married to the deceased or 'a person ... who, for a continuous period of not less than 3 years immediately before the person's death, had ordinarily lived with the person as the person's husband or wife, as the case may be, on a permanent and *bona fide* domestic basis.'⁴⁹

7.5.2 Superannuation for Australian Defence Force (ADF) members

The *Defence Force Retirement and Death Benefits Act 1973* provides for a 'spouse' to receive pensions on the death of a contributing member or a recipient member.⁵⁰ A 'spouse' must have been in a 'marital relationship' at the time of death, the definition of which is limited to 'husband' and 'wife'.⁵¹

Further the *Military Superannuation and Benefits Rules* scheduled to the *Military Superannuation and Benefits Act 1991* entitles a 'spouse' and children to payment of the deceased's superannuation benefit.⁵² 'Spouse' is defined the same way as under the *Superannuation Act 1990*, which is discussed above.⁵³

7.5.3 Superannuation for Parliamentarians

⁴⁵ *Superannuation Act 1976*, ss 81, 89, and 93.

⁴⁶ *Superannuation Act 1976*, s8B.

⁴⁷ *Superannuation Act 1976*, s8A.

⁴⁸ *Superannuation Act 1990*, The Schedule, *Rules for the administration of the Superannuation Scheme*, rr5.1.1 and 5.2.1.

⁴⁹ *Superannuation Act 1990*, *Rules for the Administration of the Superannuation Scheme*, r1.1.1.

⁵⁰ *Defence Force Retirement and Death Benefits Act 1973*, ss38-39.

⁵¹ *Defence Force Retirement and Death Benefits Act 1973*, ss6A, 6B.

⁵² *Military Superannuation and Benefits Act 1991*, *Military Superannuation and Benefits Rules*, r1, Part 5, sub-rules 38, 41, 46 and 47

⁵³ *Military Superannuation and Benefits Act 1991*, *Military Superannuation and Benefits Rules*, Schedule 1 r2, Part 5, sub-rule 9.

The *Parliamentary Contributory Superannuation Act 1948* (Cth) provides that an annuity is payable to a 'spouse' on the death of a person entitled to a parliamentary allowance.⁵⁴

The relevant definitions of 'spouse' are identical to the provisions in the *Superannuation Act 1990* discussed above.⁵⁵

7.6 Workers compensation under Comcare

Comcare provides workers compensation benefits to Commonwealth employees pursuant to the *Safety, Rehabilitation and Compensation Act 1988*.

The definition of 'spouse' clearly excludes same-sex partners by referring to 'a person of the opposite sex' who lives or lived with the employee on a *bona fide* basis.⁵⁶ The definition of 'dependent' includes a 'spouse' and various relatives of the employee, but does not mention same-sex partners.

Amongst other possible effects, these definitions mean that if a Commonwealth employee dies of a work-related injury, a same-sex partner is not entitled to a payment that would otherwise be available to 'dependents' of the employee.⁵⁷

7.7 Pensions and compensation for veterans

Recent changes to end discrimination against members of the Australian Defence Force (ADF) (including Reserve Forces) relate to serving members but do not affect the issue of veterans' benefits and entitlements.

On 1 December 2005 the Government amended the definition of 'dependent' to include a member's 'interdependent partner'.⁵⁸ 'Interdependent partner' is 'a person who, regardless of gender, is living in a common household with the member in a bona fide, domestic, interdependent relationship, although not legally married to the member'. 'Common household' is defined as a 'home in which the member and their partner normally live and in which they have pooled a significant amount of their household possessions for joint use as a consequence of establishing the partnership'.

It therefore seems that currently serving defence personnel in same-sex relationships do have access to the same entitlements as personnel in heterosexual relationships.

⁵⁴ *Parliamentary Contributory Superannuation Act 1948*, s19.

⁵⁵ *Parliamentary Contributory Superannuation Act 1948*, ss4B, 4C.

⁵⁶ *Safety, Rehabilitation and Compensation Act 1988*, s4

⁵⁷ *Safety, Rehabilitation and Compensation Act 1988*, s17. See also s19 regarding compensation for injuries that incapacity but not death.

⁵⁸ Defence Instruction (General) Personnel 53-1. The Instruction sets out the conditions of service entitlements to current members of the Australian Defence Forces.

However same-sex partners cannot receive veterans' pensions and compensation entitlements paid to the 'spouse' of a former ADF member.

7.7.1 Veterans' pensions and benefits

The *Veterans' Entitlements Act 1986* confers a number of financial benefits on veterans, their 'dependents' and their 'partners'.

A 'partner' means the other 'member of a couple' and a person is a 'member of a couple' if they are either legally married, or are living with a person of the *opposite sex* 'in a marriage-like relationship', in the opinion of the Repatriation Commission.⁵⁹

A 'dependent' of a veteran is a 'partner', 'widow', 'widower' or child of the veteran.⁶⁰

A 'widow' is a woman who was a partner of a man immediately before he died, while a 'widower' is a man who was a partner of a woman immediately before she died.⁶¹

These definitions exclude same-sex partners from the following range of benefits otherwise granted to a heterosexual 'partner' or 'dependent':

- the pension available to 'dependents' of veterans if the veteran dies or is incapacitated in war or from war-related causes⁶²
- access to 'partner' service pensions,⁶³ which may also give rise to a pension bonus,⁶⁴ medical treatment at Departmental expense,⁶⁵ and a one-off education entry payment⁶⁶
- calculation of pension in arrears if this affects the veteran's 'partner's' social security payments⁶⁷
- a special pension rate available to 'widows' and 'widowers', which also entitles them to a pharmaceutical allowance⁶⁸
- a veteran's 'partner' can make a claim that the veteran performed military service, making them eligible to receive veterans' entitlements⁶⁹

⁵⁹ *Veterans' Entitlements Act 1986*, ss 5(1), 5E(2).

⁶⁰ *Veterans' Entitlements Act 1986*, s11.

⁶¹ *Veterans' Entitlements Act 1986*, s5E(1).

⁶² *Veterans' Entitlements Act 1986*, s13.

⁶³ *Veterans' Entitlements Act 1986*, s38

⁶⁴ *Veterans' Entitlements Act 1986*, s45TC

⁶⁵ *Veterans' Entitlements Act 1986*, s53D

⁶⁶ *Veterans' Entitlements Act 1986*, s118AA

⁶⁷ *Veterans' Entitlements Act 1986*, s27A.

⁶⁸ *Veterans' Entitlements Act 1986*, ss30, 118A.

⁶⁹ *Veterans' Entitlements Act 1986*, s35C.

- ‘dependents’ are entitled to medical treatment at Departmental expense from the date of the veteran’s death from war-related causes⁷⁰
- war ‘widows’ and ‘widowers’ may be eligible for an income support supplement⁷¹ which entitles them to fringe benefits,⁷² including a utilities allowance⁷³ and a telephone allowance⁷⁴
- where the ‘partner’ of a veteran pensioner is also receiving a veterans’ or social security pension, they are protected from any financial disadvantages caused by the ‘partner’s’ death during a 98-day bereavement period⁷⁵
- ‘widows’ and ‘widowers’ of veterans who were receiving disability payments are also entitled to bereavement payments on the death of the veteran⁷⁶
- war ‘widows’ and ‘widowers’ and a veteran’s ‘partner’ are eligible for a seniors health card if they meet certain requirements⁷⁷
- the Repatriation Commission has discretion to grant special assistance or benefits to a ‘dependent’ of a veteran.⁷⁸

As discussed in section 6.1 above, in 2003 the UN Human Rights Committee found that Australia’s denial of veterans’ pensions to same-sex couples constituted a breach of Article 26 of the ICCPR.⁷⁹

The UN Committee recommended that Australia remedy the situation by amending the law to prevent the breach recurring, and gave Australia 90 days to provide the Committee with plans to this effect. The Government did not respond.

7.7.2 Compensation for veterans

The *Military Rehabilitation and Compensation Act 2004* provides for compensation and other benefits to be paid to the ‘dependents’ of ADF members whose death was the result of severe injuries or disease acquired in the course of service.⁸⁰

⁷⁰ *Veterans’ Entitlements Act 1986*, s86.

⁷¹ *Veterans’ Entitlements Act 1986*, s45A.

⁷² *Veterans’ Entitlements Act 1986*, s53A.

⁷³ *Veterans’ Entitlements Act 1986*, s118OA

⁷⁴ *Veterans’ Entitlements Act 1986*, s118Q.

⁷⁵ *Veterans’ Entitlements Act 1986*, Part III B, Division 12A, Subdivision B.

⁷⁶ *Veterans’ Entitlements Act 1986*, s98A.

⁷⁷ *Veterans’ Entitlements Act 1986*, s118V.

⁷⁸ *Veterans’ Entitlements Act 1986*, s106.

⁷⁹ *Young v Australia*, (941/00), at [10.4]

⁸⁰ *Military Rehabilitation and Compensation Act 2004*, s12.

The legislation defines, 'dependent' to be the member's 'partner', parent, child or another relative. A 'partner' does not have to be legally married to the member, but must be of the opposite sex.⁸¹

Thus same-sex partners will not have access to the compensation available to wholly dependent 'partners' on the death of the veteran,⁸² including compensation for financial advice,⁸³ a telephone allowance⁸⁴ and medical treatment.⁸⁵

'Partners' who are not wholly dependent on the veteran are entitled to reasonable compensation not exceeding \$60,000. This compensation is not available to a same-sex partner.⁸⁶

7.8 Travel Entitlements for Parliamentarians

The *Parliamentary Entitlements Act 1990* sets out a variety of benefits that may be enjoyed by the 'spouse' of a Member of the Commonwealth Parliament. As noted above, the common law definition of 'spouse' excludes same-sex couples.

One example of a benefit only available to a 'spouse' includes the right of a Member of Parliament to exchange a business class air ticket for two economy class tickets so that his or her 'spouse' can accompany the Member on the business trip.⁸⁷

Some parliamentary allowances and entitlements are provided by Determinations made by the Remuneration Tribunal, pursuant to the *Remuneration Tribunal Act 1973*.⁸⁸ Examples of potentially discriminatory Determinations made by that Tribunal include:

- senators and members who will be reimbursed for the cost of hire cars and charter aircraft may be accompanied by a 'spouse' and/or staff⁸⁹
- members entitled to financial assistance for overseas travel for study purposes will be covered for the fares, accommodation and subsistence costs of a 'spouse' only⁹⁰

⁸¹ *Military Rehabilitation and Compensation Act 2004*, s5.

⁸² *Military Rehabilitation and Compensation Act 2004*, s233.

⁸³ *Military Rehabilitation and Compensation Act 2004*, s239.

⁸⁴ *Military Rehabilitation and Compensation Act 2004*, s245.

⁸⁵ *Military Rehabilitation and Compensation Act 2004*, s284.

⁸⁶ *Military Rehabilitation and Compensation Act 2004*, ss262-3.

⁸⁷ See Clause 9(2) of Schedule 1. Under the *Parliamentary Entitlement Regulations 1997*, members travelling overseas who are representing a Minister or the Government (Reg 3B(3)(a)) or Australia, (Reg 3C(2)(f)) are entitled to, inter alia, 'the cost of travel overseas by the member's spouse when accompanying the member, if the Prime Minister approves'

⁸⁸ *Remuneration Tribunal Act 1973*, s 7.

⁸⁹ *Determination 2005/09*, cl 6.5.

⁹⁰ *Determination 2005/09*, cl 9.1(d)(ii). Clause 9.12 stipulates that for the purposes of clauses 9.1-9-11, 'spouse' has the same meaning as in the *Parliamentary Entitlements Act 1990*.

- where a minister's or office holder's 'spouse' travels with them at government expense, an additional \$10 a night travelling allowance is payable.⁹¹

The Tribunal's Determinations regarding senior public servants are quite different to those made in respect of parliamentarians. In those determinations, 'partner' means 'any person who lives with the office holder on a genuine domestic basis as the partner of the office holder' and there is no specificity regarding sex.⁹² Travel entitlements for senior public servants include the right of a 'partner' or 'spouse' to travel with an office holder. Thus, for senior public servants, it appears that same-sex partners are entitled to the same benefits as de facto heterosexual partners.

7.9 Judicial pensions

Under the *Judges Pensions Act 1968* (Cth), a 'spouse who survives a deceased judge' is entitled to 62.5% of the Judge's pension entitlement.⁹³ The definition of 'spouse who survives a deceased judge' includes a person who was in a 'marital relationship' with the judge at the relevant time.⁹⁴

Under the Act, a person is considered to be in a 'marital relationship' if 'the person ordinarily lived with that other person as that other person's husband or wife on a permanent and *bona fide* domestic basis'.⁹⁵

It is not necessary for the husband or wife to be legally married to the Judge as long as they have been living together for more than three years and the Attorney-General is satisfied that, amongst other things, the person was wholly dependent on the Judge, they had a child by birth or adoption and they jointly owned a home which was their usual residence.⁹⁶

The use of the terms 'husband' and 'wife' in the Act appears to exclude same-sex relationships.

⁹¹ *Determination 2005/08 Members of Parliament – Travelling Allowance*, cl 2.8.

⁹² *Determination 2004/03 – Official Travel by Office Holders*, cl 1.5.7, 1.10. These travel entitlements also apply to specified statutory officers under clause 3.1 of the *Determination 2005/03 Specified Statutory Officers – Remuneration and Allowances*.

⁹³ *Judges Pension Act 1968*, ss7-9.

⁹⁴ *Judges Pension Act 1968*, s4AC.

⁹⁵ *Judges Pension Act 1968*, s4AB(1).

⁹⁶ *Judges Pension Act 1968*, s4AB(2).

8 Which State and Territory laws discriminate against same-sex couples in the context of this Inquiry?

In addition to the Commonwealth laws discussed in the previous section, there are a myriad of State and Territory laws which determine the financial and work-related benefits and entitlements enjoyed by Australians.

A preliminary analysis indicates variation between each State and Territory regarding the extent to which same-sex couples enjoy the financial and work-related entitlements enjoyed by heterosexual couples.

Given the variability between States and Territories, and the vast number of relevant statutes, this Discussion Paper does not attempt to canvas all the relevant issues or identify the State and Territory legislation which may be discriminatory.

However, to provide a starting point, the following are just some of the areas to explore in State and Territory laws:

- intestacy, wills and family provision claims
- workers compensation schemes
- motor accident compensation
- compensation due to criminal injury or tort liability
- public sector superannuation schemes
- division of property on separation
- stamp duty exemptions.

The Inquiry strongly encourages submissions which identify and analyse any State and Territory laws which may discriminate against same-sex couples with respect to financial and work-related entitlements and benefits.

The Inquiry also encourages personal stories about the impact that such discrimination may have had on same-sex couples.

State and Territory laws: guide for submissions

4. The Inquiry encourages submissions that provide:

(a) information and analysis about State and Territory laws which discriminate against same-sex couples, and any children of same-sex couples, in the context of financial and work-related benefits and entitlements

(b) examples of the impact that discriminatory State and Territory laws have had on the lives of same-sex couples and any children of same-sex couples.

9 Concluding remarks

This Discussion Paper provides some background information for those individuals and organisations interested in contributing to the Inquiry process.

The material in this Discussion Paper does not represent any finalised research, nor is it intended to limit the scope of submissions. Rather, the paper is intended to provide guidance on the types of issues that the Inquiry is interested in exploring in more detail.

The Inquiry will be relying on input from government and the community to identify a full list of Commonwealth, State and Territory laws that may discriminate against same-sex couples in the context of financial and work-related entitlements. The Inquiry encourages suggestions about how to rectify the discriminatory aspects of those laws and it is particularly interested in hearing stories about the impact of those laws on people in same-sex relationships.

Section 5 of this paper provides information on how to make submission or tell your story to the Inquiry. Any further questions should be sent by email to samesex@humanrights.gov.au