

Same-Sex: Same Entitlements

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



Areas of Federal Law that Exclude Same-Sex Couples and their Children

Research Paper

A research paper for the Human Rights and Equal Opportunity
Commission's *National Inquiry into Discrimination against
People in Same-Sex Relationships: Financial and Work-Related
Entitlements and Benefits*.

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INTRODUCTION

The Scope of this Research Paper

This research paper outlines all federal legislation that grants rights and entitlements to couples and families, and, in some instances, imposes obligations on them. In all, more than 60 statutes and regulations are examined.¹ The research is current as at 1 September 2006.

This research was commissioned by the Human Rights and Equal Opportunity Commission as part of the *National Inquiry into Discrimination against People in Same-Sex Relationships: Financial and Work-Related Entitlements and Benefits (Same Sex: Same Entitlements)*. The research was conducted by Associate Professor Jenni Millbank.

The objective of the research is to gather, in one place, information about federal financial and work-related entitlements for same-sex couples. The paper seeks to inform debate and to prompt further comment about the issues discussed.

This research is not the final report of the Inquiry and does not include any final recommendations of the Inquiry.

Some tentative suggestions for definitions of couples and parent-child relationships are outlined in the Appendices. These are options for discussion rather than recommendations. They are included to generate comment about whether they are workable, useful, or desired alternatives to the current law.

Any views expressed in this paper are those of the author, not the Commission.

An electronic copy of this paper, and a discussion paper summarising this paper, can be found on the Commission's website at:

<http://www.humanrights.gov.au/samesex/index.html>

Organisation of this Research Paper

The paper is thematically organised, with each piece of legislation listed under a subject area, such as health, employment or retirement. The paper is organised in this way so that readers can go directly to an area of interest, which may be regulated by several different statutes, and gain an overview of how couples are treated in that context.

¹ Several Acts, although still technically in force, are not analysed in detail in this paper because they have extremely limited operation. Such Acts are noted in footnotes for completeness. For example, the *Home Savings Grant Act 1964* (Cth) and *Home Deposit Assistance Act 1982* (Cth), which provided federal funds to assist with the purchase of a first home, accepted no new applications after 1 January 1987. It is notable that first home-buyer funds which are provided in a cooperative arrangement with state governments are regulated by state law, using definitions of spouse now common in state law but still alien to federal law. So, for example, the *First Home Owners Grant 2000* (NSW) s 6(1) defines spouse to include a de facto relationship within the meaning of the *Property (Relationships) Act 1984* (NSW), which includes same-sex couples.

Legislation Grants Both Rights and Obligations

Most of the legislation discussed in this paper grants rights and entitlements, based on a recognised relationship, which are either directly or indirectly of financial benefit to the people concerned. Many of these benefits are employment-related, for instance: the right to take leave to care for a partner; to pay a lower rate of tax on earnings based on a partner's dependence or medical costs; or the right to directly inherit a partner's superannuation or pension benefits on death.

A wide range of other benefits are indirectly financially beneficial, for example the right to migrate to Australia as the partner of a skilled migrant without needing to meet the eligibility criteria independently. The rights granted under the statutes discussed in this paper are overwhelmingly *beneficial*.

However there are also a number of statutes that impose *obligations* based on a recognised relationship. The most common form of obligation is in taxation- and investment-related legislation, where a person cannot use their spouse or family members for sham transactions to avoid tax or as a "front" to gain control of a company. One area where relationship recognition brings *both* benefits and obligations, with a significant impact upon individuals, is social security law. It is notable that social security was the first area of federal law to recognise heterosexual de facto relationships, as early as 1920.²

The Categories of Relationship-based Rights

The most common relationship-based terms in federal law are "spouse" and "child". Many statutes also include broader categories such as "relatives", "dependants", "associates" and, in a few instances, "members of a household". However these broader terms always *include* "spouse" and "child" within them.

Spouse and child are the key categories in law and the main focus of discussion in this research paper.

Additional Information in the Appendices

Appendix I is an alphabetical list of all federal legislation noting the sections that would need to be amended in order to include same-sex couples and their children. This list specifies only which sections would need to be replaced, not the definitions they would be replaced with.

Appendix II is a collection of comparative definitions of de facto relationships. This information is drawn together so that the reader may see how couple relationships are defined across all state and federal law in Australia.

Table 1 in Appendix II outlines the terms, definitions and criteria used for couple relationships in state and territory law.

Table 2 in Appendix II lays out all available definitions of couple relationships present within federal law and indicates the legislation in which each definition

² See discussion in NSW LRC, *De Facto Relationships*, Report 36 (1983).

appears. Where qualifying criteria are used in conjunction with a definition, these are also included.

Throughout the research paper, when couple-based definitions are used, such as “de facto spouse”, these are cross-referenced to the tables laid out in Appendix II. The reader can look to Appendix II to see the full text of any couple definition and also see at a glance the other legislation in which it appears.

Appendix II also includes a possible option for a harmonious definition and set of criteria for de facto relationships, drawing on key elements from state and territory law. Comment is invited on this form of definition.

Appendix III briefly outlines some of the issues in defining parent-child relationships in same-sex families. This includes a series of possible options for an inclusive approach to the definition of “child”. Defining parent-child relationships is a far more complex legislative and policy question than defining couple relationships, due to the diversity of family forms in question. The options laid out provide only a very basic framework. Comment is invited on the options.

QUESTIONS FOR CONSIDERATION

This paper contains detailed information about discrimination against same-sex couples in accessing work-related and financial entitlements, which are found within federal legislation.

The Human Rights and Equal Opportunity Commission encourages further submissions to the *Same-Sex: Same Entitlements* Inquiry in response to this paper.

In particular, the Commission is interested in responses to any or all of the following questions:

- Can you identify any discriminatory federal legislation, regulation or policy that we have missed in our research?
- Can you clarify how any of the discriminatory provisions described in this paper work in practice?
- Do you have a personal experience which illustrates the impact of any of the laws described in this paper?
- Do you have any comments about the suggested definition of “de facto relationship” in federal law (see Appendix II)?
- Do you have any comments about the suggested options for recognising a “child” in federal law (see Appendix III)?
- Do you have any recommendations about how to address the discrimination described in this paper?

The deadline for comments is **3 November 2006**.

Any comments sent to the Inquiry will be considered as submissions and may be published on the Inquiry website, unless otherwise specified.

The Inquiry strongly encourages submissions by email to:

samesex@humanrights.gov.au.

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

For further information, please email the Inquiry at samesex@humanrights.gov.au. Or call (02) 9284 9600 or 1800 620 241 (TTY).

OVERVIEW OF THE GENERAL ISSUES REGARDING “SPOUSE” AND “CHILD” DEFINITIONS IN FEDERAL LAW

“Spouse”

Equal Treatment of Legally Married and Heterosexual De Facto Spouses

Virtually all federal legislation specifically includes heterosexual de facto partners within the definition of “spouse”.

Only a handful of Acts do not contain a definition of “spouse”, and it is not clear whether de facto partners would be read in to such Acts.

The only two areas of federal laws that *specifically exclude* heterosexual de facto partners from the definition of “spouse” are the *Family Law Act 1975* (Cth) (set to change following referrals of power by the states) and the *Members of Parliament (Life Gold Pass) Act 2002* (Cth) which sets lifetime travel entitlements of federal parliamentarians.

Within federal legislation that explicitly includes de facto partners there are very few instances in which de facto and legally married spouses are treated differently. The most significant difference is that a small number of Acts grant rights to a separated married spouse upon death (usually in circumstances of substantial financial dependence on the deceased), but do not grant such rights to a former de facto spouse.³

In short, heterosexual de facto spouses have almost identical rights, entitlements and obligations to married spouses in federal law.

No Recognition of Same-Sex Partners as De Facto Relationships

There are a number of different definitions of “de facto” spouses in federal legislation. However, there is no federal legislation which recognises same-sex couples’ relationships as de facto relationships.⁴

On the limited occasions where same-sex partners are covered in federal law it is through the use of additional non-couple-based categories such as “interdependent”. Where same-sex couples could be read-in to other open-ended definitions, this is noted. Unless otherwise stated, same-sex couples are excluded from the benefits created, or obligations imposed, by the legislation discussed in this paper.

Numerous federal Acts specifically require that a de facto couple be made up of partners of the “opposite sex”. (See Appendix II, Spouse definitions 2, 3, 4, 6.) These Acts unambiguously exclude same-sex couples.

³ See eg *Governor-General Act 1974* (Cth); *Superannuation Act 1976* (Cth); *Superannuation Act 1990* (Cth); *Military Superannuation and Benefits Act 1991* (Cth); *Judges’ Pensions Act 1968* (Cth).

⁴ Note that the *Criminal Code Act 1995* (Cth) uniquely does refer to a “same-sex partner”, but still does so separately to a de facto partner: s 102.1.

However many statutes do *not* expressly exclude same-sex couples, rather they have been interpreted to do so because of the use of the words “husband or wife” or “spouse” within the definition.

So, for example, the most common definition of “de facto spouse” in federal law is:

“another person who, although not legally married to the person, lives with the person on a *bona fide* domestic basis as the husband or wife of the person.” (See Appendix II, Table 2, Spouse 1.)

In 1995 the Administrative Appeals Tribunal held in *Re Brown and Commissioner for Superannuation* that the words “as that person’s husband or wife” necessarily excluded same-sex couples because only men could be husbands of women and only women could be wives of men.⁵

Some federal laws do not use the words “husband or wife” and instead define a de facto spouse as:

“a person who is living with the member as the spouse of the member on a genuine domestic basis although not legally married to the member.” (See Appendix II, Table 2, Spouse 5.)

In 1998 the Federal Court held in *Commonwealth of Australia v HREOC & Muller* that living “as” a “spouse” meant that a couple, although *not* married, must be *able* to marry; thereby excluding same-sex couples.⁶ The reasoning in *Muller* is debatable in that heterosexual de facto partners are recognised in numerous federal statutes even if one of them is still in a current legal marriage with another person. Such couples live “as” spouses even though they are *not* able to marry.⁷ Further, given the widespread inclusion of same-sex couples in state law since that time, it is open to question whether living “as” a spouse would be determined in the same way today. While some state laws have created new terminology such as “partner” or “domestic relationship”, many now commonly define “spouse” as including same-sex relationships.⁸ Several state Acts define de facto relationships of both same-sex and heterosexual couples as “marriage-like” relationships, which is equivalent to “living as a spouse”.⁹

⁵ *Re Brown and Commissioner for Superannuation* (1995) 21 AAR 378, see discussion at 384-386. “A ‘husband’ remains a married man, and a ‘wife’ remains a married woman. Or, to put it another way, a ‘husband’ and a ‘wife’ are a man and a woman who are married to each other, with or without a marriage ceremony”: at 386.

⁶ See *Commonwealth of Australia v HREOC & Muller* (1998) EOC 92-931.

⁷ A number of federal Acts discussed in this paper make specific provision for exactly this situation (ie where there is both a *de jure* and a de facto spouse): see eg *Superannuation Act 1976* (Cth) s 110; *Military Superannuation and Benefits Act 1991* (Cth) r 58; *Defence Force Retirement and Death Benefits Act 1973* (Cth) s 41; *Parliamentary Contributory Superannuation Act 1948* (Cth) s 21AA.

⁸ For a full discussion of the changes to state and territory law to recognise same-sex couples: see Jenni Millbank, “Recognition of Lesbian and Gay Families in Australian Law – Part One: Couples” (2006) 34 *Federal Law Review* 1.

⁹ See *Interpretation Act 1984* (WA) s 13A(1); *Commonwealth Powers (De facto Relationships) Act 2003* (NSW); *Commonwealth Powers (De facto Relationships) Act 2003* (Qld); *Commonwealth Powers (De facto Relationships) Act 2004* (Vic); *De facto Relationships (Northern Territory Request) Act 2003* (NT).

However the question has not been revisited and so the 1998 decision in *Muller* is still the guiding precedent; thus the use of “spouse” in any part of a definition of a couple in federal law would be likely, without more, to exclude same-sex couples. This would apply, for instance, to the small number of federal statutes that do not include any definition of “de facto spouse”.

What Does “Living With” Require for De Facto Relationships

A common aspect of the definition of de facto spouse is that of “living with” the other person. Contrary to popular belief, very few pieces of legislation mandate any requirement for a set period of cohabitation before recognition as a de facto spouse. Of the few federal Acts that do prescribe a period of cohabitation for a de facto relationship to be eligible, three years is the requisite time.¹⁰ Notably all of the Acts with a time requirement also include discretion for a decision-maker to waive it.¹¹

It is also important to note that the expression “living with” or “lives with” in the definition of de facto spouse has been broadly and flexibly interpreted in state law over the years. So, for example, couples physically separated (even for lengthy periods) due to external forces – such as work, poor health, incarceration, or family commitments – have consistently been held to meet the definition.¹²

“Child”

Around 20% of lesbians and up to 10% of gay men have children. Where such children were born into previous heterosexual relationships, it is clear who the child’s parents are and their relationships are legally recognised. However children are increasingly being born into same-sex families. When this occurs, federal law provides no recognition of the relationship of the child with the non-biological parent.

The definition of “child” under federal law is extremely varied and uncertain, as is any path to reform definitions to include same-sex families. This is for a number of reasons: firstly, most federal laws do not provide definitions for the categories of “parent” and “child”. Secondly, unlike most heterosexual families, in same-sex families there is always one parent who does not have a biological relationship with the child. Furthermore, states and territories have primary responsibility for determining parental status, and so recognition of parent-child relationships in same-sex families in federal law involves difficult questions concerning the inter-relation of state and federal provisions.

Most federal Acts implicitly assume that a child is a biological child of its parents without any express provision or definition regarding the relationship between parent and child. Where there are definitions of child in federal laws these generally relate only to conditions of eligibility for a benefit, such as a child’s age, or whether they are

¹⁰ Some Acts, particularly those concerning retirement and death benefits, set a time limit for legally married couples also: see eg *Judges’ Pensions Act 1968* (Cth) s 4AC(2).

¹¹ See eg *Superannuation Act 1976* (Cth) s 110.

¹² See the cases discussed in Jenni Millbank, “The Changing Meaning of ‘De facto’ Relationships” (2006) 12 *Current Family Law* 82. Note also that living “as” a spouse or definitions of a “spouse-like” relationship have not been held by courts to require conformity to idealised aspects of marital relationships, such as monogamy or an enduring sexual relationship: see Jenni Millbank, “Same-Sex Couple Property Disputes” (2005) 43 (10) *Law Society Journal* 56.

financially dependent on the adult. Many Acts contain no definition of child at all. It is untested, but highly likely, that a court interpreting the word “child” would do so narrowly in the absence of express provision in the Act to cover a non-biological or non-adoptive child. Numerous Acts provide simply that “child” includes an adopted or ex-nuptial child – however note that today it is *very* unlikely that Acts without such express provision would be interpreted as excluding children who were adopted or born outside of marriage.

It is noteworthy that the children of same-sex families are covered by a far wider range of laws than the relationship between their parents is. This is because numerous Acts, particularly those concerning death benefits and compensation to dependants, have always utilised very broad definitions of child in order to protect a wide range of a person’s dependants. So, for example, several federal Acts include a child “living with a person as a member of their family”, or a child to whom the person “acts in the place of a parent”. These Acts would clearly include a non-biological or non-adoptive parent.

The laws of some states and territories have changed in recent years to grant same-sex couples both presumed parental status and eligibility for adoption. The extent to which the status granted under these new laws flows through to the federal legislation discussed in this paper is very unclear. Three possible issues with parental status are discussed below.

Parenting Orders

The first issue is the status of a non-biological parent who has obtained an order of sole or joint parental responsibility under s 64B of the *Family Law Act 1975* (Cth) (referred to throughout this paper simply as “parenting orders”). The Act defines “parental responsibility” as meaning “all the duties, powers, responsibilities and authority which, by law, parents have in relation to children”.¹³ Parenting orders are not limited to legal parents, and may be applied for and granted to any person with an interest in the “care, welfare and development of a child”.¹⁴ Parenting orders can be applied for by consent, for example by lesbian mothers who have a child through assisted reproduction, and by gay male couples with children born through surrogacy.

A small number of Acts include additional provision for a person who is the “guardian” of a child. Federal Acts which include a “guardian” would likely include a non-biological parent who had obtained an order of parental responsibility.

In statutes where there are definitions of “dependent child” many of these use terms such as a child for whom the adult is “legally responsible”. The meaning of “legally responsible” would cover same-sex families with parenting orders. However, it is not clear in these Acts whether the child must, *in addition*, be a child *of* the person (ie a biological child), or need *only* be a child for whom the person is legally responsible.

Further, it is not clear how legislation with no general definition of “child”, but a definition of “dependent child”, operates. For example, is “dependent child” the category that controls who is a child for the Act, or it is “dependent child” only a sub-

¹³ *Family Law Act 1975* (Cth) s 61B.

¹⁴ *Family Law Act 1975* (Cth) s 65C.

set of a larger undefined category of “child” (which would almost certainly be given its “ordinary meaning”, that of a biological child)?

Where a definition of “child” in a particular Act may be inclusive of a person with parenting orders, this has been noted in the paper.

Adoptive Parents

The second issue is the status of a non-biological parent who has obtained an adoption order. Same-sex couples are presently eligible to apply to adopt children in Western Australia and the ACT.¹⁵ In Tasmania, registered same-sex couples can only apply to adopt a child related to one partner. There are therefore three Australian jurisdictions, as well as a number of overseas jurisdictions such as Canada and South Africa, where a same-sex couple may both be the adoptive parents of a child, or where one parent is the biological parent and the other is the adoptive parent of a child.

Not all federal legislation specifically references adopted children, but there are no cases available of an adopted child being excluded from the definition of “child” in any federal law.

Unless otherwise stated, it is my view that “child” in all the legislation discussed below would include a child adopted by same-sex couples in Western Australia, the ACT, Tasmania or international jurisdictions.

Presumptions regarding Parental Status in States and Territories

The third issue is the status of the non-biological mother in lesbian families formed through assisted reproductive technology (ART).

All state laws grant parental status to the husband or male de facto partner of a woman who has conceived a child through assisted reproduction, regardless of whether he is the biological father of the child. No federal legislation, with the exception of the *Family Law Act 1975* (Cth) and *Child Support (Assessment) Act 1989* (Cth) makes specific provision for children conceived through assisted reproduction.¹⁶ Because such men are listed on the birth register, they have full status as parents under state law, (and generally need not and do not reveal that they are not in fact the biological father of the child). There are no cases in which the relationship of a non-biological father and ART child have been excluded from federal legislation.

Automatic parental status is now granted to a consenting female partner of the birth mother in the same manner as that granted to a male partner in Western Australia, the Northern Territory and the ACT (“the recognition states”). If a child is born in a recognition state, the non-biological mother can be entered on the birth register as the second parent.¹⁷ The recognition states also have provision for amendment of the

¹⁵ For a fuller discussion see Jenni Millbank, “Recognition of Lesbian and Gay Families in Australian Law – Part Two: Children” (2006) 34(2) *Federal Law Review*, forthcoming.

¹⁶ The provision, s 60H of the *Family Law Act*, does not cover a female partner. However this provision is relevant only to parental status under the *FLA* and is not of general application. See discussion under “Parental Status” and “Child Support”.

¹⁷ Note also that the ACT has provision for commissioning parents in a surrogacy arrangement to apply for orders amending the birth register so as to be recorded as the child’s parents: *Parentage Act 2004*

birth register for ART children born prior to the amendments. It is therefore strongly arguable that the relationship of a non-biological mother and ART child from a recognition state should be covered by the definition of “child” in all federal legislation that does not specifically exclude such a relationship. However this remains untested and so is an area of considerable uncertainty.

There is no case law available on the relationship of any of the above provisions and so all views provided in this paper are simply based on the range of likely interpretations that would be given to the words used, but are in no way authoritative.

A series of possible alternatives to provide a broadly inclusive, but reasonably certain, definition of parent-child relationships for same-sex families is included in Appendix III.

(ACT) div 2.5, in particular s 24. Such an order could be used by a gay male couple in that jurisdiction so that they were both registered as parents.

EMPLOYMENT

Workplace Laws

Workplace Relations Act 1996 (Cth)

The *Workplace Relations Act 1996* (Cth) as recently amended by the *Workplace Relations Amendment (Work Choices) Act 2005* (Cth) establishes certain minimum workplace entitlements for Australian employees. The workplace entitlements that are relevant to couples and families under this Act are:

- carers' leave;
- compassionate leave; and
- parental leave.

These are minimum entitlements only. Other entitlements relevant to couples, such as relocation allowance or the ability to inherit a partner's accrued leave entitlements on death, are not covered by this Act, and would appear instead in collective or individual workplace agreements.

Definitions used in the Act

"Immediate family" includes a spouse, as well the child, parent, grandparent, grandchild or sibling of the employee, or of the spouse of the employee.

"Spouse" includes both current and former spouses and de facto spouses, but "de facto spouse" explicitly excludes same-sex couples.¹⁸ (See Appendix II, Table 2, Spouse 2.)

The definition of "child" includes an adopted, step, ex-nuptial and adult child.¹⁹ This definition would not include a non-biological or non-adoptive child.

Impact on same-sex couples

Carers' Leave

The provision of carers' leave is guaranteed in certain circumstances.²⁰ Carers' leave is leave required:

"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

¹⁸ *Workplace Relations Act 1996* (Cth) ss 240, 263. This is in conflict with the Objects provision of the Act. Section 3(m) states one of the objects as "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".

¹⁹ *Workplace Relations Act 1996* (Cth) s 240.

²⁰ *Workplace Relations Act 1996* (Cth) s 250.

personal illness, or injury, of the member; or (ii) an unexpected emergency affecting the member.”²¹

“Member of the household” is not defined anywhere in the Act, so would have its ordinary meaning, covering any person ordinarily resident with the employee, including a same-sex partner.

A same-sex partner who lives with the employee is therefore not included as a de facto spouse, but is covered as a member of the household.²² The effect of this distinction is that, although an employee could take leave to care for their same-sex partner, they could not do so to care for that partner’s family members (unless they too were part of the household). In contrast, the family of an employee’s spouse is considered to be the immediate family of the employee.

Likewise, the non-biological or non-adoptive child of an employee would likely be covered as a member of the employee’s household, although not as a member of their immediate family.

Compassionate Leave

The provision of compassionate leave is guaranteed in certain circumstances.²³

Compassionate leave is for an employee who needs to spend time with a member of their immediate family or a member of the employee’s household if that person has a “serious injury or threat to life”, or after the death of such a person. As with carers’ leave, a same-sex partner would be covered under “member of the household” but not as “immediate family”. The effect of this distinction is that an employee is not guaranteed leave as a result of the illness or death of a member of their same-sex partner’s family.

Parental Leave

Certain minimum guarantees of parental and adoption leave are also provided for in the Act.

The guarantee of parental leave only applies to a male employee who is the spouse of a woman giving birth.²⁴ A female partner is therefore excluded.

The adoption leave provisions apply to the “placement”²⁵ of an “eligible child”.²⁶ Adoption leave is guaranteed before and following placement of an “eligible child” with an employee for adoption.²⁷ Taken together, these provisions require that the employee be the adoptive parent, and so leave is not guaranteed to the non-adoptive parent in a same-sex couple.

²¹ *Workplace Relations Act 1996* (Cth) s 244(b).

²² *Personal/Carers’ Leave Test Case Stage 2* (1995) 62 IR 48 at 57.

²³ *Workplace Relations Act 1996* (Cth) s 257.

²⁴ *Workplace Relations Act 1996* (Cth) s 282.

²⁵ *Workplace Relations Act 1996* (Cth) s 263.

²⁶ *Workplace Relations Act 1996* (Cth) s 298.

²⁷ *Workplace Relations Act 1996* (Cth) ss 298-300.

Employment by the Federal Government

Most employment-related entitlements and benefits are determined by collective or individual agreements rather than through statute. In a sample audit conducted by the Commonwealth Public Service Union (CPSU), the union concluded that a number of public sector agencies were transferring employment entitlements out of collective or certified agreements that are available publicly and into agency policy documents.²⁸

To ascertain the areas of federal government employment that do not provide couple-based entitlements to same-sex couples would require access to all of the government agency policy documents that set out employment conditions.

Those policy documents that are available, and entitlements subject to determinations made by the Remuneration Tribunal, are outlined below, as are the few statutes that do set workplace entitlements for areas of federal employment.

Numerous employment-related benefits and entitlements are linked to a couple or family relationship. These include forms of leave in addition to the unpaid minimum guarantees in the *Workplace Relations Act 1996* (Cth), and may include:

- paid parental leave;
- paid maternity leave;
- additional bereavement leave;
- additional unpaid leave for child raising; and
- leave for a partner's ART treatments.

Some employment that requires travel or relocation may also provide for benefits to be paid at a greater rate to compensate for the cost of an accompanying partner, such as:

- remote locality entitlements;
- relocation allowance;
- overseas living allowance; and
- work-related travel costs.

Some employers also extend other family benefits, such as providing or subsidising the cost of housing, loans, health insurance, education or employer products.

Benefits may also be non-financial, such as the ability to time shift-work in conjunction with a partner who is employed at the same facility.

Finally, the value of accumulated leave such as recreation and long-service leave may be paid out to the spouse or dependants of an employee who dies.²⁹

²⁸ See CPSU Submission to HREOC Discussion Paper, at 6.

²⁹ Note that some legislation discussed in this section concerns benefits to an employee's spouse after death. These benefits are covered in this section, rather than in the retirement section where most death benefits are discussed, because they are specifically employment-related and are not linked to retirement or drawn from superannuation entitlements.

Additionally, there may be obligations associated with a relationship, such as disclosure requirements for employees or board members, who must notify an employer of a conflict of interest involving a partner or must provide a disclosure of assets that include those held by a partner.

Public Service Act 1999 (Cth)

The *Public Service Act 1999* (Cth) s 24 grants an agency head the ability to determine remuneration or other terms and conditions of employment, but only to the extent that it does not reduce a benefit that would otherwise be available to an employee as part of an award, Australian Fair Pay and Conditions standard or Australian Workplace Agreement (AWA).

It is not known what, if any, determinations by agency heads in the public service extend employment rights and benefits to same-sex partners.

The Remuneration Tribunal is empowered to determine the travel entitlements of holders of public office and principal executive officers under the *Remuneration Tribunal Act 1973* (Cth).³⁰ The most recent determination³¹ provides for the entitlements of the “spouse” and “partner” of an office holder.

Definitions used in the Travel Determination

“Spouse” is defined in the current travel determination as meaning “husband or wife”.³² This definition would probably, but not certainly, exclude heterosexual de facto couples.

Notably, “partner” is defined in the determination as:

“any person who lives with the specified office holder on a genuine domestic basis as the partner of the office holder.”³³ (See Appendix II, Table 2, Partner 3.)

This definition clearly includes same-sex and heterosexual de facto spouses.

The same definitions of “spouse” and “partner” appear in determinations covering the travel allowances of other senior office holders such as the Chief Executive of the CSRIO³⁴ and the Solicitor General and Director of Public Prosecutions.³⁵

Impact on same-sex couples

Spouses and partners have exactly the same travel entitlements as a result of the determination, and so same-sex couples are not disadvantaged for purpose.³⁶

³⁰ *Remuneration Tribunal Act 1973* (Cth) ss 5(2A), 7(3) and 7(4).

³¹ *Determination 2004/03 Official Travel by Office Holders*.

³² *Determination 2004/03 Official Travel by Office Holders* cl 1.5.9.

³³ *Determination 2004/03 Official Travel by Office Holders* cl 1.5.7

³⁴ *Determination 2001/01: Remuneration, Allowances and Other Related Matters of the Chief Executive of the Commonwealth Scientific and Industrial Research Organisation*.

³⁵ *Determination 2000/15: Remuneration and Allowances of the Solicitor-General and Director of Public Prosecutions*.

³⁶ *Determination 2004/03 Official Travel by Office Holders* cl 1.10; 3.2.

However it is not known whether other rights and benefits, such as relocation or remote living allowances, are paid to same-sex partners of employees in a range of public service positions.

Defence Act 1903 (Cth)

The *Defence Act 1903* (Cth) provides for the establishment and administration of defence forces, including army, navy and air forces.

The Chief of the Australian Defence Forces (ADF) can issue instructions, which cover various conditions of service.³⁷

Definitions used in instructions under the Act

From 1 December 2005, the ADF instructions on pay and conditions were amended to include “interdependent partnership” as a category of recognised relationship.³⁸

Under these instructions “interdependent partner” is defined as

“a person who, regardless of gender, is living in a common household with the member in a bona fide, domestic, interdependent partnership, although not legally married to the member. This includes those previously recognised by the ADF under the previous Defence Instruction (General) PERS 53-1—*Recognition of de facto marriages*, as having a de facto marriage, and also allows for those now recognised on the basis that they are in an interdependent same-sex partnership.”³⁹

The ADF instructions set out exhaustive criteria for the recognition and approval of an “interdependent partnership”⁴⁰ (see Appendix II, Table 2, Interdependent 1), including the requirement that the member and their partner have lived together for not less than 90 continuous days (although the Approving Authority may waive this requirement if there is a temporary separation or unavoidable separation) and the completion of an application form plus a statutory declaration and annexure of four items of documentary evidence to prove the relationship (which must be drawn from a compulsory list).⁴¹ A couple must complete this documentation to be recognised as an interdependent partnership (note that this is in contrast to all other federal laws that recognise de facto relationships without the need for any formal step to register the relationship).

Impact on same-sex couples

The ADF instructions cover employment-related benefits available to spouses such as on- and off-base accommodation, relocation expenses and travel benefits, leave

³⁷ *Defence Act 1903* (Cth) s 9A.

³⁸ Defence Instructions (General) DI(G) PERS 53-1 of 1 December 2005 amended the Defence Instruction (General) Manual and the ADF Pay and Conditions Manual.

³⁹ Item 4(b). Item 4(c) further defines “Common household” and 4(d) defines “Permanent basis”.

⁴⁰ Items 7-15.

⁴¹ It is remarkable that many of the items of proof listed are in fact unavailable to same-sex couples, such as evidence of recognition as a couple under Commonwealth pension or benefit, Medicare, or birth certificates listing both parties as parents (although the latter are now available to lesbian couples who have children through ART in the NT, WA or ACT).

entitlements including personal and carers' leave, and education and training benefits.⁴²

However the instructions do not affect other defence-employment-related benefits that are governed by other statutes, such as home loans discussed immediately below.

Defence Force (Home Loans Assistance) Act 1990 (Cth)

The *Defence Force (Home Loans Assistance) Act 1990* (Cth) provides low-interest home loans for members of the defence forces and in some circumstances also former members of the forces.⁴³

Definitions used in the Act

“Spouse” is defined as including only opposite-sex de facto couples (see Appendix II, Table 2, Spouse 3.)

“Child” is defined as a child, step-child or legally adopted child, and so excludes a non-adoptive or non-biological child.⁴⁴

Impact on same-sex couples

Loans are available if an employee of the defence force owns the entire share of a house, or if their interest is more than a half interest, or if their interest, when added to the interest of a spouse or child, is more than a half interest.⁴⁵ This means that a defence force member in a heterosexual couple can buy a house jointly with a partner (or even with other owners if the member or member and partner have a greater-than-half share) and still qualify for the subsidised loan.

In contrast, a defence force member in a same-sex relationship is not eligible for subsidised home loans if he or she purchases a house as joint tenants with a partner. The member would only be eligible if they purchased the house in their own sole name, or if they purchased a larger-than-half share with a partner as tenants in common.

If the service member dies, the loan remains available to their surviving spouse. A surviving same-sex partner would be excluded from this benefit.⁴⁶

Governor-General Act 1974 (Cth)

The *Governor-General Act 1974* (Cth) provides the terms and conditions of employment for the Governor-General of Australia.

⁴² See ADF Pay and Conditions Manual, Chapter 8, Members and their Dependants, available at <<http://www.defence.gov.au/dpe/pac/>> (accessed 21 July 2006).

⁴³ This Act was preceded by the *Defence Service Homes Act 1918* (Cth) which still applies to members who joined the force prior to 14 May 1985.

⁴⁴ *Defence Force (Home Loans Assistance) Act 1990* (Cth) s 3.

⁴⁵ *Defence Force (Home Loans Assistance) Act 1990* (Cth) s 5.

⁴⁶ *Defence Force (Home Loans Assistance) Act 1990* (Cth) ss 26, 29.

Definitions used in the Act

Spouses must be in a “marital relationship”.⁴⁷ The definition of marital relationship includes someone living “as the husband or wife” of a person.⁴⁸ (See Appendix II, Table 2, Marital Relationship.) This wording has been interpreted to exclude same-sex couples.⁴⁹

Impact on same-sex couples

The Act provides for an allowance to a former Governor-General – this allowance passes to their spouse upon death.⁵⁰

Parliamentary Entitlements Act 1990 (Cth)

The *Parliamentary Entitlements Act 1990* (Cth) governs the entitlements of members of federal parliament.

Definitions used in the Act

“Spouse” is defined as including:

“a person who is living with the member as the spouse of the member on a genuine domestic basis although not legally married to the member.”⁵¹ (See Appendix II, Table 2, Spouse 5.)

Unlike most definitions of “spouse” or “de facto” in federal law, this definition does not include the terms “husband or wife” or explicitly require that the parties be opposite-sex. However the use of “as the spouse” would still exclude same-sex couples if the interpretation given by the Federal Court in *Muller* (1998) continues to be followed.⁵²

“Dependent child” of a Senior Officer is defined very broadly and includes a person under 16 who is in the custody, care and control of the Officer or is a person to whom the Officer has access; or is between 16 and 25 in full-time education and is wholly or substantially dependent upon the Officer.⁵³ This should include the non-biological or non-adoptive child under 16 in a same-sex family where the second parent had parenting orders. The definition for children over 16 appears only to require financial dependence rather than any form of parental responsibility.

Impact on same-sex couples

The Act and Regulations provide benefits such as:

⁴⁷ *Governor-General Act 1974* (Cth) s 2B(3)(a) and (b). For de facto couples this requires that they have lived together for three years, but there is discretion to waive this requirement.

⁴⁸ *Governor-General Act 1974* (Cth) s 2B(2).

⁴⁹ See *Re Brown and Commissioner for Superannuation* (1995) 21 AAR 378.

⁵⁰ *Governor-General Act 1974* (Cth) ss 4, 4A and 4AA.

⁵¹ *Parliamentary Entitlements Act 1990* (Cth) s 3.

⁵² *Commonwealth of Australia v HREOC & Muller* (1998) EOC 92-931. I argue in the Introduction to this paper that the reasoning in the decision is questionable.

⁵³ *Parliamentary Entitlements Act 1990* (Cth) s 3.

- a member may downgrade a class of travel and use the difference in cost to offset the fare of an accompanying “spouse”,⁵⁴
- the cost of travel of a spouse accompanying a senior officer overseas and within Australia, respectively;⁵⁵
- the cost of travel within Australia of a dependent child of a senior officer;⁵⁶
- members travelling overseas are entitled to the cost of travel by an accompanying spouse if the Prime Minister approves;⁵⁷
- the cost of an accompanying spouse for an Opposition Office Holder or Presiding Officer travelling in Australia;⁵⁸ and
- the cost of charter transport for the leader of a minority party and allows for an accompanying spouse.⁵⁹

A same-sex partner is excluded from all of the above entitlements.

The Remuneration Tribunal is empowered to determine additional entitlements under the Act. The Tribunal has issued determinations that:

- senators and members entitled to reimbursement for the cost of hire cars and charter aircraft may be accompanied by a spouse;⁶⁰
- members entitled to costs of overseas travel for study will be covered for the costs of an accompanying spouse;⁶¹ and
- a minister or office holder’s accompanying spouse entitles the member to an additional \$10 per night travelling allowance.

The Ability to Nominate a Person for Certain Entitlements

Importantly, *Determination 2005/09* provides for a “designated person” or “nominee” to accompany the member for the purpose of many (but not all) travel entitlements.⁶²

The Determination defines “designated person” as meaning:

“a person or persons (not being a dependent child, spouse or nominee or a member of the staff of the senator or member) nominated by the senator or member who:

- (a) is substantially dependent on the senator or member; or
- (b) has significant caring responsibilities for:
 - (i) a person substantially dependent on the senator or member; or
 - (ii) the senator's or member’s spouse, nominee, or dependent

⁵⁴ *Parliamentary Entitlements Act 1990* (Cth) sch 1 pt 1 s 9(2)

⁵⁵ *Parliamentary Entitlements Act 1990* (Cth) sch 1 pt 2 s 3(1) and 3(2).

⁵⁶ *Parliamentary Entitlements Act 1990* (Cth) sch 1 pt 2 s 4.

⁵⁷ *Parliamentary Entitlement Regulations 1997* (Cth) regs 3B, 3C.

⁵⁸ *Parliamentary Entitlement Regulations 1997* (Cth) sch 1 para 1(1)(e).

⁵⁹ *Parliamentary Entitlement Regulations 1997* (Cth) sch 1 para 1(1)(f).

⁶⁰ *Determination 2005/09*.

⁶¹ *Determination 2005/09* cl 9.1(d).

⁶² Designated persons and nominees are not included in provisions for hire car use outside metropolitan areas and charter flights.

child; or
(c) is any other member of the senator's or member's family.”

This broad definition would clearly include a same-sex partner. This category could also cover a non-biological or non-adoptive child if they were interpreted as not falling within the definition of the “dependent child” in the statute.

Judicial and Statutory Officers (Remuneration and Allowances) Act 1984 (Cth)

The *Judicial and Statutory Officers (Remuneration and Allowances) Act 1984 (Cth)* provides for travel allowances to certain statutory officers.

The Act provides for the cost of accommodation of a spouse in the calculation of the travel allowance paid to statutory officers and judges of the High Court.⁶³

No definition of spouse in the Act

There is no definition of “spouse” in the Act.

The travel entitlements of holders of judicial office are governed by *Determination 2004/03* of the Remuneration Tribunal, discussed under the *Public Service Act*. These provide for a “partner” defined as “any person who lives with the specified office holder on a genuine domestic basis as the partner of the office holder.”⁶⁴ (See Appendix II, Table 2, Partner 3.)

Impact on same-sex couples

The term “partner” clearly includes same-sex and heterosexual de facto couples, consequently they do have access to travel entitlements.⁶⁵

Members of Parliament (Life Gold Pass) Act 2002 (Cth)

The *Members of Parliament (Life Gold Pass) Act 2002 (Cth)* governs free domestic air travel for both sitting and former members of federal parliament and their spouses.

Definition used in the Act

“Spouse” is defined as the person’s “legally married husband or legally married wife”.⁶⁶ This is the only federal Act (apart from the *Family Law Act* which is restricted for Constitutional reasons) that expressly excludes heterosexual de facto couples.

⁶³ *Judicial and Statutory Officers (Remuneration and Allowances) Act 1984 (Cth)* ss 4, 6.

⁶⁴ *Determination 2004/03 Official Travel by Office Holders* cl 1.5.7

⁶⁵ *Determination 2005/09* cl 1.10, 3.2.

⁶⁶ *Members of Parliament (Life Gold Pass) Act 2002 (Cth)* s 4.

Impact on same-sex couples

The Act provides a set number of free domestic trips per year for accompanying spouses of former and sitting members, as well as a set number of trips for the surviving spouse of a member.⁶⁷

Defence Housing Authority Act 1987 (Cth)

The *Defence Housing Authority Act 1987* (Cth) establishes an Authority to determine defence housing.

Definitions used in the Act

The definition of spouse requires the parties to be of the opposite sex.⁶⁸ (See Appendix II, Table 2, Spouse 2.)

Impact on same-sex couples

Members of the Authority are paid. One member of the Authority is to be the spouse of a member of the defence forces who is rendering continuous full-time service.⁶⁹ Consequently, a same-sex partner is not eligible to sit on the Authority.

Workers' Compensation

Safety, Rehabilitation and Compensation Act 1988 (Cth)

The *Safety, Rehabilitation and Compensation Act 1988* (Cth) regulates workplace safety, workers' compensation and rehabilitation services for injury, disease and death that occur in the course of employment. This Act covers most federal government employees (excepting those in fields covered by their own specific statute, discussed below) as well as employees of government business agencies, such as Telstra, and also private sector companies that have been granted licence to self-insure under the scheme.

Definitions used in the Act

The Act defines "dependant" to include the spouse and a wide range of relatives and step-relatives of the employee.⁷⁰ "Spouse" is explicitly defined as opposite-sex, and so clearly excludes same-sex couples⁷¹ (see Appendix II, Table 2, Spouse 2). Spouses and children are deemed to be dependants for the purposes of the Act.⁷²

"Dependant" also includes:

"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

⁶⁷ *Members of Parliament (Life Gold Pass) Act 2002* (Cth) ss 10-12.

⁶⁸ *Defence Housing Authority Act 1987* (Cth) s 12(1A).

⁶⁹ *Defence Housing Authority Act 1987* (Cth) s 12(1)(ca).

⁷⁰ *Safety, Rehabilitation and Compensation Act 1988* (Cth) s 4(1).

⁷¹ *Safety, Rehabilitation and Compensation Act 1988* (Cth) s 4(1).

⁷² *Safety, Rehabilitation and Compensation Act 1988* (Cth) s 4(5).

wholly or partly dependent on the employee at the date of the employee's death."⁷³

This would clearly cover the relationship between children and non-biological or non-adoptive parents in same-sex families, although unlike heterosexual families, they would need to prove economic dependence.

Impact on same-sex couples

The Act provides a range of benefits for dependants, such as:

- payment of compensation to dependants in the event of an injury resulting in death;⁷⁴
- payment of compensation to dependants in the event of an injury resulting in an incapacity;⁷⁵ and
- compensation for household and attendant care services and the provision of such services or need for such services by a "member of the household" of the employee.⁷⁶

There is no definition of "member of the household" in the Act. If given its ordinary meaning this last provision would cover a cohabiting same-sex partner even though the other provisions do not.

Veterans' Entitlements Act 1986 (Cth)

The *Veterans' Entitlements Act 1986* (Cth) provides compensation and other benefits for members of the defence forces who have rendered "operational service", ie seen active service in war-time or in peace-keeping missions, and suffered an injury or death related to that service. This is a specific form of workers' compensation.

Definitions used in the Act

The Act defines a "Member of a couple" or "partner" as a person of the opposite sex to the veteran who is living in a "marriage-like" relationship with them.⁷⁷ Same-sex couples are explicitly excluded. (See Appendix II, Table 2, Member of a Couple 1.) "Dependant" is defined as partner, spouse or child of the veteran.⁷⁸ This category therefore also excludes a same-sex couple.

Unusually, the Act specifically provides that unless the contrary intention appears, a reference to a child of a veteran includes a child of whom the veteran is the mother or father, or a child adopted by the veteran or their partner, or "any other child who is, or was immediately before the death of the veteran, wholly or substantially dependent on

⁷³ *Safety, Rehabilitation and Compensation Act 1988* (Cth) s 4(1).

⁷⁴ *Safety, Rehabilitation and Compensation Act 1988* (Cth) s 17.

⁷⁵ *Safety, Rehabilitation and Compensation Act 1988* (Cth) s 19.

⁷⁶ *Safety, Rehabilitation and Compensation Act 1988* (Cth) s 29.

⁷⁷ *Veterans' Entitlements Act 1986* (Cth) s 5E(2).

⁷⁸ *Veterans' Entitlements Act 1986* (Cth) s 5E(2) and also includes "widow" and "widower". Widow and widower are further defined in s 5E(1).

the veteran”.⁷⁹ This broad definition clearly covers non-biological and non-adoptive children, provided they can establish economic dependence.

The definition of “dependent child” requires the adult to be legally responsible (whether alone or jointly) for the day-to-day care, welfare and development of the young person, and for the young person to be in the adult’s care.⁸⁰ This would include a non-biological or non-adoptive parent with parenting orders.

Impact on same-sex couples

The Act provides a range of benefits to all dependants, such as:

- a pension if the veteran dies or is incapacitated from a war-related injury or disease;⁸¹ and
- receipt of free medical treatment following the death of the veteran from war-related causes.⁸²

The Act also provides a range of benefits to an opposite-sex partner in certain circumstances. These include:

- a partner service pension,⁸³ which may include a pension bonus,⁸⁴ free medical treatment,⁸⁵ and a one-off education payment;⁸⁶
- income support supplements for war widows and war widowers who are caring for a dependent child or incapacitated for work;⁸⁷
- a bereavement pension to the widow or widower of a veteran on a disability pension;⁸⁸ and
- a seniors health card for the partner, war widow or war widower of a veteran.⁸⁹

The denial of eligibility to apply for a widow’s pension under this Act led a gay man to bring a complaint against Australia to the United Nations Human Rights Committee. In the 2003 case, *Young v Australia*, Edward Young argued that his Article 26 right to equality and Article 17 right to privacy and family life under the International Covenant on Civil and Political Rights (ICCPR) were breached by Australia granting pension rights to heterosexual de facto partners of veterans but not to same-sex partners. The Human Rights Committee agreed and issued an opinion adverse to Australia.⁹⁰ The Committee decided that although State parties are not

⁷⁹ *Veterans’ Entitlements Act 1986* (Cth) s 10.

⁸⁰ *Veterans’ Entitlements Act 1986* (Cth) s 5F(1) adopting *Social Security Act 1991* (Cth) s 5(2).

⁸¹ *Veterans’ Entitlements Act 1986* (Cth) s 13.

⁸² *Veterans’ Entitlements Act 1986* (Cth) s 86.

⁸³ *Veterans’ Entitlements Act 1986* (Cth) s 38.

⁸⁴ *Veterans’ Entitlements Act 1986* (Cth) s 45TC.

⁸⁵ *Veterans’ Entitlements Act 1986* (Cth) s 53D.

⁸⁶ *Veterans’ Entitlements Act 1986* (Cth) s 118AA.

⁸⁷ *Veterans’ Entitlements Act 1986* (Cth) s 45A.

⁸⁸ *Veterans’ Entitlements Act 1986* (Cth) s 98A.

⁸⁹ *Veterans’ Entitlements Act 1986* (Cth) s 118V.

⁹⁰ *Young v Australia* [2003] Communication No 941/2000 (18 September 2003). The case was the first in which the Committee held that the substantive guarantee of equality under Article 26 of the ICCPR extends to lesbians and gay men who are covered under “other status”. This question had been left

obliged to extend rights to unmarried couples, once they choose to do so then they are obliged to do so equally – treating same-sex and opposite-sex unmarried couples alike. No action has been taken at a federal level in response to this determination.

Military Rehabilitation and Compensation Act 2004 (Cth)

The *Military Rehabilitation and Compensation Act 2004* (Cth) provides compensation and other benefits for current and former members of the Defence Force who suffer a service injury, death or disease.

Definitions used in the Act

The Act limits the categories of person who can be a “dependant” of a member to a partner, child and other listed relatives.⁹¹ “Partner” of a member is defined as opposite-sex.⁹² (See Appendix II, Table 2, Partner 2.)

Notably however this list of dependants includes “a person in respect of whom the member stands in the position of a parent” as well as “a person who stands in the position of a parent to the member” which would cover a non-biological or non-adoptive parent with or without parenting orders.⁹³

Impact on same-sex couples

The Act provides compensation for permanent impairment that occurs as a result of one or more service injuries or diseases. A severely impaired person who has a dependent child is entitled to an additional lump sum.⁹⁴

There is specific provision for compensation for household and attendant care services which takes into account the provision of such services or need for such services by a “household member”. There is no definition of “household member” and so the needs of a same-sex partner could be taken into account for this section alone.⁹⁵

The Act includes a range of compensation to be paid to wholly dependent partners following a member’s death,⁹⁶ such as:

undecided in the previous cases of *Toonen v Australia* [1994] Communication No 488/1992 (4 April 1994) and *Joslin v New Zealand* [2002] Communication No 902/1999 (30 July 2002).

⁹¹ *Military Rehabilitation and Compensation Act 2004* (Cth) s 15(2). See also ss 5, 17, which deem a partner who was living with the member at the time of death to be a “wholly dependent partner”.

⁹² *Military Rehabilitation and Compensation Act 2004* (Cth) s 5.

⁹³ *Military Rehabilitation and Compensation Act 2004* (Cth) s 17 appears to broaden the category of child through the additional category of “eligible young person” who is deemed to be “wholly dependent” on a member if they were living with the member. Under s 5 an “eligible young person” is under 16 or between 16 and 25 if in full-time education. There is no requirement of any biological or legal relationship with the member.

⁹⁴ *Military Rehabilitation and Compensation Act 2004* (Cth) s 66. Section 80 provides for additional lump sum payments for each person who is both a dependant of the impaired person and an eligible young person.

⁹⁵ *Military Rehabilitation and Compensation Act 2004* (Cth) s 215.

⁹⁶ Note that *Military Rehabilitation and Compensation Act 2004* (Cth) s 244 provides that compensation can be payable to two or more partners.

- a choice between compensation as a lump sum or as a weekly amount,⁹⁷ and compensation for the cost of financial advice needed to make that choice;⁹⁸
- compensation to a wholly dependent partner where there was continuing permanent impairment and incapacity before death;⁹⁹
- an allowance to pay for his or her home phone;¹⁰⁰ and
- free medical treatment, or compensation for treatment.¹⁰¹

A same-sex partner is excluded from all of the above benefits.

The Act also includes a range of compensation for “eligible young persons” dependent on certain deceased members, members or former members,¹⁰² such as:

- lump sum compensation;¹⁰³
- additional weekly compensation for eligible young people wholly or mainly dependent on the deceased member;¹⁰⁴
- education and training;¹⁰⁵ and
- free medical treatment, or compensation for treatment.¹⁰⁶

There is no requirement that an “eligible young person” be a child *of* the member, and so the non-biological or non-adoptive child of a member would be included in the above benefits.

Seafarers Rehabilitation and Compensation Act 1992 (Cth)

The *Seafarers Rehabilitation and Compensation Act 1992* (Cth) regulates workers’ compensation specifically for seafarers.

Definitions used in the Act

The Act limits the categories of person who can be a “dependant” of an employee to a spouse, child and other listed relatives.¹⁰⁷ “Dependant” is defined to mean a spouse, child and certain listed relatives and step-relations. “Spouse” is defined as exclusively opposite-sex.¹⁰⁸ (See Appendix II, Table 2, Spouse 2.)

As with several other compensation Acts,¹⁰⁹ it is notable that the list of dependants includes a broadly defined parent and child category, in this instance someone “in relation to whom the employee stood in the position of a parent or who stood in the

⁹⁷ *Military Rehabilitation and Compensation Act 2004* (Cth) div 2.

⁹⁸ *Military Rehabilitation and Compensation Act 2004* (Cth) div 3.

⁹⁹ *Military Rehabilitation and Compensation Act 2004* (Cth) s 242.

¹⁰⁰ *Military Rehabilitation and Compensation Act 2004* (Cth) s 245.

¹⁰¹ *Military Rehabilitation and Compensation Act 2004* (Cth) ch 6.

¹⁰² *Military Rehabilitation and Compensation Act 2004* (Cth) ch 6 div 2-4.

¹⁰³ *Military Rehabilitation and Compensation Act 2004* (Cth) ss 251-252.

¹⁰⁴ *Military Rehabilitation and Compensation Act 2004* (Cth) ss 253-254.

¹⁰⁵ *Military Rehabilitation and Compensation Act 2004* (Cth) ss 258-259.

¹⁰⁶ *Military Rehabilitation and Compensation Act 2004* (Cth) ch 6.

¹⁰⁷ *Seafarers Rehabilitation and Compensation Act 1992* (Cth) s 3.

¹⁰⁸ *Seafarers Rehabilitation and Compensation Act 1992* (Cth) s 3

¹⁰⁹ See eg *Military Rehabilitation and Compensation Act 2004* (Cth).

position of a parent to the employee” if they were wholly or partly dependent on the employee at the date of the employee’s death. This category would cover a non-biological or non-adoptive parent and child, with or without parenting orders.

Impact on same-sex couples

The Act provides for the payment of compensation to “dependants” in the event of death of an employee (wholly dependent dependants have priority).¹¹⁰

While spouses and children are presumed to be dependent,¹¹¹ same-sex partners are excluded from the provisions and a non-biological or non-adoptive child would need to prove financial dependence to qualify.

Employment-Related Privileges and Immunities

Certain federal statutes grant privileges and immunities to foreign nationals engaged in particular occupations within Australia.

Foreign States Immunities Act 1985 (Cth)

The *Foreign States Immunities Act 1985* (Cth) extends all of the diplomatic privileges contained in the *Diplomatic Privileges and Immunities Act 1967* (Cth) to the spouse of the head of a foreign state.¹¹²

Definitions used in the Act

There is no definition of “spouse” in either Act, so it is unclear whether a heterosexual de facto spouse would be included in these immunities. A same-sex partner would be excluded if the approach of the Federal Court to the term “spouse” in *Muller* (1998) were followed.¹¹³

Impact on same-sex couples

The *Diplomatic Privileges and Immunities Act 1967* (Cth) provides immunity from jurisdiction for relevant personnel, including liability for various forms of taxation.

International Organisations (Privileges and Immunities) Act 1963 (Cth)

The *International Organisations (Privileges and Immunities) Act 1963* (Cth) provides certain privileges and immunities to international organisations and the staff and representatives of those organisations.

¹¹⁰ *Seafarers Rehabilitation and Compensation Act 1992* (Cth) s 29.

¹¹¹ *Seafarers Rehabilitation and Compensation Act 1992* (Cth) s 15(2).

¹¹² *Foreign States Immunities Act 1985* (Cth) s 36(1)(b).

¹¹³ See *Commonwealth of Australia v HREOC & Muller* (1998) EOC 92-931.

No definitions in the Act

“Spouse”, “child” and “dependent relatives” are not defined in the Act. It is unclear whether a heterosexual de facto spouse would be included in these immunities. A same-sex partner is likely to be excluded.

Impact on same-sex couples

The privileges and immunities under the Act are those of a diplomatic agent. These include those of a “spouse” and “children” under the age of 21 years.¹¹⁴

The Act provides privileges such as exemption of the “spouse” of the representative from the application of laws relating to immigration, the registration of aliens and the obligation to perform national service¹¹⁵ and any “dependent relatives” from the application of laws relating to immigration and the registration of aliens.¹¹⁶ Exemption from tax liability may be provided for the organisation, its income, property, assets and transactions.¹¹⁷

Passenger Movement Charge Collection Act 1978 (Cth)

The *Passenger Movement Charge Collection Act 1978* (Cth) levies a departure tax on people departing from Australia as a way of directly recouping customs and immigration costs.

Definition used in the Act

Spouse includes someone who lives “as the husband or wife of the person”.¹¹⁸ (See Appendix II, Table 2, Spouse 1.) This expression has been interpreted to exclude same-sex couples.¹¹⁹

Impact on same-sex couples

The Act exempts from the tax defence force members from another country travelling in the course of duty, and crew members of an aircraft or ship. These exemptions extend to the accompanying spouse or child of such a person.¹²⁰

Higher Education Funding Act 1988 (Cth) and Higher Education Support Act 2003 (Cth)

Both the *Higher Education Funding Act 1988* (Cth) and the *Higher Education Support Act 2003* (Cth) regulate the funding of tertiary education in Australia. In doing so, they make provision for the charging of fees to students, including overseas students.

¹¹⁴ *International Organisations (Privileges and Immunities) Act 1963* (Cth) sch 2.

¹¹⁵ *International Organisations (Privileges and Immunities) Act 1963* (Cth) sch 3 cl 5.

¹¹⁶ *International Organisations (Privileges and Immunities) Act 1963* (Cth) sch 4, cl 3.

¹¹⁷ ATO Ruling TR 92/14, <http://law.ato.gov.au/atolaw/view.htm?locid=TXR/TR9214/NAT/ATO#P3> (accessed September 19 2006).

¹¹⁸ *Passenger Movement Charge Collection Act 1978* (Cth) s 3.

¹¹⁹ See *Re Brown and Commissioner for Superannuation* (1995) 21 AAR 378.

¹²⁰ *Passenger Movement Charge Collection Act 1978* (Cth) s 5(d), (f).

Both Acts exempt the spouse of a New Zealand Diplomat from liability to pay fees as an overseas student.¹²¹ Neither Act includes a definition of “spouse”, so it is unclear whether heterosexual de facto couples would be included. Same-sex couples are most likely to be excluded.¹²²

¹²¹ *Higher Education Funding Act 1988* (Cth) s 3; *Higher Education Support Act 2003* (Cth) sch 1.

¹²² See *Commonwealth of Australia v HREOC & Muller* (1998) EOC 92-931.

TAX

Income Tax Assessment Act 1936 (Cth)

The *Income Tax Assessment Act 1936* (Cth) (ITA) governs personal income taxation, setting methods of assessment and allowing various income deductions and rebates. In general, the tax unit is the individual. However there are a significant number of rebates that are based upon a relationship with a spouse.

Benefits provided on the basis of a recognised relationship are addressed first. These are followed by areas of income tax law where the recognition of a relationship imposes obligations.

Definitions used in the Act

The Act defines “spouse” as including a person who lives with other the person “as the husband or wife of the person”.¹²³ This is the most common definition of de facto spouse in federal law (see Appendix II, Table 2, Spouse 1). Although there is no express exclusion of same-sex couples, the same definition was interpreted by the Administrative Appeals Tribunal in 1995 to exclude same-sex couples¹²⁴ and the Australian Tax Office (ATO) has continued to interpret the definition in this fashion in several non-binding decisions concerning a range of the provisions discussed below.¹²⁵

“Child” is defined as including “an adopted child, a step-child or an ex-nuptial child of that person”¹²⁶ and would exclude a non-biological or non-adoptive parent.

“Relative” includes a spouse or child.

Impact on same-sex couples – current disadvantages

Dependant Rebates

The ITA provides for tax rebates of a set amount for prescribed dependants of the income earner if the income earner contributes to the maintenance of that person through the tax year and various other criteria are met.¹²⁷ Rebates are available for a dependant:

- spouse;
- child housekeeper;
- invalid relative; and
- parent or spouse’s parent.

¹²³ *Income Tax Assessment Act 1936* (Cth) 6(1).

¹²⁴ *Re Brown and Commissioner for Superannuation* (1995) 21 AAR 378.

¹²⁵ See eg the following Interpretative Decisions: ATO ID 2002/731; ATO ID 2002/211.

¹²⁶ *Income Tax Assessment Act 1936* (Cth) s 6(1).

¹²⁷ *Income Tax Assessment Act 1936* (Cth) s 159.

There are additional provisions for a rebate for the cost of a full-time housekeeper to care for a spouse on a disability support pension (in 2006 of \$1000)¹²⁸ and a rebate for the care of dependant children where a rebate is not available in the categories listed above.¹²⁹ Same-sex couples cannot qualify for these rebates, nor can a non-biological or non-adoptive parent qualify for the rebates that concern children.

Other Rebates Granted at a Higher Rate for Taxpayer With Spouse

A number of other rebates are paid at a higher rate if the taxpayer has a “dependent spouse”, such as the:

- zone rebate for people living in rural or remote areas;¹³⁰
- rebate for members of the defence force serving overseas;¹³¹ and
- rebate for civilians serving with a United Nations force.¹³²

There is also a senior Australians tax offset (or low-income aged person’s rebate) for a taxpayer with a spouse.¹³³ This is calculated on a higher effective combined income of the couple and may be transferred to a spouse in some cases. Same-sex couples are excluded from the higher level of these rebates.

Specific Exemption from Income Tax for US Military Facilities

There is a specific exemption from income tax for members of the United States (US) Defence Forces and civilian employees working at specific US facilities in Australia. This exemption is also available to the “spouse” or “dependent relative” of an eligible person, which excludes a same-sex partner.¹³⁴

Superannuation Contribution Rebates and Tax Concessions

A taxpayer who contributes to a spouse’s superannuation fund when the spouse earns less than a set amount is entitled to a rebate.¹³⁵

Furthermore, superannuation payments to a spouse or child’s fund on their on behalf are not subject to superannuation contributions tax which is usually levied at the rate of 15% on contributions.¹³⁶

A person who made a superannuation contribution on behalf of a same-sex partner would be excluded both from the rebate and the contribution tax exemption.

¹²⁸ *Income Tax Assessment Act 1936* (Cth) s 159L.

¹²⁹ *Income Tax Assessment Act 1936* (Cth) s 159K.

¹³⁰ *Income Tax Assessment Act 1936* (Cth) s 79A.

¹³¹ *Income Tax Assessment Act 1936* (Cth) s 79B.

¹³² *Income Tax Assessment Act 1936* (Cth) s 23AB(7).

¹³³ *Income Tax Assessment Act 1936* (Cth) s 160AAAA.

¹³⁴ *Income Tax Assessment Act 1936* (Cth) s 23AA.

¹³⁵ *Income Tax Assessment Act 1936* (Cth) s 159T. Note that s 159TA determines the amount of the rebate where a taxpayer qualifies for the rebate concerning two spouses in one tax year. Section 159TC defines “spouse” specifically for the purpose of the superannuation rebate as:

“(a) includes another person who, although not legally married to the taxpayer, lives with the taxpayer on a bona fide domestic basis as the husband or wife of the taxpayer; but:
(b) does not include a person who lives separately and apart from the taxpayer on a permanent basis.”

¹³⁶ *Income Tax Assessment Act 1936* (Cth) s 274.

Medical Expenses Rebate

Once a person has paid over a set amount of out-of-pocket medical costs (in 2005-6 \$1500), they may claim a 20% rebate off their income tax for medical expenses over that sum.¹³⁷ This is separate to Medicare refunds, and covers amounts not refunded by Medicare and amounts not covered by the Medicare Safety Nets.

This rebate includes medical costs paid on behalf of a “dependant”, which is defined to include a spouse and child of the taxpayer.¹³⁸ This permits the taxpayer to meet the threshold through the collective medical expenses of their spouse and children, and gain the rebate of 20% of the amount spent by both members of the couple over that threshold. Same-sex couples must meet the threshold individually.

Concessional Tax Treatment for Property Transfers on Relationship Breakdown

Transfer for the Benefit of a Child

The ITA provides favourable tax treatment of the transfer of property to a child or trustee on behalf of a child if such transfer is the result of a “family breakdown”.¹³⁹

“Family breakdown” is defined as requiring that “a person ceases to live with another person as the spouse of that person on a genuine domestic basis (whether or not legally married to that person)”.¹⁴⁰ The use of “spouse” in this definition would exclude same-sex couples if the interpretation given to the expression “lives as a spouse” by the Federal Court in *Muller* (1998) continues to be followed.¹⁴¹ This means that the transfer of property to a child or trustee on behalf of a child of a same-sex relationship breakdown is taxed at a higher rate than that applied to the child of a heterosexual couple.

Transfer of property to a former spouse

There is favourable capital gains treatment of the transfer of property from a taxpayer, company or trustee to a “spouse or former spouse” of a person under a court order or maintenance agreement under the *Family Law Act* or a state or territory court order relating to the breakdown of de facto marriages.¹⁴²

The coverage of same-sex couples under these provisions is ambiguous. In all states and territories except South Australia, same-sex couples may currently be the subject of a court order under state property-division regimes. However the provisions refer to “de facto marriages”, and the use of the word “marriage” could be interpreted as excluding same-sex couples.

¹³⁷ *Income Tax Assessment Act 1936* (Cth) s159P.

¹³⁸ *Income Tax Assessment Act 1936* (Cth) s 159.

¹³⁹ *Income Tax Assessment Act 1936* (Cth) s 102AGA. See also *Income Tax Assessment Act 1997* (Cth) s 51.50.

¹⁴⁰ *Income Tax Assessment Act 1936* (Cth) s 102AGA(2)(a).

¹⁴¹ *Commonwealth of Australia v HREOC & Muller* (1998) EOC 92-931. I argue in the Introduction to this paper that the reasoning in the decision is questionable.

¹⁴² *Income Tax Assessment Act 1936* (Cth) ss 160ZZM, 160ZZMA. See also *Income Tax Assessment Act 1997* (Cth) ss 126.5, 126.15.

Maintenance Payments

Maintenance payments paid to a “spouse or former spouse” received for the benefit of a child of the payer or for the benefit of a former spouse of the payer are exempt from income tax otherwise payable by the *recipient* of the payment.¹⁴³ Same-sex couples are excluded from the definition of spouse, and so maintenance received by a former partner in a same-sex relationship, including child maintenance, would be subject to income tax.

Impact on same-sex couples – current advantages

Anti-Avoidance Measures

Numerous provisions of the ITA concern anti-avoidance and commonly cover the transactions of an “associate” of a taxpayer.¹⁴⁴

“Associate” is variously defined for the purpose of different provisions, but includes a relative, child or spouse of the taxpayer in all instances.¹⁴⁵ These anti-avoidance provisions do not apply to a same-sex partner because they are excluded from the definition of spouse.

The exclusion of same-sex couples from the definition of spouse, and of non-biological or adoptive children from the definition of child means that people in such relationships could legitimately engage in behaviour to avoid tax that would be unlawful for heterosexual families.

Income Tax Assessment Act 1997 (Cth)

The *Income Tax Assessment Act 1997* (Cth) operates in addition to the *Income Tax Assessment Act 1936* (Cth).

Definitions used in the Act

The 1997 Act defines “spouse” and “child” and “adopted child” in identical terms to the *Income Tax Assessment Act 1936* (Cth).¹⁴⁶ (See Appendix II, Table 2, Spouse 1.)

Most of the relationship-based provisions under the Act are beneficial, with two exceptions that impose an obligation. One is the anti-avoidance provisions, referred to in the section immediately above on the 1936 Act. The other obligation concerns an element of the capital gains tax provisions, which is noted in the section of that name below.

¹⁴³ *Income Tax Assessment Act 1936* (Cth) s 23.

¹⁴⁴ See eg: *Income Tax Assessment Act 1936* (Cth) ss 26AAC, 78A.

¹⁴⁵ See eg: *Income Tax Assessment Act 1936* (Cth) ss 82KH(a), 160E, 159GE, 318, 491, 221YHAAA, 160ZZPM.

¹⁴⁶ *Income Tax Assessment Act 1997* (Cth) s 995.1.

Impact on same-sex couples

Baby Bonus

The first-child rebate, known as the “baby bonus”, was available for a child born or adopted in the years 2001-2004 as a non-income-tested tax rebate to eligible parents.¹⁴⁷ For children born after 1 July 2004 the “baby bonus” is paid as a tax-free lump sum directly to eligible parents.

The 1997 Act provides a rebate for a first child born from 2001-2004 for the income years up to and including the year the child turns 5.¹⁴⁸ This rebate is available if there is a “child event” which requires that the taxpayer become “legally responsible” for the child.¹⁴⁹ This definition, which should cover a non-biological or non-adoptive parent with parenting orders, would still exclude them from being able to claim the rebate if there was another eligible parent.¹⁵⁰

As with the Child-Care Rebate, discussed below, the 1997 Act allows the First-Child Rebate to be transferred to a “spouse” who does not have the primary entitlement.¹⁵¹ Same-sex couples cannot transfer the rebate. The ability to transfer the rebate is beneficial if one partner does not have a sufficient tax liability in the tax year to be able to claim the value of the rebate but the other partner does.

Child-Care Tax Rebate

The 30% Child-Care Tax Rebate is a separate rebate over and above the Child-Care Benefit (which is discussed in this paper in the “Social Security” section as it is not linked to the tax system). To be eligible for the Child-Care Rebate one must *also* be eligible for the Child-Care Benefit.¹⁵²

This Child-Care Rebate covers 30% of out-of-pocket child-care expenses for approved child-care, up to a maximum of \$4000 per child per year. This rebate reduces the amount of tax otherwise owed, and so is only beneficial if a person has a tax liability for the year in question.

The rebate applies based on child-care fees incurred by an individual or his or her “partner”.¹⁵³ “Partner” is explicitly limited to opposite-sex couples.¹⁵⁴

¹⁴⁷ *Income Tax Assessment Act 1997* (Cth) sub-div 61-I s 61.360.

¹⁴⁸ *Income Tax Assessment Act 1997* (Cth) s 61.355. Section 61.440 provides an additional tax offset for a child who is in the taxpayers’ care prior to being adopted.

¹⁴⁹ *Income Tax Assessment Act 1997* (Cth) s 61.360. Section 995.1 defines “legally responsible” as meaning: “legally responsible (whether alone or jointly with someone else) for the day-to-day care, welfare and development of the child”.

¹⁵⁰ *Income Tax Assessment Act 1997* (Cth) s 61.375.

¹⁵¹ *Income Tax Assessment Act 1997* (Cth) ss 61.355, 61.440.

¹⁵² *Income Tax Assessment Act 1997* (Cth) sub-div 61-IA.

¹⁵³ *Income Tax Assessment Act 1997* (Cth) s 61.490.

¹⁵⁴ The term is defined as having the same meaning as in the *A New Tax System (Family Assistance) Act 1999*, which in turn defines “partner” as having the same meaning as in the *Social Security Act 1991* (Cth) where the term is defined as meaning “member of a couple” and that expression is defined as exclusively opposite-sex.

Where the amount of the Child-Care Rebate exceeds the amount of income tax liability such that the person cannot utilise the value of the offset in a tax year, they may transfer it to a “spouse”.¹⁵⁵

As the non-biological or non-adoptive parent in a same-sex couple is not a parent of the child or a partner of the other parent for the purposes of the Act, any child-care payments made by them are ineligible for the Child-Care Rebate.

The rebate cannot be transferred by the biological or adoptive parent to a same-sex partner by virtue of the definition of “partner”. This is particularly disadvantageous if the legal parent has no tax liability in any given year.

Capital Gains Tax

The capital gains tax provisions (CGT) contain both benefits and obligations based on recognised relationships.

Current disadvantage for same-sex couples

There is an exemption from CGT for an inherited dwelling that takes into account that it was the main residence of the “spouse” of the deceased.¹⁵⁶ Same-sex couples are excluded from this provision and so may have a higher tax liability than a heterosexual couple in the event of inheriting a partner’s residence on their death.

Current advantage for same-sex couples

Capital gains tax is not payable on the capital gain of a dwelling that is the taxpayer’s “main residence”.¹⁵⁷

If during any period a person lives in a separate main dwelling from their “spouse” (except a spouse living permanently separately and apart from the person), the person and spouse must either choose one of those residences as their main residence for the period or nominate both as their main residences. If the different dwellings are both nominated as main residences, the CGT exemption is split.¹⁵⁸ Same-sex couples are excluded from this provision and so may gain a CGT advantage if they own and live in two separate properties, as they can legitimately claim each for the exemption.

Fringe Benefits Tax Assessment Act 1986 (Cth)

The *Fringe Benefits Tax Assessment Act 1986* (Cth) governs the assessment and collection of fringe benefits tax (FBT), which is assessed on the basis of benefits granted to a person and also certain benefits that are granted to a person’s “associates”.

¹⁵⁵ *Income Tax Assessment Act 1997* (Cth) s 61.496.

¹⁵⁶ *Income Tax Assessment Act 1997* (Cth) s 118.205.

¹⁵⁷ *Income Tax Assessment Act 1997* (Cth) s 118.110(1).

¹⁵⁸ *Income Tax Assessment Act 1997* (Cth) s 118.70.

Definitions in the Act

“Associate” includes a relative, spouse or child.¹⁵⁹ The categories “relative”, “close relative” and “family member” are also used, and each includes a spouse or child.

“Spouse” is defined as another person who lives with the person “as the husband or wife of the person”¹⁶⁰ (see Appendix II, Table 2, Spouse 1). This definition has been interpreted to exclude same-sex couples.¹⁶¹

“Child” is defined to include an adopted, step- or an ex-nuptial child and so would exclude a non-biological or non-adoptive child.¹⁶²

Impact on same-sex couples – current advantages

The main provisions of the Act impose obligations. FBT applies to a range of benefits provided to an employee and their spouse or relatives. Benefits provided to the same-sex partner or non-biological or non-adoptive child of a person should not be subject to FBT under the current legislation.

Note, however, Australian Tax Office (ATO) ruling ATO ID 2003/7. This ruling held that a same-sex partner who was a “third party” to an “arrangement” under s 148(2) of the Act was *deemed* to be an “associate”, such that a car provided by an employer and used by the employee’s same-sex partner was subject to fringe benefits tax.

The definition of “associate” in the Act is an exhaustive one, which covers a “spouse”. It thus appears that the only way the ATO could *deem* a partner to be an “associate” is to include them as a spouse, which then draws them into the definition of associate. This is incorrect, as other available ATO rulings on the definition of spouse exclude same-sex partner.¹⁶³ It is notable that this ruling applies only the obligations, and not the benefits, of FBT rules to same-sex couples.

Impact on same-sex couples – current disadvantages

There is an exemption from FBT for the provision of transport benefits if they are used to attend the funeral of a “close relative” of the employee.¹⁶⁴

The provision of a range of items to residential employees is exempt from FBT during the period of accommodation. These include provision to the employee or a spouse or child of the employee of: accommodation; residential fuel; meals provided; and food or drink (other than meals) for consumption during that period.¹⁶⁵

The Act also exempts from FBT a benefit provided by a religious employer to an employee who is a religious practitioner, or to a spouse or a child of the employee (if

¹⁵⁹ *Fringe Benefits Tax Assessment Act 1986* (Cth) s 136(1) defines “relative” as having the same meaning as that given in s 26AAB of the *Income Tax Assessment Act 1936* (Cth).

¹⁶⁰ *Fringe Benefits Tax Assessment Act 1986* (Cth) s 136(1).

¹⁶¹ See *Re Brown and Commissioner for Superannuation* (1995) 21 AAR 378.

¹⁶² *Fringe Benefits Tax Assessment Act 1986* (Cth) s 136(1).

¹⁶³ See eg the Interpretative Decisions: ATO ID 2002/731; ATO ID 2002/211.

¹⁶⁴ *Fringe Benefits Tax Assessment Act 1986* (Cth) s 58LA.

¹⁶⁵ *Fringe Benefits Tax Assessment Act 1986* (Cth) ss 58, 58U, 58T.

that benefit relates principally to pastoral duties, or any other duties or activities that are directly related to the practice, study, teaching or propagation of religious beliefs).¹⁶⁶

Same-sex couples and the non-adoptive or non-biological child of an employee would not be covered by this range of exemptions available to heterosexual couples.

A New Tax System (Goods and Services Tax) Act 1999 (Cth)

The *A New Tax System (Goods and Services Tax) Act 1999* (Cth) provides for the imposition of a goods and services tax (GST) on certain transactions, known as a “taxable supply”.

The ATO has determined that an ordinary transfer of property as the result of a “matrimonial property division” is not a taxable supply, and has issued directions on how GST would be applied to the transfer of “enterprise assets” (business resources) between separating couples as a result of a “matrimonial property division”.

Matrimonial property division includes division resulting from court orders and agreements entered into under applicable property division legislation.¹⁶⁷ This ruling specifically states that this also applies to property distributions between “de facto or same-sex couples upon their personal relationship breakdown”.¹⁶⁸

¹⁶⁶ *Fringe Benefits Tax Assessment Act 1986* (Cth) s 57.

¹⁶⁷ ATO Ruling GSTR 2003/6.

¹⁶⁸ ATO Ruling GSTR 2003/6 para 3. Note, however, that there is nothing in the Act itself that defines “matrimonial property division”.

SOCIAL SECURITY

Social Security Act 1991 (Cth)

The *Social Security Act 1991* (Cth) provides government income support for people in a range of circumstances, including unemployment through inability to find paid work, or through disability, or care of a child, as well as support for other purposes such as education and training.

Social security law grants certain benefits based on a recognised relationship, but there are also numerous areas where the recognition of a relationship is disadvantageous to the people concerned, for example through a reduction of, or disentitlement to, benefits that are granted to individuals. Benefits provided on the basis of a recognised relationship are addressed below. These are followed by areas of social security law where the recognition of a relationship is more likely to be disadvantageous to same-sex couples.

Definitions used in the Act

The key category in social security law is “member of a couple”, which is defined as including a relationship between an unmarried couple if they are of the opposite sex and in the Secretary’s opinion they are in a “marriage-like relationship.”¹⁶⁹ (See Appendix II, Table 2, Member of a Couple 1.) This definition is adopted by the *A New Tax System (Family Assistance) Act 1999* (Cth) and *Income Tax Assessment Act 1997* (Cth), but is not in use in other federal law. The requirement that a couple be opposite-sex is an explicit part of the definition; same-sex couples are categorically excluded. “Partner” is also a commonly used term in the Act, and this is defined as meaning a “member of a couple”.¹⁷⁰

The Act sets out criteria that must be taken into account in forming an opinion about a relationship, including detailed consideration of financial interdependence, living arrangements, and the social and sexual aspects of the relationship.¹⁷¹ The criteria are also adopted by the *A New Tax System (Family Assistance) Act 1999* (Cth) and *Income Tax Assessment Act 1997* (Cth), but are not in use in any other area of federal law.

Although differently worded, the main elements of the criteria are in fact very similar to those in use in all state and territory laws to assist in determining the existence of a de facto relationship of both same-sex and opposite-sex couples (see Appendix II, Table 1 for a comparison).

The definition of “parent” in the Act includes an “adoptive parent” or “natural parent”.¹⁷² The term “natural parent” is in use in this and only one other federal Act, and is not defined in either place.¹⁷³ This term would likely be interpreted as meaning

¹⁶⁹ *Social Security Act 1991* (Cth) s 4(2).

¹⁷⁰ *Social Security Act 1991* (Cth) s 4(1).

¹⁷¹ *Social Security Act 1991* (Cth) s 4(3).

¹⁷² *Social Security Act 1991* (Cth) s 5(1). Section 5(1) further defines “adopted child” as meaning a “young person” “adopted under the law of any place, whether in Australia or not, relating to the adoption of children.”

¹⁷³ *Income Tax Assessment Act 1936* (Cth) s 102AGA.

biological parents and so would exclude the non-biological or non-adoptive parent in a same-sex family. However it would be an extremely surprising result if legal parents such as the non-biological father of a child born through assisted reproductive technology, recognised as a parent through state parenting presumptions, were excluded from social security law through the use of the term “natural parent”.

Impact for same-sex couples – current disadvantages

Same-sex couples are not recognised as partners for any of the benefits described below.

Partner Allowances

There are various kinds of *partner allowance* that may be payable in certain circumstances.¹⁷⁴ For example, if a person’s partner is on a disability pension, sickness allowance or Austudy and the person does not have recent workforce experience then a person may be entitled to a partner allowance.¹⁷⁵

Bereavement Allowance and Bereavement Payments

Bereavement Allowance is payable to a person without dependent children for a set number of weeks immediately after the death of a partner.¹⁷⁶

There are also a range of bereavement payments to partners of people in receipt of social security payments¹⁷⁷ or Austudy.¹⁷⁸ There are also certain one-off payments to partners, and those eligible for wives’ and carers’ pensions in the event of a death.¹⁷⁹ Some bereavement payments are also available to the carer of a person who dies, if the carer was in receipt of carer payment, or to the carer or parent of a young child who dies.¹⁸⁰

Widows’ Pensions and Allowances

There are specific pensions that are payable only to a divorced, separated or widowed woman in certain circumstances. These are the *Widow B Pension*¹⁸¹ and *Widow Allowance*.¹⁸² Further, a woman whose partner has died has simpler eligibility criteria for the age pension.¹⁸³ Male partners in any relationship and female partners in same-sex relationships are not eligible for these payments.

Youth Allowance

In determining Youth Allowance, eligibility is subject to a parental income test or Family Actual Means test unless the person is classified as “independent”.¹⁸⁴ If a

¹⁷⁴ *Social Security Act 1991* (Cth) ss 771-771NZAA.

¹⁷⁵ *Social Security Act 1991* (Cth) s 771HA.

¹⁷⁶ *Social Security Act 1991* (Cth) ss 315-359.

¹⁷⁷ *Social Security Act 1991* (Cth) ss 237-243.

¹⁷⁸ *Social Security Act 1991* (Cth) ss 592-592E.

¹⁷⁹ *Social Security Act 1991* (Cth) ss 512-514F.

¹⁸⁰ *Social Security Act 1991* (Cth) ss 235-236B.

¹⁸¹ *Social Security Act 1991* (Cth) ss 362A-407.

¹⁸² *Social Security Act 1991* (Cth) ss 408AA-408GI.

¹⁸³ *Social Security Act 1991* (Cth) s 43(1A).

¹⁸⁴ Another ground for independence is that either the person or their partner has a dependent child under *Social Security Act 1991* (Cth) s 1067A(3).

person is in a “Youth Allowance Couple” this is taken to establish them as independent.¹⁸⁵ The definition of “Youth Allowance Couple” requires that the parties be in an opposite-sex relationship.¹⁸⁶ Thus a member of a same-sex couple may be unable to establish their independence for the purpose of this allowance.

Another issue with Youth Allowance is question of eligibility for the allowance if they are unable to accept an offer of work because it would be unreasonably difficult for them to commute to it. Several factors under this section concern the circumstances of a person’s opposite-sex “partner” as well as their own, including: pregnancy; medical condition; jeopardising current employment of a partner; having a child under 16 living with them; and having significant caring responsibilities.¹⁸⁷ A person in a same-sex couple may therefore be found ineligible for the Youth Allowance benefit because they are unable to accept an offer of employment due to a partner’s circumstances.

Retirement Assistance to Farmers

The provision of retirement assistance to farmers exempts the value of farming interests transferred by a qualifying farmer, and a present, or former, opposite-sex “partner”, for the purpose of determining eligibility for social security.¹⁸⁸ A farmer in a same-sex relationship could therefore be rendered ineligible for assistance if transferring the value of a farming interest.

Recipient Incarcerated

If a social security pension is not payable because the recipient is in gaol or psychiatric confinement on a criminal charge, the payment may be redirected by the Secretary to a “dependent child” or opposite-sex “partner” of the person.¹⁸⁹ The same-sex partner or non-biological child of a person confined in these circumstances is not eligible to receive the payment.

Impact on same-sex couples - current advantages

Income and Assets Tests

The income or assets of a partner are taken into account in determining eligibility for social security.¹⁹⁰ This may exclude a person from benefits that they would otherwise be eligible to receive, or may mean that they receive a benefit at a lower rate. The income or assets of same-sex partners are not taken into account as they are not included in the definition of “member of a couple”.

In determining eligibility for benefits the entire value of the income and assets of a partner are counted in provisions such as:

- Newstart allowance;¹⁹¹

¹⁸⁵ *Social Security Act 1991* (Cth) s 1067A(2).

¹⁸⁶ *Social Security Act 1991* (Cth) s 1067C.

¹⁸⁷ *Social Security Act 1991* (Cth) s 541D(1A).

¹⁸⁸ *Social Security Act 1991* (Cth) ss 1185A, 17A .

¹⁸⁹ *Social Security Act 1991* (Cth) s 1159.

¹⁹⁰ *Social Security Act 1991* (Cth) s 8(1B).

¹⁹¹ *Social Security Act 1991* (Cth) s 612(1). This is not an exhaustive list.

- Parenting payment¹⁹²
- Sickness allowance;¹⁹³ and
- Health Care Concession Card.¹⁹⁴

If the partner is also on social security or another form of income support, the income and assets test for certain benefits imputes only 50% of the value of the income and assets to the person, rather than 100%. This may be beneficial or detrimental to a couple depending upon how their assets are divided.¹⁹⁵ This applies to benefits such as:

- Newstart allowance;¹⁹⁶
- Sickness allowance;¹⁹⁷
- Age Pension (this includes a partner not on social security);¹⁹⁸
- Sole parent pension, Bereavement Allowance and Widow B pension;¹⁹⁹
- Payments based on “severe financial hardship”.²⁰⁰

Benefits at a partnered rate

Many benefits are paid at a “partnered rate” to people who are members of a couple. This is less than the sum that would be paid to two individuals who are not members of a couple, based on the assumption that a cohabiting couple pools expenses and lives more cheaply than two individuals can.

Benefits that are paid at a partnered rate to members of a couple include:

- 1 Parenting Payment;²⁰¹
- 2 Austudy;²⁰²
- 3 Youth Allowance;²⁰³ and
- 4 Age and Disability Support pensions.²⁰⁴

The exclusion of same-sex couples from the definition of “partner” and “member of a couple” in the above instances may be beneficial as both members may legitimately claim the individual rate.

¹⁹² *Social Security Act 1991* (Cth) s 500Q.

¹⁹³ *Social Security Act 1991* (Cth) s 681(1).

¹⁹⁴ *Social Security Act 1991* (Cth) s 1071A.

¹⁹⁵ Take, for instance, a scenario where the individual asset limit was \$50,000 and the couple limit \$100,000. A couple who held assets of \$52,000 and \$47,000 respectively would both be eligible if assessed as a couple, but the first partner would be ineligible if assessed as an individual. However, if one partner had \$10,000 and the other \$110,000, the first partner would be eligible if assessed individually whereas both would be ineligible if assessed as a couple.

¹⁹⁶ *Social Security Act 1991* (Cth) s 612(2). This is not an exhaustive list.

¹⁹⁷ *Social Security Act 1991* (Cth) s 681(2).

¹⁹⁸ *Social Security Act 1991* (Cth) ss 1064-A2, G3.

¹⁹⁹ *Social Security Act 1991* (Cth) s 1066-A2.

²⁰⁰ *Social Security Act 1991* (Cth) s 19C.

²⁰¹ *Social Security Act 1991* (Cth) ss 1068, 503. This is not an exhaustive list.

²⁰² *Social Security Act 1991* (Cth) s 1067L.

²⁰³ *Social Security Act 1991* (Cth) s 1067G.

²⁰⁴ *Social Security Act 1991* (Cth) ss 1065-B1.

Parental Income for Youth Allowance

“Parent” is defined to have a broader meaning in certain sections of the Act relating to Youth Allowance. For these provisions, “parent” includes a parent’s opposite-sex partner, or “any other person” on whom the young person is wholly or substantially dependent.²⁰⁵

A non-biological or non-adoptive parent in a same-sex family therefore could be recognised as someone on whom the child is dependent for the detrimental purpose of assessing Youth Allowance, although not for social security law generally.

A New Tax System (Family Assistance) Act 1999 (Cth)

A New Tax System (Family Assistance) Act 1999 (Cth) governs various family-related benefits, including family assistance through the Family Tax Benefit scheme and certain child-care benefits.

Family Tax Benefit

Despite its title, the Family Tax Benefit (FTB) is not linked to the tax system but is paid as a direct form of support to families with children, either as an annual or a fortnightly sum. There are two different kinds of assistance, both of which are paid on a per-child basis, and vary in amount depending on the age of the children and the level of family income.

Definitions used in the Act

“Member of a couple” and “partner” have the same meaning as that given in the *Social Security Act 1991* (Cth)²⁰⁶ (see Appendix II, Table 2, Member of a Couple 1), and so expressly exclude same-sex couples. Family income under the scheme is the income of both members of the couple.

Payments are made on the basis of each “FTB child”, who is defined as a child under 18 in the care of a person who is legally responsible for them, or an individual between 18 and 20 in the care of a person, or an individual between 21 and 25 in full-time education in the care of a person.²⁰⁷ For children under 18, it is noteworthy that the Act specifically provides that the individual is an FTB child of the adult if there is a family law order or a registered parenting plan is in force in relation to the individual.²⁰⁸ This means that a non-biological or non-adoptive parent with parenting orders should be taken to have an “eligible FTB child”.

This leads to some ambiguity for a same-sex couple with parenting orders, as it means that the child should meet the definition of an “FTB child” in relation to both adults, yet the relationship between the adults does not meet the definition of “couple”, and many provisions rest upon the income of the couple.

The result of this is that if the child lived solely with a non-biological or non-adoptive parent from a separated same-sex couple, the relationship of parent and child should

²⁰⁵ *Social Security Act 1991* (Cth) s 5(1) “parent” (b)(ii), (iii).

²⁰⁶ *A New Tax System (Family Assistance) Act 1999* (Cth) s 3.

²⁰⁷ *A New Tax System (Family Assistance) Act 1999* (Cth) s 22.

²⁰⁸ *A New Tax System (Family Assistance) Act 1999* (Cth) s 22(3)(b).

be recognised for FTB purposes. However, it is unknown whether, as a matter of administrative practice, the Family Assistance Office will accept applications for FBT from a non-biological parent with parenting orders.

In any case, if the couple are together, the relationship between the adults is not recognised under the provisions, meaning that the biological or adoptive parent is in effect treated as a single parent. This is beneficial for the purpose of FTB A and, depending on the allocation of income within the couple, may also be beneficial under FTB B.

Impact on same-sex couples

FTB A is the most common form of family payment made by the Australian government. It is a broadly based family-support payment available to both low-income and medium-income families. In the 2006-2007 year the maximum rate is paid up to a family income of \$40,000, the rate is then reduced by 20 cents for each dollar earned over that amount up to a family income of \$88,622 per year (plus \$3,504 for each additional dependent child) and then reduced by 30 cents in the dollar after that amount until the payment reaches nil.²⁰⁹ FTB A is income-tested on the income of both “members of a couple”. A same-sex partner’s income is not counted, increasing the amount paid and the likelihood of not reaching the upper income limit. The exclusion of same-sex couples from the definition of couple is therefore beneficial for this provision.

FTB B gives extra assistance to sole-parent families and to families where one member of the couple is in paid employment and the other is primarily engaged in care of children. It is available in addition to FTB A, and is payable for children under 16 and those between 16 and 18 if in full-time education. For sole parents there is no income test for this payment. For couples, the payment is income tested on the income of the individual earning the *lesser* income within the couple. If the secondary earner’s income is above \$4,234 per year, the rate of payment reduced by 20 cents for every dollar earned over that amount (up to a maximum income of \$21,572 if the youngest child is under five years of age or \$16,790 if the youngest child is over five.²¹⁰)

Same-sex couples are excluded from the definition of “member of a couple”, and so the biological or adoptive parent is treated as a sole parent and is entitled to the maximum FTB B benefit with no income test. This is beneficial if the lower-earning member of the same-sex couple is earning over the lower income limit amount, as it means they are entitled to a higher rate of benefit than a similarly situated heterosexual couple. If the secondary earner in a same-sex couple is earning over the maximum limit then the couple is still entitled to the full benefit, whereas a heterosexual couple would not be entitled to any. If, however, the secondary earner earns less than the lower limit, then there would be no benefit and no detriment, because both an unrecognised same-sex couple (assessed as single) and a recognised heterosexual couple (assessed on the lower income) would get the same payment.

²⁰⁹ See Family Assistance Office, “Factsheet, Family Tax Benefit Part A” (1 July 2006).

²¹⁰ See Family Assistance Office, “Factsheet, Family Tax Benefit Part B” (1 July 2006).

Child-Care Benefit

The Act also provides a Child-Care Benefit for approved and registered child-care. This benefit is distinct from the 30% Child-Care Rebate which is paid through the taxation system (and discussed in the “Tax” section of this paper). The Child-Care Benefit may be paid directly to the child-care centre or be reimbursed to the individual as a lump sum at the end of the year. The benefit is paid on a per-child basis and is calculated on a sliding scale based on family income. Even high-income families are entitled to the minimum rate of the benefit, as there is no income cut-off point.

Entitlement to the benefit is based upon a child being an “FTB child” of the individual or the individual’s partner.²¹¹

As with the FTB provisions discussed above, which use the same definitions of “child”, it is possible that a non-biological or non-adoptive parent with parenting orders would be eligible to claim the benefit as an “individual” but not as the “partner” of an individual. However, it is unknown whether, as a matter of administrative practice, the Family Assistance Office will accept applications for the Child-Care Benefit from a non-biological parent with parenting orders.

Fee reductions are provided for child-care paid for by an individual or their “partner”.²¹² Fees paid for by a non-biological or non-adoptive parent in a same-sex family may not be eligible for the benefit, as that person is excluded from the definition of “partner” under the Act. This is detrimental, but could be overcome by a same-sex couple ensuring that the legal parent was the individual recorded as paying the child-care fees.

The benefit is paid for a set number of “eligible hours” of child-care (24 hours per week). Eligible hours are increased if a person is engaged in work or study, training or if a person has a disability (up to 50 hours per week). The “work/disability” test for higher eligible hours must be satisfied by both “members of a couple”.²¹³ The exclusion of same-sex couples from the definition of couple is beneficial for this provision as only the legal parent would need to meet this test in order to claim for a higher number of eligible hours.

²¹¹ *A New Tax System (Family Assistance) Act 1999* (Cth) ss 42, 43.

²¹² *A New Tax System (Family Assistance) Act 1999* (Cth) ss 43-46.

²¹³ *A New Tax System (Family Assistance) Act 1999* (Cth) s 57E.

HEALTH

Medicare

Medicare Levy Act 1986 (Cth)

The *Medicare Levy Act 1986* (Cth) determines the levy imposed upon personal incomes to fund the Medicare scheme. This levy is composed of two elements, the general levy and the surcharge.

Definitions drawn from other legislation

The Act does not include definitions of “spouse”, “child” or “dependant”, but instead refers to definitions contained in the *Income Tax Assessment Act 1936* (Cth) section 251R.²¹⁴ These definitions exclude same-sex couples and the non-biological or non-adoptive parent of a child in a same-sex family.

Impact on same-sex couples

Medicare Levy

The general Medicare levy is 1.5% of an individual’s taxable income. However this rate is reduced if a person is a member of a couple and is entitled to a rebate for a dependant spouse, child housekeeper or invalid relative under the *Income Tax Assessment Act 1936* (Cth) s 159J.²¹⁵ As noted above in the “Tax” section of this paper, same-sex couples are excluded from the dependant rebates, and so are by extension excluded from any reduction of the general Medicare levy.

Medicare Surcharge

The Medicare surcharge is an additional 1% charged on income above a set amount if the individual does not have private health insurance for the tax year.²¹⁶ There is a “family surcharge threshold” which is double that of the individual threshold (plus an extra \$1500 of income for each dependant who is a child).²¹⁷ The “family” surcharge threshold is composed of a “family income” which is defined as comprising a person’s taxable income plus the taxable income of a “spouse”.²¹⁸ Same-sex couples are excluded from the definition of spouse, and so are assessed under the individual rather than the family threshold. If a couple have one partner over and one under the individual threshold, but would jointly be under the family threshold, this exclusion is detrimental.²¹⁹

²¹⁴ *Medicare Levy Act 1986* (Cth) s 8D.

²¹⁵ *Medicare Levy Act 1986* (Cth) s 8.

²¹⁶ *Medicare Levy Act 1986* (Cth) ss 8B-8D. See also *Income Tax Assessment Act 1997* (Cth) s 61.305.

²¹⁷ *Medicare Levy Act 1986* (Cth) s 3A.

²¹⁸ *Medicare Levy Act 1986* (Cth) s 8(5).

²¹⁹ Thus a family of two heterosexual spouses with three children has a threshold of \$104,500; whereas for an individual it is \$50,000. For a same-sex couple, the individual threshold rather than the family threshold applies so if one partner was earning \$40,000 and the other \$59,000 the latter partner would be required to pay the surcharge. Further, only the biological parent of a child could add the child to their individual threshold.

Furthermore, heterosexual couples can make an agreement as to which of them will claim the extra threshold for a dependent child, reducing the surcharge on the higher income in the couple.²²⁰ A same-sex couple cannot do so.

Health Insurance Act 1973 (Cth)

The *Health Insurance Act 1973* (Cth) provides for the payment of Medicare benefits and hospital services by the federal government.

Definitions used in the Act

“Members of a person’s family” for the purposes of the Medicare “safety net” and “extended safety net” include a person’s “spouse” and “any dependent child of the person or of the person’s spouse.” “Spouse” is defined to include “de facto spouse”.²²¹

It is noteworthy that although “de facto spouse” is not defined anywhere in the Act, the term has been interpreted by Medicare as excluding same-sex couples.²²²

A “dependent child” under the Act is a child either under 16 or a full-time student under the age of 25 who is “in the custody, care and control of that person”.²²³ This definition appears to be a broad one that could include a non-biological or non-adoptive parent with parenting orders. However the definition of “family” refers to any dependent child *of* the person, which may be interpreted to require a biological relationship. It appears that, as an administrative practice, Medicare has not permitted non-biological or non-adoptive parents to register their children for the safety nets. In the absence of registration, a claim cannot be made.

Impact on same-sex couples

Medicare sets schedule fees for different medical services, but doctors and hospitals are able to charge more than these fees. There are two “gaps” in Medicare: one between the schedule fee and the sometimes lower amount of the fee that Medicare refunds, and the other between the schedule fee and the higher actual “out-of-pocket” cost of the service.

Medicare usually pays 100% of the schedule fee for GP services but only 85% of the schedule fee for other medical services. However once an individual or family spend

²²⁰ *Income Tax Assessment Act 1936* (Cth) ss 251R (6E), (6D) provides that a person and their “spouse” may make a “family agreement” to this effect.

²²¹ *Health Insurance Act 1973* (Cth) s 10AA.

²²² The registration form for the Medicare safety net states in Section 2 “Spouse details” that “Medicare safety net recognises a spouse as being a person who is legally married and not separated, or a man and a woman in a de facto relationship”:

<http://www.medicareaustralia.gov.au/resources/medicare/ma_0701_medicare_safety_net_family_registration_form_web_011005.pdf> (7 July 2006).

²²³ *Health Insurance Act 1973* (Cth) s 10AA. The registration form for the safety net states that the student must be someone “whom you support” – although this element is not included in the statutory definition of dependent child in s 10AA: see Registration Form online at <http://www.medicareaustralia.gov.au/resources/medicare/ma_0701_medicare_safety_net_family_registration_form_web_011005.pdf> (7 July 2006).

over a certain amount on this gap Medicare refunds the entire scheduled fee. In 2006 the threshold amount for this “safety net” is \$345.50.

The Act also provides an “extended safety net” for individuals and families who have spent over a set amount on certain medical expenses in a calendar year.²²⁴ The extended safety net refunds 80% of the difference between the actual cost (ie out-of-pocket cost) of the medical service and the schedule fee once the threshold is reached. In 2006 the threshold was \$1000.²²⁵

The threshold of expense for both the safety net and extended safety net is the same for individuals and families; thus recognition as a family means that the couple’s combined expenses can be used to reach the threshold, rather than needing to meet it individually.

Same-sex couples cannot pool expenses to reach the family threshold for the safety net or the extended safety net.

Pharmaceutical Benefits Scheme

National Health Act 1953 (Cth)

The *National Health Act 1953* (Cth) governs medical, dental and pharmaceutical benefits.

The Act provides for concession cards for the Medicare safety net and for subsidised prescription medications under the Pharmaceutical Benefits Scheme (PBS) for “members of a family” under certain circumstances.

Definitions used in the Act

As with the *Health Insurance Act 1973* (Cth) “members of a person’s family” are defined as including a person’s “spouse” and “any dependent child of the person or of the person’s spouse”.²²⁶ “Spouse” includes de facto spouse, which in turn is defined as exclusively opposite-sex.²²⁷ (See Appendix II, Table 2, Spouse 4.)

A “dependent child” under the Act is a child either under 16 or a full-time student under the age of 25 who is “in the custody, care and control of that person”.²²⁸ As with the *Health Insurance Act 1973* (Cth) this definition is a broad one, but could be limited by interpretation if the reference to any dependent child *of* the person was held to require a biological relationship. An additional provision states that:

²²⁴ *Health Insurance Act 1973* (Cth) s 10ACA. Although note that the expenses must have a Medicare schedule item number; thus the safety nets do not provide a rebate for medical expenses that are not covered by Medicare at all, only those that are partially covered by Medicare. So, for instance, sex reassignment surgery would not attract any refund under the safety nets because, since 1997, it is not included in the Medicare scheme. Similarly fertility treatment to lesbian women assumed to be “medically fertile” by the provider are not ascribed a schedule item number and so must be paid in full by the recipient even if she has met the threshold.

²²⁵ For Commonwealth Concession card holders and families eligible for Family Tax Benefit A, the threshold in 2006 was \$500.

²²⁶ *National Health Act 1953* (Cth) s 84B.

²²⁷ *National Health Act 1953* (Cth) s 4.

²²⁸ *National Health Act 1953* (Cth) s 84B.

“For the purposes of this section, a person shall not be taken to have the custody of a child unless the person, whether alone or jointly with another person, has the right to have, and to make decisions concerning, the daily care and control of the child.”²²⁹

The use of the word “right” in relation to decision-making in this provision suggests that the legal requirement of parental responsibility must be present for the definition of child to be satisfied for this section and that it is this, rather than a biological relationship that is the crux of the definition. A non-biological or non-adoptive parent who had parenting orders should therefore satisfy this provision. However, it appears that, as an administrative practice, Medicare has not accepted non-biological or non-adoptive parents and children as “family” for the benefits discussed below.

Impact on same-sex couples

Once an individual or family spend more than a certain amount per year on prescription medicines, they are entitled to a PBS concession entitlement card.²³⁰ In 2006 the threshold amount of family prescription expenses is \$960.10, after which the purchase of any further prescription medicine is only \$4.70 per script rather than the standard \$29.50. For holders of Commonwealth concession cards the threshold amount of family prescription expenses is \$253.80 in 2006, after which the cost of per script drops from \$4.70 to zero. Heterosexual couples can use collective expenses to meet the threshold. Same-sex couples must meet these thresholds individually.

The Act also provides that once an individual or family spend more than a certain amount per year on prescription medicines, they are entitled to a Medicare safety net concession card (which in turn entitles the family to a lower threshold to meet the Medicare extended safety net, in 2006 the concession card holders’ threshold is \$500 rather than \$1000).²³¹

Both PBS and Medicare safety net concession cards also cover a “member of a person’s family”.²³² Thus, once the family meets the threshold, all members benefit from the concession. By contrast, if a member of a same-sex couple did meet the threshold through their individual expenses, their partner would be unable to access the benefit of the card once issued.

Health Information

Privacy Act 1988 (Cth)

The *Privacy Act 1988* (Cth) regulates the collection, use and disclosure of personal information by government agencies and the private sector.

Definitions used in the Act

Unusually, this Act includes in the definition of a person who is “responsible” for an individual – in addition to a “spouse” or “de facto spouse” – “a person who has an intimate personal relationship with the individual”. This appears to be the earliest

²²⁹ *National Health Act 1953* (Cth) s 84B(3)

²³⁰ *National Health Act 1953* (Cth) s 84C.

²³¹ *National Health Act 1953* (Cth) s 85DA.

²³² *National Health Act 1953* (Cth) s 84G.

instance of an open-ended category in federal law that would include same-sex couples.²³³

Impact on same-sex couples

The Act includes a provision that a health organisation may provide private information about a person to a person who is “responsible” for an individual if that individual is incapacitated.²³⁴

²³³ *Privacy Act 1988* (Cth) sch 3 cl 2.4(g). No definition of “de facto spouse” or “intimate personal relationship” is provided in the Schedule or elsewhere in the Act.

²³⁴ *Privacy Act 1988* (Cth) sch 3 cl 2.4.

FAMILY LAW

Property Division on Relationship Breakdown

Family Law Act 1975 (Cth)

The *Family Law Act 1975* (Cth) concerns the transfer of property between individuals upon relationship breakdown as well as decisions about where children live and who has contact with them. Thus, inclusion or exclusion from the family law system may have significant financial impact upon couples experiencing relationship breakdown, and also upon their children.

Family law property regime currently applies to married couples only

The *Family Law Act 1975* (Cth) (FLA) grants the Family Court of Australia and the Federal Magistrates Court power to issue an order dividing the property and superannuation assets of married couples.²³⁵ The FLA also provides couples who are married the ability to come to binding financial agreements.

Unmarried couples are currently unable to use the FLA for property matters due to Constitutional restrictions (although they have been able to use it for child-related matters since 1988, following a referral of powers by the states and territories). All states and territories enacted their own property division regimes for unmarried couples through the 1980s and 1990s, and all except South Australia also now include same-sex couples in these regimes.²³⁶

Jurisdiction to extend to heterosexual de facto couples

Heterosexual de facto couples may soon be able to use the *Family Law Act 1975* (Cth) for property matters following an agreement by states and territory governments to refer powers to the Commonwealth. Thus far, NSW, Queensland, Victoria and the Northern Territory have referred their powers over de facto property division to the Commonwealth.²³⁷

Section 3 of the referring legislation in NSW, Queensland, Victoria and the Northern Territory defines “de facto relationship” as meaning:

“a marriage-like relationship (other than a legal marriage) between two persons.”²³⁸

²³⁵ Western Australia has its own Family Court which operates under the *Family Court Act 1997* (WA). Since 2002 same-sex couples have been covered under Western Australian law: *Acts Amendment (Lesbian and Gay Law Reform) Act 2002* (WA); *Family Court Act 1997* (WA) div 8 sub-div 2. The Family Court of WA administers very similar but not identical provisions to the *Family Law Act 1975* (Cth); as a state court it is unable to divide superannuation or make orders over third parties.

²³⁶ See Jenni Millbank, “Recognition of Lesbian and Gay Families in Australian Law – Part One: Couples” (2006) 34 *Federal Law Review* 1.

²³⁷ See: *Commonwealth Powers (De facto Relationships) Act 2003* (NSW); *Commonwealth Powers (De facto Relationships) Act 2003* (Qld); *Commonwealth Powers (De facto Relationships) Act 2004* (Vic); *De facto Relationships (Northern Territory Request) Act 2003* (NT).

²³⁸ It is important to note that the term “de facto relationship” is used in s 4 of each of the referral Acts to mean both same-sex and heterosexual couples. The use of “marriage-like” in conjunction with same-

Section 4 of the referring legislation in each of the above jurisdictions provides two separate referrals of power, in s 4(a) to the financial matters arising from the breakdown of de facto relationships between “persons of different sexes” and under 4(b) of de facto relationships between “persons of the same-sex”.

Other states are expected to follow.

However, the Commonwealth government has indicated that it will refuse to accept the referral of power over same-sex couples.²³⁹ The simplicity and broader jurisdiction of the Family Court regime to divide property will therefore only be available to married and unmarried heterosexual couples, while same-sex couples must continue using state and territory courts for their property disputes.

Impact on same-sex couples

Exclusion from the federal family law regime is disadvantageous for the following reasons:

1. State regimes are more procedurally complex and do not incorporate the informal dispute resolution systems that have always been integrated into the Family Court system. Dispute resolution under state regimes is more time-consuming and expensive to participants.
2. State regimes are unable to divide superannuation assets, which often make up a significant portion of a couples’ asset pool. Since 2002 the FLA grants the power under Part VIII B to deal with superannuation funds. This means that the court can order the split of a member’s fund so that a set amount of the fund is transferred into a spouse’s name within the fund, or into the spouse’s own separate fund. Couples may also make consent agreements under the FLA to achieve this. Such transfers are exempt from capital gains tax.²⁴⁰
3. The FLA grants broad powers to make orders over third parties, which state courts do not have.²⁴¹ For example, the Court may make property orders or issue injunctions over family companies, even if they are not in the legal control of one partner.²⁴² The Court can also make orders over creditors, apportioning the couple’s debts to one or the other partner.²⁴³
4. While state regimes include consideration of non-financial contributions, they have traditionally granted a far lower value to homemaking contributions than

sex relationships could reopen the interpretative debate about whether the use of “spouse” – where not defined, or where defined as living in a “marriage-like” relationship or “living as a spouse” – in other legislation is capable of including same-sex couples, as it plainly is in this instance.

²³⁹ "Federal Attorney-General, Daryl Williams, indicated that the Commonwealth was not inviting references on same-sex de facto couples, and whilst states and territories were free to refer such powers, the Commonwealth would not exercise them." ACT Legislative Assembly Hansard, 8 May 2002, Hargreaves at 1282.

²⁴⁰ *Income Tax Assessment Act 1997* (Cth) s 118.305.

²⁴¹ Following the insertion of a new Part VIII A in 2003.

²⁴² See *Family Law Act 1975* (Cth) ss 90AC, 90AE, 90AF.

²⁴³ See *Family Law Act 1975* (Cth) ss 90AD, 90AF.

cases decided under the FLA.²⁴⁴ The Family Court of Australia has repeatedly enunciated the “partnership principle”: that financial and non-financial contributions to a relationship should often be valued equally.²⁴⁵ State regimes tend to give far greater weight to financial contributions.

5. The FLA includes broad consideration of future needs as well as past contributions when making property adjustments.²⁴⁶ This is a vital element in adjusting for the financial consequences of separation: particularly where there has been a division of labour in relationships (especially those that concern children), or financial sacrifices made by one partner for the other. Only half of the state and territory regimes consider any form of future needs, and not all do so as broadly as the federal regime.²⁴⁷
6. The FLA contains provision for periodic or lump sum maintenance payments where appropriate,²⁴⁸ (such as in cases where one party has a very limited earning capacity or where a party has extensive financial resources but few assets available for division). Maintenance provisions in state law are extremely limited in NSW, the ACT, the Northern Territory²⁴⁹ and Tasmania,²⁵⁰ and are not mentioned at all in the legislation in Victoria,²⁵¹ South Australia²⁵² and Queensland.²⁵³

In short, the federal property division regime covers a larger pool of the couple’s shared assets, can divide such assets with a far greater degree of flexibility, and takes into account a wider range of factors and circumstances of the parties during and after the relationship in making any adjustments.

Parental Status under the Family Law Act

Who is a Parent

The parental status of children who are born through assisted reproductive technology (ART) is determined largely, but not exclusively, by state and territory law. The

²⁴⁴ See Lindy Wilmott, Ben Mathews and Greg Shoebridge, “De facto Relationships Property Adjustment Law – A National Direction” (2003) 17 *Australian Journal of Family Law* 37.

²⁴⁵ See eg *Waters and Jurek* [1995] FLC 92-635. See Belinda Fehlberg, “With all my Worldly Goods I Thee Endow? The Partnership Theme in Australian Matrimonial Property Law” (2005) 19 *International Journal of Law, Policy and the Family* 148.

²⁴⁶ See *Family Law Act 1975* (Cth) ss 79, 75(2).

²⁴⁷ *Property Law Act 1974* (Qld) ss 297-309. Tasmania and the ACT are the broadest: see *Domestic Relationships Act 1994* (ACT) s 15(1)(e); *Relationships Act 1993* (Tas) ss 40(1)(e), 47.

²⁴⁸ See *Family Law Act 1975* (Cth) s 75(2).

²⁴⁹ For example in NSW the *Property (Relationships) Act 1984* (NSW) s 26 provides that there is no right to maintenance between de facto partners, but under s 27 does provide for the limited situation of a person being unable to self-support by reason of care of a child under 12 or a child with a disability under the age of 16 or because they are unable to self-support by reason of circumstances of the relationship and the maintenance would allow them to retrain. See *Evans v Marmont* (1997) 42 NSWLR 70 at 78-79. The Northern Territory and ACT provisions are very similar: see *De facto Relationships Act 1991* (NT) ss 24, 26; *Domestic Relationships Act 1994* (ACT) ss 18, 19.

²⁵⁰ *Relationships Act 1993* (Tas) s 47, although not requiring that the inability to self-support is due to the care of a child as in NSW, the ACT and NT.

²⁵¹ See *Property Law Act 1958* (Vic).

²⁵² See *De facto Relationships Act 1996* (SA).

²⁵³ See *Property Law Act 1974* (Qld).

problem in this area is that who is a parent under the FLA may not match who is a parent under state law.

Each state and territory has “status of children” laws, passed originally in the 1970s and 1980s, to sever the legal relationship between sperm donors and children and accord parental status to the non-biological father in families formed through assisted reproduction. The provisions deem the consenting male de facto partner or husband of a woman who conceived through assisted conception to be the parent of that child and allow him to be listed on the birth register. In recent years, Western Australia, the Northern Territory and the ACT amended their laws to include a woman’s female partner in these provisions so that she is deemed to be a parent.²⁵⁴

The *Family Law Act 1975* (Cth) has its own provisions regarding children conceived through assisted reproductive technology. Section 60H(1) provides that the male de facto partner or husband of a woman who conceives through ART is a parent for the purposes of the FLA. This section does *not* include a female de facto partner, even if she lives in a state or territory that grants her full parental rights under status of children legislation and records her as a parent on the birth register (currently Western Australia, the ACT and the Northern Territory).²⁵⁵

Section 60H(2) contains a provision relating to the parental status under the FLA of children born through assisted conception to a woman who is not in a marriage or heterosexual de facto relationship. This provision is ambiguous and has been subject to varying interpretations by the Family Court of Australia, with some judges suggesting in *obiter* that they *could* find that a sperm donor is a parent under the FLA, despite no express provision to that effect in the FLA and contrary provisions in state law.²⁵⁶ This ambiguity, in conjunction with exclusion of lesbian couples from the terms of s 60H(1), has led to increased complexity and cost for lesbian mothers seeking parenting orders as some judicial officers have regarded known donors as a “parent” who must consent to, or participate in, proceedings.

Why Who is a Parent under the FLA is Important

Although people who are not legally recognised as a parent under the FLA can still use the Act to apply for parenting orders as someone concerned with the “care, welfare and development” of a child, there are some provisions of the FLA that provide additional rights to legal parents, and these have been significantly enhanced from 1 July 2006. These include:

²⁵⁴ The *Acts Amendment (Gay and Lesbian Law Reform) Act 2002* (WA) s 26 introduced section 6A into the *Artificial Conception Act 1985* (WA). This section came into force on 21 September 2002. The *Law Reform (Gender, Sexuality and De facto Relationships) Act 2003* (NT) s 41 inserted s 5DA into the *Status of Children Act 1979* (NT). This section commenced on 17 March 2004. The *Parentage Act 2004* (ACT) repealed the *Birth (Equality of Status) Act 1988* (ACT). The *Parentage Act 2004* (ACT) came into effect on 22 March 2004.

²⁵⁵ For a discussion of the various interpretive possibilities, see Jenni Millbank “Recognition of Lesbian and Gay Families in Australian Law – Part Two: Children” (2006) 34 (2) *Federal Law Review*, forthcoming.

²⁵⁶ See *Re Mark* (2003) 31 Fam LR 162, 174; *B and J* (1996) 21 Fam LR 186, 194-5. There is one piece of *ratio* from the court, which is to the contrary, that a sperm donor cannot be a parent under the FLA: see *Re Patrick* (2002) 28 Fam LR 579, 645.

- The FLA grants automatic shared equal parental responsibility to both legal parents.

Parental responsibility is the right to care for and make decisions about a child, including medical decisions. A non-biological or non-adoptive parent in a same-sex couple does not automatically have parental responsibility. To obtain parental responsibility under the FLA, a non-biological parent in a same-sex couple must apply to the court for parenting orders by consent, the legal costs of which are currently approximately \$3000 to \$6000. Parents in a same-sex family applying for these orders must satisfy the court that the orders are in the child's best interests. Heterosexual families have these rights automatically, including fathers who have never lived with the child.

- From 1 July 2006 the FLA includes a presumption that parental responsibility will continue to be shared equally by both legal parents after separation.²⁵⁷
- From 1 July 2006 parental responsibility is shared, and the parents apply for contested parenting orders, the Court must consider the child spending equal time or substantial and significant time with each parent.²⁵⁸

These presumptions would not apply to a non-biological parent in a same-sex family even if she or he had parental responsibility under parenting orders because that person is still not a "parent" under the FLA.

- From 1 July 2006 when determining what is in a child's best interests, the range of factors has been divided for the first time into primary and secondary considerations. The "benefit to the child of having a meaningful relationship with both of the child's parents" is a primary factor.²⁵⁹

The benefit of the child having a meaningful relationship with a non-biological parent in a same-sex family cannot be taken into account as a primary factor. This is so even if that person has been the primary caregiver of the child, and regardless of whether she or he held parenting orders, because that person is still not a "parent" under the FLA.

Child Support

Child Support (Assessment) Act 1989 (Cth)

The *Child Support (Assessment) Act 1989 (Cth)* (CSAA) provides a formula for assessing child support and an administrative scheme for its collection. In some instances where support is unpaid by a liable parent, the Child Support Agency and the Australian Taxation Office pursue the debt. The system is based upon the "continuity of expenditure" principle, that children have the right to the same standard of living after parental separation as that enjoyed beforehand. This system was

²⁵⁷ See *Family Law Act 1975 (Cth)* ss 61C, 61D, 61DA. If parental responsibility is shared then under 65DAA the Court must consider the child spending equal time or substantial and significant time with each parent.

²⁵⁸ *Family Law Act 1975 (Cth)* s 65DAA.

²⁵⁹ *Family Law Act 1975 (Cth)* s 60CC(2)(a). The relationship would be taken into account only as a secondary factor under s 60CC(3)(b)(ii) (nature of the relationship with any other person).

intended to help keep children out of poverty after parental separation, by lifting the burden of pursuing support from primary carers.

The Act provides that parents of a child have the primary duty to support that child.²⁶⁰

Definitions used in the Act

“Parent” is defined in the CSAA as:

“(a) when used in relation to a child who has been adopted—an adoptive parent of the child; and

“(b) when used in relation to a child born because of the carrying out of an artificial conception procedure—a person who is a parent of the child under section 60H of the Family Law Act 1975.”²⁶¹

Section 60H of the *Family Law Act 1975* is discussed above. The effect of s 5 of the CSAA is that the husband or male de facto partner of a woman who has a child through assisted conception is a liable parent. A female partner, even if a recognised parent under state law, or the subject of an order granting parental responsibility under the *Family Law Act 1975*, is not a liable parent under the CSAA.

Impact on same-sex couples

The effect of this provision is that if a same-sex couple separate and the child remains living with the legal parent (eg the birth mother in a lesbian couple or sole adoptive parent in a gay male couple where only one partner was able to adopt the child under state law), the legal parent with care of the child cannot use the Act to pursue support from the non-biological or non-adoptive parent. The only avenues available would be to pursue a promissory estoppel claim or a limited maintenance claim under state property law – both avenues are expensive and uncertain.²⁶² This uncertainty is exacerbated by the fact that neither avenue provides a formula for the calculation of the cost of child support or its equitable division in the way that the CSAA does.

Child support payments under the CSAA are paid *to* the eligible carer of the child. “Eligible carer” means someone who has sole, substantial or shared care of a child.²⁶³ An eligible carer need not be a “parent or legal guardian” of the child. However, if the carer is not a parent or legal guardian, and the parent of the child does not consent to that person having care of the child, then they will not be an eligible carer unless it is “unreasonable in the circumstances” for the parent or legal guardian to have care.²⁶⁴

²⁶⁰ *Child Support (Assessment) Act 1989* (Cth) s 3(1).

²⁶¹ *Child Support (Assessment) Act 1989* (Cth) s 5.

²⁶² See *W v G* (1996) 20 Fam LR 49 which involved a three-day trial in equity. Under the *Property (Relationships) Act 1984* (NSW) s 27, maintenance is only available on very limited grounds.

²⁶³ *Child Support (Assessment) Act 1989* (Cth) s 7B(1).

²⁶⁴ *Child Support (Assessment) Act 1989* (Cth) s 7B(2). Section 7B(3) provides that: “For the purposes of subsection (2), it is unreasonable for a parent or legal guardian to care for a child if:

- (a) the Registrar is satisfied that there has been extreme family breakdown; or
- (b) the Registrar is satisfied that there is a serious risk to the child’s physical or mental wellbeing from violence or sexual abuse in the home of the parent or legal guardian concerned.”

There is no definition of “legal guardian” in the CSAA. “Guardianship” is a term that has not been used for some years in the *Family Law Act 1975*, where it was replaced by the concept of “parental responsibility”.²⁶⁵ By implication, it seems likely that a person with parenting orders granting them sole or shared parental responsibility under the *Family Law Act 1975* would be taken as a “legal guardian” for the purposes of the CSAA.

In a separated same-sex couple, if the couple’s child were to remain in the care of the non-biological or non-adoptive parent, then that parent would be an eligible carer able to use the CSAA to pursue the legally recognised parent for support of the child in each of the following circumstances:

- the child was in their care with the consent of the legally recognised parent;

or if that parent did not consent:

- the carer had an order granting them sole or shared parental responsibility under the FLA, either by consent or through a contested process; or
- it was unreasonable in the view of the Registrar that the child be in the care of the legally recognised parent.

²⁶⁵ See eg *Family Law Act 1975* (Cth) ss 61B, 61D, 64B(1).

RETIREMENT

Superannuation

Superannuation is a form of compulsory retirement savings, principally generated through mandatory contributions by both workers and employers under the Superannuation Guarantee Scheme, which has been in operation since 1992. Employees may also make voluntary contributions to superannuation on their own behalf or on behalf of a spouse. Superannuation law is closely intertwined with taxation law, as there are significant tax concessions for contributions, the earnings of superannuation funds and benefit payments from super funds,²⁶⁶ so long as the fund is one that complies with governing legislation.

Superannuation benefits that are couple-related include:

- Death benefits;
- Reversionary pensions to spouses following death of a member;
- No-detriment payments following death of a member;
- Ability to make superannuation contributions on behalf of a spouse; and
- Information about a spouse's superannuation.

This first section covers legislation that relates to all superannuation schemes. Superannuation funds are established under trust deeds which are in turn regulated by federal legislation.²⁶⁷

A separate section discusses legislation that is specific to federal government sector schemes. These funds differ from private sector schemes in that they are established by separate federal statutes and so the changes made to general superannuation regulations do not necessarily flow through to them. The final section discusses retirement savings accounts, which are a different form of non-compulsory retirement savings.

Superannuation Industry (Supervision) Act 1993 (Cth)

Compliance with the *Superannuation Industry (Supervision) Act 1993* (Cth) (SIS Act) is what guarantees concessional tax treatment of the contributions to and earnings from a superannuation fund.²⁶⁸

²⁶⁶ See Miranda Stewart, "Superannuation, Same-Sex Couples and Interdependency: Between Equality, Property and Family" (2006) 28 *Sydney Law Review* 437, for a concise explanation of the range of tax concessions and how they operate.

²⁶⁷ So, for example, a member may nominate their preferred beneficiary and, under some trust deeds, is able to make a binding nomination but this only binds the trustee where the statutory definition of "dependant" is satisfied in any event: *Superannuation Industry (Supervision) Act 1993* (Cth) s 59(1A).

²⁶⁸ *Superannuation Industry (Supervision) Act 1993* (Cth) s 62; *Income Tax Assessment Act 1936* (Cth) s 6(1) "superannuation fund". The compliance test is set out in *Superannuation Industry (Supervision) Act 1993* (Cth) s 42; see also *Superannuation Industry (Supervision) Regulations 1993* reg 6.22.

Superannuation – Death Benefits

In most superannuation funds a significant portion of a deceased member's entitlements pass to a beneficiary. This may occur directly to a "dependant" or indirectly through their estate, with different tax consequences either way. Death benefits paid directly to a "dependant" are exempt from income tax (up to a set level currently, and to an unlimited amount from 1 July 2007).²⁶⁹ In contrast, death benefits paid through an estate (if not passed on to a "dependant") attract tax of 15% for the fund and 15% for the recipient, meaning an overall tax rate of 30%. Therefore, a death benefit of \$100,000 that passed directly to a dependant would be worth its full value, whereas if the benefit passed through a will or intestacy provisions it would only be worth \$70,000.

A "death benefit" is made up of the member's entitlements under the general terms of the fund but can also be augmented by life insurance cover, through which a member sacrifices some of their fund payments to purchase a greater death benefit.

Definitions used in the Act

The *Superannuation Industry (Supervision) Act 1993* (Cth) includes the following definitions.

"Dependant" is defined to include:

"the spouse of the person, any child of the person and any person with whom the person has an interdependency relationship".²⁷⁰

"Spouse" includes someone living "as the husband or wife" of a person²⁷¹ (see Appendix II, Table 2, Spouse 1). This definition has been interpreted to exclude same-sex couples.²⁷²

The effect of these provisions is that an opposite-sex married or de facto spouse is presumed to be a dependant, while a same-sex partner is not. However, a same-sex partner may still qualify on either of two bases. One is that they were a "dependant" of the deceased in the ordinary meaning of the word. This has been interpreted as requiring evidence of regular or on-going financial dependence.²⁷³ The other avenue, available since amendments took effect on 1 July 2004,²⁷⁴ is to qualify as having had an "interdependent relationship".

"Child" is defined as including an adopted, a step or ex-nuptial child and so would exclude a non-biological or non-adoptive child.²⁷⁵ However, a non-biological or non-adoptive child would be able to claim under the ordinary meaning of "dependent" or potentially under the new "interdependency relationship" category.

²⁶⁹ See *Income Tax Assessment Act 1936* (Cth) s 27AAA.

²⁷⁰ *Superannuation Industry (Supervision) Act 1993* (Cth) s 10. See also *Income Tax Assessment Act 1936* (Cth) s 27A(1).

²⁷¹ *Superannuation Industry (Supervision) Act 1993* (Cth) s 10.

²⁷² See *Re Brown and Commissioner for Superannuation* (1995) 21 AAR 378.

²⁷³ See Miranda Stewart, "Superannuation, Same-Sex Couples and Interdependency: Between Equality, Property and Family" (2006) 28 *Sydney Law Review* 437 at 446-451.

²⁷⁴ *Superannuation Legislation Amendment (Choice of Superannuation Funds) Act 2004* (Cth).

²⁷⁵ *Superannuation Industry (Supervision) Act 1993* (Cth) s 10.

“Interdependency relationship” is defined as:

“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.²⁷⁶ (See Appendix II, Table 2, Interdependency Relationship 4.)

Impact on same-sex couples

The burden of proving each of the elements in the interdependency definition is still a significant barrier to claimants in same-sex couples. By contrast, heterosexual couples are presumed by the statute to be dependants and so are automatically eligible for death benefits on the death of a member.

All elements of the definition of interdependency relationship must be satisfied, ie financial *and* domestic support *and* personal care. This mirrors the non-couple-based relationship definition used in certain NSW laws, and restrictively interpreted in NSW as requiring actual physical care-giving in addition to emotional support and financial interdependence.²⁷⁷ It appears, however, that thus far the Australian Tax Office has taken a somewhat broader view.²⁷⁸ The benefit of the interdependency category compared to a general claim as a dependant is that it can be demonstrated through mutual interdependence, or through dependence by the deceased on the claimant instead of the reverse.

Possibly as a result of concerns about the ambiguity of the interdependency category, the Superannuation Industry (Supervision) Regulations 1994 (Cth) were amended with application from 11 November 2005 to prescribe factors that must be taken into account in determining the existence of an “interdependency relationship”.²⁷⁹ These

²⁷⁶ *Superannuation Industry (Supervision) Act 1993* (Cth) s 10A. Section 10A (2) “Subject to subsection (3), for the purposes of this Act, if:

- “(a) 2 persons (whether or not related by family) satisfy the requirement of paragraph (1)(a); and
- (b) they do not satisfy the other requirements of an interdependency relationship under subsection (1); and
- (c) the reason they do not satisfy the other requirements is that either or both of them suffer from a physical, intellectual or psychiatric disability; they have an interdependency relationship .”

The category also appears in the *Income Tax Assessment Act 1936* (Cth) s 27AAB.

²⁷⁷ Under the *Property (Relationships) Act 1984* (NSW), the non-couple relationship known as a “close personal relationship” is defined in s 5(1)(b), (2). This section was interpreted in *Dridi v Fillmore* [2001] NSWSC 319 at [108] where Master Macready held that “domestic support and personal care” were a cumulative requirement. The Master further held that personal care entailed caregiving beyond that in ordinary reciprocal relationships; requiring “assistance with mobility, personal hygiene and physical care”.

²⁷⁸ In ATO Interpretive Decision ID 2005/143, a son who undertook heavy lifting and buying groceries was held to satisfy the “domestic support and personal care” requirement: see Miranda Stewart, “Superannuation, Same-Sex Couples and Interdependency: Between Equality, Property and Family” (2006) 28 *Sydney Law Review* 437 at 456-7.

²⁷⁹ Regulation 1.04AAAA provides that trustees *must* consider:

factors largely mirror the criteria used to assess the existence of a de facto relationship now in place in all state and territory laws (see Appendix II, Table 1). Given the explicit inclusion in the Act of heterosexual de facto partners as “spouses”, it seems clear that the interdependent category as defined further by the regulations is intended to cover, but not to name as such, same-sex de facto relationships.

Given these factors, it would seem inappropriate, although not impossible, for a parent-child relationship to be covered by the category – suggesting that a claim as an ordinary “dependant” is more likely for a non-biological or non-adoptive child.

It is important to note that the inclusion of the “interdependency relationship” category in 2004 was enabling only, not prescriptive. That is, the amendment allows, but does not *require*, that funds pay out death benefits to a person in such a relationship. Death benefits remain a highly contentious area of superannuation law, and Miranda Stewart notes that they formed the major ground of complaint to the Superannuation Complaints Tribunal in 2004.²⁸⁰

Superannuation – Other Issues

Reversionary Pensions

Some superannuation funds provide in their trust deeds for the payment of a reversionary pension rather than a lump sum death benefit. The pension is generally a portion of the pension that would be paid, or was being paid, to the deceased.

It is likely that same-sex couples continue to be widely excluded from reversionary pensions. Most deeds provide only for the reversion of a pension to a married or heterosexual de facto spouse.²⁸¹ The 2004 amendments including “interdependency relationship” did not alter the definition of “spouse” in the *Superannuation Industry*

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- “(a) all of the circumstances of the relationship between the persons, including (where relevant):
- (i) the duration of the relationship; and
 - (ii) whether or not a sexual relationship exists; and
 - (iii) the ownership, use and acquisition of property; and
 - (iv) the degree of mutual commitment to a shared life; and
 - (v) the care and support of children; and
 - (vi) the reputation and public aspects of the relationship; and
 - (vii) the degree of emotional support; and
 - (viii) the extent to which the relationship is one of mere convenience; and
 - (ix) any evidence suggesting that the parties intend the relationship to be permanent;
- (b) the existence of a statutory declaration signed by one of the persons to the effect that the person is, or (in the case of a statutory declaration made after the end of the relationship) was, in an interdependency relationship with the other person.”

Regulation 1.04AAAA (2) further provides “ For paragraph 10A (3) (b) of the Act, 2 persons have an interdependency relationship if:

- “(a) they satisfy the requirements of paragraphs 10A (1) (a) to (c) of the Act; and
- (b) one or each of them provides the other with support and care of a type and quality normally provided in a close personal relationship, rather than by a mere friend or flatmate.

Examples of care normally provided in a close personal relationship rather than by a friend or flatmate

1. Significant care provided for the other person when he or she is unwell.
2. Significant care provided for the other person when he or she is suffering emotionally.”

²⁸⁰ Miranda Stewart, “Superannuation, Same-Sex Couples and Interdependency: Between Equality, Property and Family” (2006) 28 *Sydney Law Review* 437 at 442.

²⁸¹ Miranda Stewart, “Superannuation, Same-Sex Couples and Interdependency: Between Equality, Property and Family” (2006) 28 *Sydney Law Review* 437 at 464.

(*Supervision*) Act 1993 (Cth) or the Superannuation Industry (Supervision) Act Regulations 1994 (Cth).²⁸²

No-detriment Payments

A superannuation fund trustee is empowered to pay out additional amounts to dependants of a deceased member of the fund to “top up” the death benefit in some circumstances. To prevent double tax, the fund is entitled to a tax deduction for this payment, as long as the benefit of that deduction (which would usually be 15% of the amount of the payment) is passed on to the “dependant”.²⁸³

This includes a spouse, child and person in an “interdependency relationship”²⁸⁴, so same-sex couples can access this benefit provided they can meet the criteria for an interdependency relationship.

Payments Made on Behalf of a Spouse

The Superannuation Industry (Supervision) Act Regulations 1994 (Cth) permit a person to split either their personal contributions or their employer’s contributions with a spouse since 1 January 2006.²⁸⁵ This provides tax benefits as both spouses have access to their individual Eligible Termination Payment (ETP)²⁸⁶ and Reasonable Benefit Limit (RBL)²⁸⁷ which set a certain amount of superannuation that can be taken before a higher rate of tax is payable on the benefit. Same-sex couples are excluded from these provisions.

From 1 July 2007 this tax benefit will be of lesser significance, as from that date tax is no longer payable on superannuation taken by members over the age of 60, either in the form of a lump sum or pension. This means that the ETP and RBL limits do not apply. However for those who retire before the age of 60, the ETP and RBL continue to apply, so the tax advantage of contributing to a spouse continues to exist in those circumstances.

Information About a Spouse’s Fund

Since 2002 the ability to split superannuation funds between separated spouses has been available through the *Family Law Act 1975* (Cth) s 90MC. This is discussed below in the section on “Family Law”.

The *Family Law Act* defines “spouse” as “the party to a marriage”.²⁸⁸ (This is due to Constitutional limitations and will be amended to include heterosexual de facto spouses once the states have referred power over the property disputes of de facto couples).

²⁸² See eg Superannuation Industry (Supervision) Act Regulations 1994 (Cth) regs 1.06(7), (8).

²⁸³ *Income Tax Assessment Act 1936* (Cth) s 279D.

²⁸⁴ *Income Tax Assessment Act 1936* (Cth) s 279D(4) adopts the definition of “dependant” in s 27A(1)(a) of the same Act.

²⁸⁵ As amended by the Superannuation Industry (Supervision) Amendment Regulations 2005 (No 8) (Cth).

²⁸⁶ Set at \$648,946 for lump sums and \$1,297, 886 for pensions in 2005-6.

²⁸⁷ Set at \$123,808 in 2004-5.

²⁸⁸ *Family Law Act 1975* (Cth) s 90MD.

The spouse of a member may now apply directly to a superannuation fund to discover the value of a member's superannuation assets.²⁸⁹ The fund must not disclose to the member that such an application has been made. This provision means that a married spouse has access to important information in order to negotiate a property settlement.

Federal Statutory Superannuation Schemes

The superannuation schemes of federal employees and statutory office holders are governed by a range of specific federal statutes, many with common benefits and definitions.

General provisions on superannuation discussed above, such as that on *Reversionary Pensions* and *Information About a Spouse's Fund*, are applicable to federal statutory schemes. The same taxation laws apply to statutory as to private superannuation schemes.

However note that the changes to *death benefits* discussed above cover only private sector schemes and do **not** flow through to these statutory schemes unless otherwise specified.

Superannuation Act 1976 (Cth)

The *Superannuation Act 1976* (Cth) governs superannuation of federal government and ACT government employees under the Commonwealth Superannuation Scheme (CSS) fund, which closed to new members from 1 July 1990.²⁹⁰

Definitions used in the Act

A person is defined as having a "marital relationship" with someone if they "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".²⁹¹ (See Appendix II, Table 2, Marital Relationship.) Spouse benefits depend upon being in a "marital relationship".²⁹²

In 1994 Gregory Brown applied for the spouse benefit under the Act after his same-sex partner's death. When the benefit was denied, Mr Brown appealed to the Administrative Appeals Tribunal, which held that he was excluded from the definition of spouse in the Act.²⁹³ This interpretation has been widely applied in federal law, as the definition of spouse is one in common use. Note, however, that this was only a Tribunal decision, not a judicial determination.

²⁸⁹ *Family Law Act 1975* (Cth) s 90MZB.

²⁹⁰ Note that this Act was preceded by the *Superannuation Act 1922* (Cth) which closed to new members on 1 July 1976. The 1922 Act originally only covered married spouses, but now provides in s 48ABA for the grant of benefits to a spouse as defined by the 1976 Act.

²⁹¹ *Superannuation Act 1976* (Cth) ss 8A(1), 8B(2). Section 8A(2) provides that this definition will be met by couples who have lived together for not less than three years, but may be met by those who have lived together for a shorter period if the Board is of the opinion that the relationship was permanent and *bona fide*.

²⁹² *Superannuation Act 1976* (Cth) s 8B.

²⁹³ *Re Brown and Commissioner for Superannuation* (1995) 21 AAR 378.

“Child” is defined to include an adopted child, an ex-nuptial child, a foster child, a step-child or a ward of the person or of a spouse of the person.²⁹⁴ The biological or adoptive child of a surviving partner in a same-sex couple would be excluded by virtue of the present interpretation of the definition of spouse. However the meaning of “ward” is unclear in this context. Like the term “guardian”, “ward” has been replaced by the concept of “parental responsibility” in the *Family Law Act 1975* (Cth).²⁹⁵ So it is possible, but far from certain, that a non-biological or non-adoptive parent with parenting orders could be covered by this provision. It is also possible that the term would only cover a child for whom there was no other legal parent.

Impact on same-sex couples

The Act provides that where a leave of absence is taken for the birth of the child of a member or of the spouse of a member, the member is not required to make superannuation contributions during that period.²⁹⁶ Even if covered under the term “ward” it is unlikely that a non-biological parent in a same-sex family could avail themselves of this provision as parenting orders cannot be granted before the birth of a child.

The Act provides a range of death benefits to spouses and children.²⁹⁷ These benefits are higher where there are partially dependent children.²⁹⁸ Same-sex partners are excluded from the benefits to spouses.

In the event there is no surviving “spouse” or “child” any benefit is payable to the person’s legal personal representative – this is the executor under a will, or next of kin if there is no will.²⁹⁹ If no legal personal representative can be found, benefits can be paid to any individual or individuals that the Board determines.³⁰⁰ It is unknown whether the Board has used this discretionary power to pay death benefits to same-sex partners who were otherwise disentitled (but note they could only do so where there was no will or next of kin).

Superannuation Act 1990 (Cth)

The *Superannuation Act 1990* (Cth) governs the superannuation of Commonwealth and ACT government employees and holders of statutory offices under the Public Sector Superannuation Scheme (PSS), which took over from the earlier CSS. The PSS closed to new members from 1 July 2005.

²⁹⁴ *Superannuation Act 1976* (Cth) s 3(1).

²⁹⁵ In the *Children and Young Persons (Care and Protection) Act 1998* (NSW) “ward” is used only to refer to a child under the legal guardianship of a court or state official, not of an individual.

²⁹⁶ *Superannuation Act 1976* (Cth) s 51A.

²⁹⁷ *Superannuation Act 1976* (Cth) pt VI div 1 concerns a spouse’s benefit on death of an eligible employee before attaining maximum retiring age (ss 81-88); pt VI div 2 concerns a spouse’s benefit on death of an eligible employee after attaining maximum retiring age (ss 89-92); pt VI div 3 concerns a spouse’s benefit on death of pensioner (ss 93-96AB).

²⁹⁸ *Superannuation Act 1976* (Cth) ss 96B-96BB.

²⁹⁹ Note that a same-sex de facto partner is now the next of kin in all states and territories except South Australia.

³⁰⁰ *Superannuation Act 1976* (Cth) s 110SQ.

Definitions used in the Act

“Spouse” is defined to include someone who lived with the person “as the person’s husband or wife”.³⁰¹ (See Appendix II, Table 2, Spouse 1.) This definition has been interpreted to exclude same-sex couples.³⁰²

A “child” under the rules of the scheme is defined as meaning:

“a child (including an adopted child, an ex-nuptial child or a step-child, or any other person whom the Board determines is to be treated as a child of the first-mentioned person)”.³⁰³

It thus appears to be within the Board’s discretion to recognise a non-biological or non-adoptive child of the member. It is unknown whether the board has ever used this discretion to recognise the child of a member in a same-sex family.

Impact on same-sex couples

As with the 1976 Act, these rules provide that where a leave of absence is taken for the birth or adoption of the child of a member or of the spouse of a member, the member is not required to make superannuation contributions during that period.³⁰⁴ In the absence of a determination by the Board that a non-biological or non-adoptive child was to be treated as a child of the member, a member would not be able to utilise these provisions if taking leave to care for such a child.

Reversionary pensions under the rules pass to a “spouse” or “eligible child”.³⁰⁵

Preserved benefits of a deceased member are payable to a “spouse” or “child”³⁰⁶ and a surviving “spouse” may elect to have benefits paid in the form of a pension rather than a lump sum.³⁰⁷

In the event there is no surviving spouse or child, but the member left a will, the Board may in its discretion pay such benefit as it considers appropriate to *any* person named in the will.³⁰⁸ It is unknown whether the Board has used this discretionary power to pay death benefits to same-sex partners who were otherwise disentitled.

Superannuation Act 2005 (Cth)

The *Superannuation Act 2005* (Cth) governs the superannuation of federal government employees under the Public Sector Superannuation Accumulation Plan

³⁰¹ *Superannuation Act 1990* (Cth) sch 1 r 1.1.1. The rule sets a requirement of three years’ cohabitation but includes provisions that a couple who have lived together for less than three years immediately before the person’s death may be included if in the opinion of the Board, they were wholly or substantially dependent upon the deceased person at the time of the deceased person’s death. Legally married but separated spouses are also eligible in some instances.

³⁰² See *Re Brown and Commissioner for Superannuation* (1995) 21 AAR 378.

³⁰³ *Superannuation Act 1990* (Cth) sch 1 r 1.1.1.

³⁰⁴ *Superannuation Act 1990* (Cth) sch 1 r 3.1.13.

³⁰⁵ *Superannuation Act 1990* (Cth) sch 1 rr 5.1.1, 5.2.1.

³⁰⁶ *Superannuation Act 1990* (Cth) sch 1 rr 6.1.9, 6.1.10.

³⁰⁷ *Superannuation Act 1990* (Cth) sch 1 r 6.1.12.

³⁰⁸ *Superannuation Act 1990* (Cth) sch 1 r 6.1.11

(PSSap), which is the most recent scheme following the closure to new members of the PSS.³⁰⁹ This scheme covers employees hired on or after 1 July 2005.

Definitions used in the Act

Unlike all of the other federal statutory schemes discussed above, the PSSap Trust Deed provides that “dependant” has the same meaning as in the *Superannuation Industry (Supervision) Act 1993* (Cth), thereby adopting the “interdependency relationship” category.³¹⁰

Impact on same-sex couples

Same-sex partners are covered by the death benefit provisions of this scheme if they can satisfy the interdependency definition.

Defence Force Retirement and Death Benefits Act 1973 (Cth)

The *Defence Force Retirement and Death Benefits Act 1973* (Cth) governs the retirement funds, as well as death and disability benefits, of members of the defence forces under the Defence Forces Retirement and Death Benefits Scheme (DFRDB). This scheme closed to new members on 1 October 1991.³¹¹

Definitions used in the Act

The Act defines “marital relationship” and “spouse” in the same terms as the *Superannuation Act 1976* (Cth) and so excludes same-sex couples.³¹² (See Appendix II, Table 2, Marital Relationship.)

Like the definition in the *Superannuation Act 1976* (Cth) this Act includes a “ward” in the definition of defines “child”,³¹³ so it is possible, although far from certain, that a non-biological or non-adoptive child of a person with parenting orders could be included in the provisions.

Impact on same-sex couples

The Act provides for death benefits in the form of surviving-spouse pensions³¹⁴ and in some circumstances for commutation of such pensions into lump sum payments.³¹⁵ There are also specific pensions payable to surviving children.³¹⁶

³⁰⁹ *Superannuation Act 2005* (Cth) s 10 provides for a trust deed to establish the PSSap fund, and all relevant definitions and entitlements are contained within the Deed. Legislative Instrument F2005L01901, available on www.comlaw.gov.au.

³¹⁰ PSSap Trust Deed cl 1.2.1

³¹¹ This Act was preceded by the *Defence Force Retirement and Death Benefits Act 1948* (Cth). It appears that the 1948 Act only contemplated legally married spouses, eg pension death benefits under s 55, however this section is only applicable to members who died prior to 1 October 1972.

³¹² *Defence Force Retirement and Death Benefits Act 1973* (Cth) s 6A.

³¹³ *Defence Force Retirement and Death Benefits Act 1973* (Cth) s 3.

³¹⁴ *Defence Force Retirement and Death Benefits Act 1973* (Cth) ss 38, 39.

³¹⁵ *Defence Force Retirement and Death Benefits Act 1973* (Cth) s 41A.

³¹⁶ *Defence Force Retirement and Death Benefits Act 1973* (Cth) ss 42-43.

On the death of a member their “spouse” or “child” may elect to join the *Military Superannuation and Benefits Act* scheme (MSBS).³¹⁷

The Authority may elect for the pension to be paid to a person other than the person entitled under the Act, where the Authority believes the payment should be made to a person other than the person entitled. This may be done for any reason the authority thinks proper.³¹⁸ It is unknown whether the Authority has used this broad discretionary power to pay death benefits to same-sex partners who were otherwise disentitled.

Military Superannuation and Benefits Act 1991 (Cth)

The *Military Superannuation and Benefits Act 1991* (Cth) governs the retirement funds and death and disability benefits of members of the defence forces under the Military Superannuation and Benefits Scheme (MSBS) which took over from the DFRDB in 1991.

Definitions used in the Act

Spouse is defined to include someone who lived with the person “as that person’s husband or wife”.³¹⁹ (See Appendix II, Table 2, Spouse 2.) This definition has been interpreted to exclude same-sex couples.³²⁰ In case of any doubt, the Rules also provide that: “In spite of anything in this Part, 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.”³²¹

Like the *Superannuation Act 1976* (Cth) and *Defence Force Retirement and Death Benefits Act 1973* (Cth) this Act includes a “ward” in the definition of “child”,³²² so there is the possibility that a non-biological or non-adoptive child of a parent with parenting orders could be covered.

Impact on same-sex couples

The Act provides that a member on leave for the birth or adoption of a child can elect to continue to pay contributions for a period not in excess of 9 months.³²³ As noted earlier, a non-biological or non-adoptive parent would be unlikely to be able to use such provision, even if covered by it, because they could not gain parenting orders in advance of taking the leave.

³¹⁷ *Defence Force Retirement and Death Benefits Act 1973* (Cth) s 133.

³¹⁸ *Defence Force Retirement and Death Benefits Act 1973* (Cth) s 45.

³¹⁹ *Military Superannuation and Benefits Act 1991* (Cth) sch 1 r 7(4) (for the purpose of leave provisions); sch 1 pt 5 r 9(c) (for death benefits). The death benefits definition requires that a couple have lived together for three years immediately before the person’s death, but r 9(d) allows a discretion to waive this if in the opinion of the Board, they were wholly or substantially dependent upon the deceased person at the time of the deceased person’s death.

³²⁰ See *Re Brown and Commissioner for Superannuation* (1995) 21 AAR 378.

³²¹ *Military Superannuation and Benefits Act 1991* (Cth) sch 1 pt 5 r 12.

³²² *Military Superannuation and Benefits Act 1991* (Cth) sch 1 r 2 pt 1.

³²³ *Military Superannuation and Benefits Act 1991* (Cth) sch 1 pt 2 r 6.

The Act provides for spouses' and children's benefits on the death of a member.³²⁴

As with a number of the other statutory schemes discussed above, a discretion vests in the Board to pay benefits to those who would not be entitled under the rules. In this instance, the discretion is very wide, providing that:

“where the operation of these Rules produces a result in relation to a person that is not in the spirit of the Rules and the relevant circumstances of the case are unusual or exceptional; the Board may, in relation to that case, having regard to the circumstances of the case, the principles in these Rules and the need to maintain equity between members, determine the point at issue in favour of that person.”³²⁵

It is unknown whether the Board has used this discretionary power to pay death benefits to same-sex partners who were otherwise disentitled.

Parliamentary Contributory Superannuation Act 1948 (Cth)

The *Parliamentary Contributory Superannuation Act 1948* (Cth) governs the superannuation entitlements of members of federal parliament who entered the scheme prior to 9 October 2004. Members of parliament who enter parliament following that date are now able to choose their own superannuation fund, including private sector schemes.³²⁶

Definitions used in the Act

The Act requires that parties be in a “marital relationship” (see Appendix II, Table 2, Marital Relationship) which is defined as meaning that a person “lived with that other person as that other person’s husband or wife”.³²⁷ This wording has been interpreted to exclude same-sex couples.³²⁸

“Child” is defined to include an adopted or an ex-nuptial child, and so would exclude non-biological and non-adoptive children.³²⁹

Impact on same-sex couples

The Act provides for the payment of a proportion of a deceased member’s parliamentary allowance (if the member dies while still in parliament) or retirement

³²⁴ *Military Superannuation and Benefits Act 1991* (Cth) sch 1 pt 4 rr 38-58.

³²⁵ *Military Superannuation and Benefits Act 1991* (Cth) r 66.

³²⁶ *Parliamentary Superannuation Act 2004* (Cth).

³²⁷ *Parliamentary Contributory Superannuation Act 1948* (Cth) s 4B(1). Section 4B(2) provides that this requires three years’ continuous cohabitation but grants a discretion to the Trust, having regard to any relevant evidence, to waive this requirement. Section 4B(4) provides that for the purpose of subsection (2), “relevant evidence” includes, but is not limited to, evidence establishing any of the following:

- “(a) the person was wholly or substantially dependent on that other person at the time;
- (b) the persons were legally married to each other at the time;
- (c) the persons had a child who was:
 - (i) born of the relationship between the persons; or
 - (ii) adopted by the persons during the period of the relationship;
- (d) the persons jointly owned a home which was their usual residence.”

³²⁸ See *Re Brown and Commissioner for Superannuation* (1995) 21 AAR 378.

³²⁹ *Parliamentary Contributory Superannuation Act 1948* (Cth) s 19AA(5).

allowance (if they had retired) to a surviving spouse,³³⁰ with an additional benefit to the surviving “spouse” of a Prime Minister or former Prime Minister.³³¹

There are also benefits in respect of “orphaned children”.³³²

Both surviving “spouses” and children may convert some or part of the pension to a lump sum payment.³³³

Same-sex partners are excluded from these benefits.

Judges’ Pensions Act 1968 (Cth)

The *Judges’ Pensions Act 1968* (Cth) governs the pensions, death and disability benefits of federal judges, but not federal magistrates.

Definitions used in the Act

“Spouse” is defined as someone who was in a “marital relationship” with the judge³³⁴ and this in turn requires that the person ordinarily lived with that other person “as that other person’s husband or wife”.³³⁵ (See Appendix II, Table 2, Marital Relationship.) This wording has been interpreted to exclude same-sex couples.³³⁶

An “eligible child” is defined as a child of the judge *or* a child who was, in the opinion of the Attorney-General, wholly or substantially dependent on the deceased judge.³³⁷ This is clearly intended to cover a broad range of parent-child relationships and would include a non-biological or non-adoptive child if they satisfied the higher threshold of being wholly or substantially dependent on the deceased.

Impact on same-sex couples

The Act provides that a surviving “spouse” is granted a set portion of the judge’s pension entitlement.³³⁸ Similar provisions are made for surviving “eligible children”,³³⁹ as well as a discretion for the Attorney-General to increase the benefit paid to an “eligible child” in certain circumstances,³⁴⁰ and provision for a portion of the spouse’s pension to pass to the eligible children on the death of the spouse.³⁴¹

³³⁰ *Parliamentary Contributory Superannuation Act 1948* (Cth) s 19.

³³¹ *Parliamentary Contributory Superannuation Act 1948* (Cth) s 19A.

³³² *Parliamentary Contributory Superannuation Act 1948* (Cth) s 19AA.

³³³ *Parliamentary Contributory Superannuation Act 1948* (Cth) ss 19AAA and 19ABA, respectively

³³⁴ *Judges’ Pensions Act 1968* (Cth) s 4AC.

³³⁵ *Judges’ Pensions Act 1968* (Cth) s 4AB(1). Section 4AB(2)(a) requires three years’ continuous cohabitation for this provision, but sub (b) grants the Attorney-General “having regard to any relevant evidence” the ability to waive the requirement. Section 4AB (4) is identical to *Parliamentary Contributory Superannuation Act 1948* (Cth) s 4B(4).

³³⁶ See *Re Brown and Commissioner for Superannuation* (1995) 21 AAR 378.

³³⁷ *Judges’ Pensions Act 1968* (Cth) s 4AA.

³³⁸ *Judges’ Pensions Act 1968* (Cth) ss 7, 8.

³³⁹ *Judges’ Pensions Act 1968* (Cth) ss 9, 10.

³⁴⁰ *Judges’ Pensions Act 1968* (Cth) s 15.

³⁴¹ *Judges’ Pensions Act 1968* (Cth) s 11.

Federal Magistrates Act 1999 (Cth)

The *Federal Magistrates Act 1999* (Cth) governs the employment conditions and entitlements of federal magistrates. The Act does not currently contain specific entitlements in the event of retirement on the grounds of disability or death.

The Federal Magistrates Amendment (Disability and Death Benefits) Bill 2006 was introduced into the House of Representatives on 29 March 2006. On 30 March 2006, the Bill was referred to the Senate Legal and Constitutional Legislation Committee which released its report on 2 May 2006.³⁴²

Definitions used in the current Bill

“Spouse” and “eligible child” are defined in the Bill in identical terms to the *Judges’ Pensions Act 1968* (Cth).³⁴³

Impact on same-sex couples

Death Benefits are payable to a surviving spouse and each eligible child.³⁴⁴ Same-sex partners are excluded, but the non-adoptive or non-biological child of a magistrate would be covered if they were financially dependent on the magistrate.

Retirement Savings Accounts

A retirement savings account (RSA) is an account offered by banks, building societies, credit unions, life insurance companies and financial institutions. It is used for retirement savings and is similar to a superannuation fund.

Retirement Savings Accounts Act 1997 (Cth)

The *Retirement Savings Accounts Act 1997* (Cth) regulates the provision of retirement savings accounts. Approved RSA providers are eligible for the same concessional tax treatment as that offered to superannuation funds.

Definitions used in the Act

“Spouse”, “dependant” and “child” are all defined in identical terms to the *Superannuation Industry (Supervision) Act 1993* (Cth).

Impact on same-sex couples

Same-sex couples are excluded from the term “spouse”, but covered under the “interdependency relationship” category.³⁴⁵ Non-biological or non-adoptive children would be covered if they were financially dependent on the member, under the ordinary meaning of the word “dependant”.

³⁴² Senate Legal and Constitutional Legislation Committee, *Provisions of the Federal Magistrates Amendment (Disability and Death Benefits) Bill 2006* (2006).

³⁴³ Federal Magistrates Amendment (Disability and Death Benefits) Bill 2006 pt 2 div 2 cl 9E, 9F.

³⁴⁴ Federal Magistrates Amendment (Disability and Death Benefits) Bill 2006 pt 2 div 2 cl 9D.

³⁴⁵ *Retirement Savings Accounts Act 1997* (Cth) ss 20, 20A.

The Act provides for the payments of RSA benefits to the dependants or personal legal representative of the account holder.³⁴⁶

Aged Care

Aged Care Act 1997 (Cth)

The *Aged Care Act 1997* (Cth) provides government subsidies to cover the cost of the provision of aged residential care, as well as the allocation of places in government facilities.

The income, assets and housing needs of a partner, close relative or dependent child, may be relevant to the determination of a residential subsidy and to the calculation of an accommodation bond.

Definitions used in the Act

“Close relation” is defined as a parent, sibling, child or grandchild of the person. While “child” is not defined “dependent child” requires that

“(a) the adult:

- (i) is legally responsible (whether alone or jointly with another person) for the day-to-day care, welfare and development of the young person; or
- (ii) is under a legal obligation to provide financial support in respect of the young person”.³⁴⁷

A non-biological or non-adoptive parent with parenting orders for a child under 18 should be covered by this section.

“Partner” and “member of a couple” include someone who lives with another person “in a marriage-like relationship, although not legally married to the other person”.³⁴⁸ (See Appendix II, Table 2, Member of a Couple 2, Partner 1.) The term “marriage-like relationship” is in use in a number of state laws to define de facto relationships, including same-sex relationships,³⁴⁹ but has not been used in this way in federal law. It is therefore arguable that the term could, but unlikely that it would, be interpreted to include same-sex couples.

Impact on same-sex couples

Under the Act an assets test applies, which can affect the amount of the accommodation bond and other charges for a person entering care. The value of a jointly owned asset is assessed as being the value of the person’s interest in it, so for a recognised couple, assets are valued at 50% of the couple’s total pool. Currently, an

³⁴⁶ *Retirement Savings Accounts Act 1997* (Cth) s 15.

³⁴⁷ *Aged Care Act 1997* (Cth) ss 44.11(2), (3).

³⁴⁸ *Aged Care Act 1997* (Cth) s 44.11.

³⁴⁹ See eg: *Commonwealth Powers (De facto Relationships) Act 2003* (NSW); *Commonwealth Powers (De facto Relationships) Act 2003* (Qld); *Commonwealth Powers (De facto Relationships) Act 2004* (Vic); *De facto Relationships (Northern Territory Request) Act 2003* (NT).

accommodation bond charge applies if a person has assets that exceed \$31,500 (excluding their home if eligible under the provisions discussed below).

The Act provides that the value of a person's home is disregarded for the purposes of the assets test if that home is occupied by the "partner" or "dependent child" of the person,³⁵⁰ or a "close relative" of the person in certain circumstances.³⁵¹ A "carer" of the person is also included in the exemption if they occupied the home for the past two years and were eligible to receive an income support payment.³⁵² There is no definition of "carer" in this division or anywhere else in the Act.

The effect of these provisions is that if a person in a heterosexual couple were to enter residential care and their partner remained in their home, the value of the home would be excluded from the assets test. For a same-sex couple the full value of the home would be taken into account if the partner in care was the sole title-holder, or half of the value would be taken into account if the partner in care held title as joint tenant with their partner.³⁵³ The only exception to this would be if a same-sex partner was held to be a "carer", had lived with their partner in the home for the previous two years and was on a social security benefit.

³⁵⁰ *Aged Care Act 1997* (Cth) s 44.10(2)(a).

³⁵¹ *Aged Care Act 1997* (Cth) s 44.10(2)(c) the relative must have occupied the home for the past five years and be eligible to receive an income support payment.

³⁵² *Aged Care Act 1997* (Cth) s 44.10(2)(b).

³⁵³ Note that same-sex couples are significantly more likely than heterosexual couples to hold property in one name rather than joint names. The reason for this is that, until de facto reforms in the 1999-2003 period in states and territories, same-sex partners were unable to transfer title into joint names without incurring stamp duty. This remains the case in South Australia.

DISCRIMINATION

There is no federal legislation that prohibits discrimination on the grounds of sexual orientation.

Sex Discrimination Act 1984 (Cth)

The *Sex Discrimination Act 1984* (Cth) prohibits sexual harassment and discrimination against people on the ground of sex, marital status, pregnancy or potential pregnancy and family responsibilities in the areas of work, accommodation, education, the provision of goods and services, the disposal of land, the activities of clubs and the administration of Commonwealth laws and programs.

Definitions used in the Act

The Act defines “de facto spouse” as exclusively opposite-sex (see Appendix II, Table 2, Spouse 2), while “marital status” means:

“(a) single; (b) married; (c) married but living separately and apart from one’s spouse; (d) divorced; (e) widowed; or (f) the de facto spouse of another person.”³⁵⁴

“Family responsibilities” means responsibilities of the employee “to care for or support of a dependent child of the employee or any other immediate family member”.³⁵⁵ “Child” is defined as including an adopted, step- or ex-nuptial child and so would exclude a non-biological or non-adoptive child. “Immediate family member” includes a spouse, adult child, parent, grandparent, grandchild or sibling or any of the same relatives of a spouse of the employee, but excludes a same-sex partner.³⁵⁶

Impact on same-sex couples

Marital status discrimination is less favourable treatment on the basis of the marital status of the person.³⁵⁷ Same-sex couples are excluded from the definition of “de facto spouse”, but are also arguably not “single”, especially if their relationship has legal status under state law. This disjuncture means that it is possible that a same-sex couple would receive no protection under the marital status provisions of the Act.

Discrimination on the basis of family responsibilities is less favourable treatment on the basis of the family responsibilities of the person.³⁵⁸ Same-sex couples receive no protection under the family-responsibility provisions of the Act; non-biological or non-adoptive children in same-sex families are also excluded.

³⁵⁴ *Sex Discrimination Act 1984* (Cth) s 4(1).

³⁵⁵ *Sex Discrimination Act 1984* (Cth) s 4A(1).

³⁵⁶ *Sex Discrimination Act 1984* (Cth) s 4A(2).

³⁵⁷ *Sex Discrimination Act 1984* (Cth) s 6.

³⁵⁸ *Sex Discrimination Act 1984* (Cth) s 7A.

Age Discrimination Act 2004 (Cth)

The *Age Discrimination Act 2004* (Cth) prohibits discrimination against people on the ground of age in the areas of work, education, access to premises, the provision of goods and services, accommodation, and the administration of Commonwealth laws.

Definitions used in the Act

“Near relative” is defined to include a spouse, de facto spouse, parent, child, grandparent, grandchild, brother or sister of the person.³⁵⁹

There is no definition of “de facto spouse” anywhere in the Act; however the use of the word “spouse” is likely to exclude a same-sex partner.³⁶⁰

Impact on same-sex couples

The Act provides an exemption for discrimination in the provision of accommodation where the provider, or a near relative, also resides in the accommodation.³⁶¹

Disability Discrimination Act 1992 (Cth)

The *Disability Discrimination Act 1992* (Cth) prohibits discrimination against people on the ground of disability in the areas of work, education, access to premises, the provision of goods and services, accommodation, existing laws and the administration of Commonwealth laws. The Act also provides broad protections on the basis of the disability of a person’s “associate”.

Definitions used in the Act

“Associate” is defined to include a wide range of relationships including a spouse or relative of the person and “another person who is living with the person on a genuine domestic basis”.³⁶²

The Act contains no definition of “spouse”, so it is unclear whether a de facto spouse is included in that term. However the additional category of a person living with someone on a “genuine domestic basis” would clearly cover both heterosexual and same-sex de facto couples.

“Relative” is defined as “a person who is related to the first-mentioned person by blood, marriage, affinity or adoption.”³⁶³ It is likely that this definition would exclude a non-biological or non-adoptive child.

Impact on same-sex couples

The Act renders it unlawful to harass a person who has an “associate” with a disability in the areas of employment, education and the provision of goods or

³⁵⁹ *Age Discrimination Act 2004* (Cth) s 29(4).

³⁶⁰ See *Commonwealth of Australia v HREOC & Muller* (1998) EOC 92-931.

³⁶¹ *Age Discrimination Act 2004* (Cth) s 29.

³⁶² *Disability Discrimination Act 1992* (Cth) s 4(1).

³⁶³ *Disability Discrimination Act 1992* (Cth) s 4(1).

services.³⁶⁴ The Act also prohibits discrimination against a person on the grounds of the disability of any of the person's associates.³⁶⁵

³⁶⁴ *Disability Discrimination Act 1992* (Cth) ss 36-40.

³⁶⁵ This covers the following areas: education, the formation of partnerships, the determination of who should be a commissioning agent, the terms and conditions of contract work, the authorisation or qualification of a trade, membership of an organisation under sch 1B of the *Workplace Relations Act 1996* (Cth), employment agencies, education, access to premises, goods and services, the provision of accommodation, dealings in land, clubs and incorporated associations, sport and the administration of Commonwealth laws and programs: *Disability Discrimination Act 1992* (Cth) ss 15-29.

MIGRATION

Migration Act 1958 (Cth)

The *Migration Act 1958* (Cth) governs eligibility to visit and migrate to Australia. The Act includes some benefits and some obligations based on recognised relationships, although most rights are governed by regulations under the Act and are not set out in the Act itself.³⁶⁶

Impact on same-sex couples

Benefits to Spouses

The Act allows for the Minister to suspend processing of visa applications, but this section does not apply to visa applications by the spouse or dependent child of an Australian citizen, resident or visa holder.³⁶⁷ Spouses and children are therefore in a protected class when it comes to suspension of processing of visas.

Responsibilities of Spouses

The Act provides that non-citizens who are jointly detained and/or deported with a non-citizen spouse are liable to pay Commonwealth the cost of such action, as well as the cost of detention and/or deportation of their children.³⁶⁸ This means that a person may be liable to pay for the cost of a spouse as well as themselves.

Migration Regulations 1994 (Cth)

The migration intake is divided into humanitarian and non-humanitarian intakes. In the humanitarian intake there are refugee and humanitarian visas. In the non-humanitarian intake there are the family stream and skilled migrant and business stream, each with numerous classes of temporary and permanent visa. There are also a range of temporary visas, including visitor, student and trainee, and temporary workers or working holiday visas.

In each class of visa a recognised relationship is important, as a relationship with an Australian resident or citizen, or with the primary holder of a visa, may entitle a person to a visa.

Definitions used in the Act

The regulations contain definitions of the following categories of relationship:

- “Member of the Family Unit” (reg 1.12);
- “Member of the immediate family” (reg 1.12AA);
- “Dependent child” (reg 1.03);
- “Spouse” (reg 1.15A); and

³⁶⁶ The Act accords the Minister power to grant visas under s 29. The specific categories of visa, their requirements and the definition of various relationships are governed by Regulations under the Act.

³⁶⁷ *Migration Act 1958* (Cth) s 84.

³⁶⁸ *Migration Act 1958* (Cth) ss 211, 212.

- “Interdependent relationship” (reg 1.09A).

“Spouse” includes married and heterosexual de facto partners. (See Appendix II, Table 2, Spouse 6.)

“Dependent child” means “the natural or adopted child, or step-child” of a person, and so would exclude a non-biological or non-adoptive child.

“Interdependent relationship” does not have the same definition as that in use in superannuation law or defence employment policy. This definition refers to a genuine relationship between two unrelated adults who live together (see Appendix II, Table 2, Interdependent 3). As the definition requires “a mutual commitment to a shared life to the exclusion of any spouse relationships or any other interdependent relationships”,³⁶⁹ it is possible that an undissolved former marriage would prevent recognition of a couple under this definition.

The definition of interdependent relationship does not refer specifically to same-sex couples, but the elements of the category are clearly couple-based and as heterosexual couples are able to use the separate (and more advantageous) spouse category, it seems intended to be used primarily, if not exclusively, by same-sex couples.³⁷⁰ The requirement of cohabitation can be waived under the regulations if there are “compelling and compassionate circumstances for the grant of the visa”.³⁷¹ The Department’s public information on this element notably gives the following example: “such as if cohabitation was not permitted under the law of the country where you lived for the 12 months before you applied for your Interdependency visa”.³⁷²

Importantly, both the “Member of the Family Unit” and “Member of the Immediate Family” categories, which are in wide use in the regulations, include the “spouse” or “dependent child” of a person. Neither include an interdependent relationship.

Impact on same-sex couples

Areas of Operation of Interdependency Category

The interdependent relationship category is a limited one, included in only two areas of migration law to date, sponsored migration under the family stream and sponsored migration under a temporary skilled migrant scheme.

The family stream allows an Australian citizen or permanent resident to sponsor family members to migrate to Australia. Since 1995 this stream has included interdependent relationships in addition to the other categories of spouse, de facto

³⁶⁹ Migration Regulations 1994 (Cth) reg 1.09A(2)(c)(i). See also *Migration Act 1958* (Cth) s 238 which does not contain this element.

³⁷⁰ The DIMIA website currently refers to the category of “Interdependent Partner” as follows: “An interdependent partner is a same-sex partner where you have a mutual commitment to a shared life together to the exclusion of all others. This relationship must be genuine and continuing”: see <<http://www.immi.gov.au/skilled/skilled-workers/sbs/eligibility-family.htm>> (3 August 2006).

³⁷¹ Migration Regulations 1994 (Cth) reg 1.09A(2A).

³⁷² See <http://www.immi.gov.au/migrants/partners/interdependency/814-826/eligibility-applicant.htm> (9 August 2006).

spouse, prospective spouse, dependent child, orphaned unmarried relatives, parents and aged dependent relatives.³⁷³

The requirements and entitlements of the interdependent category are largely similar to the spouse category. The parties must be at least 18 and have lived together for 12 months before applying. The regulations allow for a temporary visa through a waiting period of approximately two years and then a permanent visa if the relationship still subsists. The temporary visas allow the partner to work and study but do not provide access to the HECS scheme. The permanent visas allow for use of the HECS scheme and, subject to a waiting period, access to social security entitlements.³⁷⁴ Both spouse and interdependent claims have priority in the family stream over other categories of eligible relative.³⁷⁵

The most significant difference between the benefits accorded through the spouse class of visas rather than interdependency visa class is that there is no “cap” or limit on the spouse visas, but the interdependent class may be subject to capping. This means that any same-sex couples over and above the limit would have to wait to be assessed in the following year, whereas heterosexual partners would not. However in the 2002-2006 period no cap was applied.³⁷⁶

The interdependency category does not appear in the skilled migrant and business, or humanitarian streams, with one exception. From 1 July 2006 the Temporary Business (Long Stay) Visa (subclass 457) permits the independent partner of a person, as well as the dependent child of such partner, to accompany the primary visa holder. The entitlements of same-sex and heterosexual couples still differ somewhat within this class of visa, however, as the “dependent relatives” of a spouse, but not of an interdependent partner, may accompany the primary visa holder.

Unlike other classes of business visa, this visa is only available if the primary applicant is sponsored by an employer. It is notable that interdependent relationships were included only in the *temporary* and not the permanent classes of skilled migrant visa. Therefore a same-sex partner is only able to stay in Australia for between three months and four years and, unlike a heterosexual partner, cannot then join in their partner’s application for a permanent visa.

Areas of Exclusion of the Interdependent Category

Spouses but not interdependent partners are included in a wide range of visa categories, including:

³⁷³ See Jenni Millbank “If Australian Law Opened Its Eyes to Lesbian and Gay Families, What Would it See?” (1998) 12 *Australian Journal of Family Law* 99 at 115-116. Note that originally there was no requirement of 12 months’ cohabitation, this was changed in 1997.

³⁷⁴ See <http://www.immi.gov.au/migrants/partners/interdependency/814-826/index.htm> (9 August 2006).

³⁷⁵ See DIMIA, Fact Sheet 37 “Processing Priorities”, <http://www.immi.gov.au/media/fact-sheets/37processing.htm> (9 August 2006).

³⁷⁶ Migration Act 1958 (Cth) s 85 requires caps to be notified in the *Government Gazette*. See *Special Gazette Nos 85, 86, 87 and 88*.

- all skilled migrant and business visa categories;³⁷⁷
- student visas;³⁷⁸ and
- humanitarian visas.³⁷⁹

The biological or adoptive child of an applicant's same-sex partner would also be excluded from these visas.

For all classes of visa it is notable that those in recognised relationships generally apply on the same form and are assessed jointly.

The benefits of being joined in one visa with a partner or family member are considerable. In many visa categories, only the primary applicant must meet the main eligibility criteria (although secondary applicants must still meet health and character tests). This means that if both partners are non-citizens they do not need to separately establish their eligibility for a visa. A person who may not be independently eligible for a visa is enabled to travel and remain with their partner. Secondly, all applicants apply on the one form, and so must pay only once for the application (and only once for the administrative and/or court cost related to any application for review of the decision made about the visa).

³⁷⁷ Eg: Skilled – Independent Visa (Subclass 136); Skill Matching Visa (Subclass 134); Business Owner Visa (provisional) (Subclass 160); Senior Executives Visa (provisional) (Subclass 161); Investor Visa (provisional) (Subclass 162).

³⁷⁸ Eg: Higher Education Sector: Temporary Visa (Subclass 573); Postgraduate Research Sector: Temporary Visa (Subclass 574).

³⁷⁹ Eg: Permanent Protection Visa (Subclass 866).

INSURANCE

Life Insurance Act 1995 (Cth)

The *Life Insurance Act 1995* (Cth) regulates the provision of life insurance.

Definitions used in the Act

“Spouse” includes a person who lives with the person “as the husband or wife of the person”.³⁸⁰ (See Appendix II, Table 2, Spouse 1.) This definition has been interpreted to exclude same-sex couples.³⁸¹

There is no definition of child in the Act; the term would likely be interpreted to exclude a non-biological or non-adoptive child.

Impact on same-sex couples

A court cannot order that a spouse’s life insurance policy can be used to discharge a person’s debt.³⁸²

For small policies, probate is not necessary and the company may pay the money under a policy directly to the “spouse, father, mother, child, brother, sister, niece or nephew of the deceased person”, or to a person entitled to the money under a will or the laws of intestacy.³⁸³

Civil Aviation (Carriers’ Liability) Act 1959 (Cth)

The *Civil Aviation (Carriers’ Liability) Act 1959* (Cth) implements various international conventions relating to the liability of air carriers.

Definitions used in the Act

“Members of the passenger’s family” include the wife or husband, de facto spouse, parents and various other relatives.³⁸⁴ There is no definition of “de facto spouse” in the Act. The use of the word “spouse” would exclude same-sex couples if the interpretation of the Federal Court in *Muller* (1998) continues to be followed.³⁸⁵

There is no definition of “child” in the Act; the term would likely be interpreted to exclude a non-biological or non-adoptive child.

Impact on same-sex couples

Members of a passenger’s family may enforce provisions regarding to liability for the death of the passenger.³⁸⁶ The Act also provides that there is no reduction of damages

³⁸⁰ *Life Insurance Act 1995* (Cth) sch 1 s 8.

³⁸¹ See *Re Brown and Commissioner for Superannuation* (1995) 21 AAR 378.

³⁸² *Life Insurance Act 1995* (Cth) s 204.

³⁸³ *Life Insurance Act 1995* (Cth) ss 211, 212.

³⁸⁴ *Civil Aviation (Carriers’ Liability) Act 1959* (Cth) ss 12(5), 35(5).

³⁸⁵ *Commonwealth of Australia v HREOC & Muller* (1998) EOC 92-931.

³⁸⁶ *Civil Aviation (Carriers’ Liability) Act 1959* (Cth) ss 12(3), 35(3).

based on the acquisition of a spouse or child of a greater interest in a home or contents as a result of the passenger's death.³⁸⁷

³⁸⁷ *Civil Aviation (Carriers' Liability) Act 1959* (Cth) ss 15(d), 28(d).

CRIMES

Criminal Code Act 1995 (Cth)

The *Criminal Code Act 1995* (Cth) is exceptional among federal legislation, as it is the only piece to recognise same-sex partners under a provision that explicitly names them as partners (rather than under a generic category such as “interdependent relationship”), although it still does not define them within the category of de facto relationship.

Definitions used in the Act

Section 102.1 defines a “close family member” of a person as meaning, among others, the person's “spouse, de facto spouse or same-sex partner”.

This provision was inserted³⁸⁸ on the same day that the *Marriage Amendment Act 2004* (Cth) was passed to prevent the recognition of same-sex marriages solemnised overseas.

Impact on same-sex couples

“Close family members” are protected from the strict liability offence of association with a terrorist.³⁸⁹

Evidence Act 1995 (Cth)

The *Evidence Act 1995* (Cth) governs the rules of evidence in federal court proceedings.

Definitions used in the Act

“De facto spouse” is defined as exclusively opposite-sex.³⁹⁰ (See Appendix II, Table 2, Spouse 2.)

“Child” is defined to include “a child living with the person as if the child were a member of the person’s family”.³⁹¹ This would clearly cover a non-biological or non-adoptive child living in a same-sex family. However, biological or adoptive children still have greater coverage under the provisions as they do not need to be living with their parent for the relationship to be covered. As the provisions include adult children this is significant.

³⁸⁸ Through the *Anti-Terrorism Act (No 2) 2004* (Cth) sch 3.

³⁸⁹ *Criminal Code Act 1995* (Cth) s 102.8(4)(a).

³⁹⁰ *Evidence Act 1995* (Cth) sch 1 s 3 pt 1.

³⁹¹ *Evidence Act 1995* (Cth) sub-cl 10(1)(b) of pt 2.

Impact on same-sex couples

The Act provides an exception regarding the compellability of a defendant's spouse, de facto spouse, parent or child in a criminal proceeding. If such a person objects to giving evidence, they must not be required to do so if the court finds that:

“(a) there is a likelihood that harm would or might be caused (whether directly or indirectly) to the person, or to the relationship between the person and the defendant, if the person gives the evidence; and

(b) the nature and extent of that harm outweighs the desirability of having the evidence given.”³⁹²

A same-sex partner cannot object to giving evidence and the harm that such evidence may cause to their relationship is not a factor the court can consider.

Proceeds of Crime Act 2002 (Cth)

The *Proceeds of Crime Act 2002* (Cth) provides for confiscation of the proceeds of federal crimes. Certain exceptions are provided to ensure that the needs of dependants are taken into account.

Definitions used in the Act

“Dependant” is defined as “the person’s spouse or de facto partner”, child “or member of the person’s household, who depends on the person for support.”³⁹³

“Spouse” and “de facto partner” are not defined in the Act. It is strongly arguable that “de facto partner” in its ordinary meaning now encompasses a same-sex partner, as most state and territory laws use this term to include both same-sex and heterosexual partners. If a same-sex partner was nonetheless excluded from this category, they would still be eligible as a member of the person’s household, as would a non-biological or non-adoptive child of the person – however this requires that they demonstrate financial dependence.

Impact on same-sex couples

A court may allow the reasonable living expenses of the dependants of a person to be met out of the property that is covered by a restraining order,³⁹⁴ and in making a forfeiture order the court can direct the Commonwealth to provide a certain amount to a dependant if there would otherwise be hardship to the dependant.³⁹⁵

³⁹² *Evidence Act 1995* (Cth) s 18(6). Note that s 19 excludes certain proceedings from this provision.

³⁹³ *Proceeds of Crime Act 2002* (Cth) s 338.

³⁹⁴ *Proceeds of Crime Act 2002* (Cth) s 24.

³⁹⁵ *Proceeds of Crime Act 2002* (Cth) s 72.

INVESTMENT, CONFLICT OF INTEREST AND DISCLOSURE

A number of federal laws regulate investment and the ownership of shares in companies or certain kinds of financial entities. Many of these provisions set limits on ownership, or require disclosure of interests. In order to prevent manipulation of such rules by the use of sham transactions involving others closely connected to the person, many rules also cover the relatives and associates of the person.

Corporations Act 2001 (Cth)

The *Corporations Act 2001* (Cth) regulates corporations and certain financial products and services.

Definitions used in the Act

The Act defines “close associate”, “relative” and “immediate family member” as including the “spouse or de facto spouse” of a person.³⁹⁶ “De facto spouse” is defined as exclusively opposite-sex.³⁹⁷ (See Appendix II, Table 2, Spouse 3.)

There is no definition of “child” in the Act; the term would likely be interpreted to exclude a non-biological or non-adoptive child.

Impact on same-sex couples – current disadvantages

Benefits that are provided under the Act include:

- member approval is not needed for the payment of small amounts to a director or their spouse or de facto spouse;³⁹⁸
- during the administration of a company, a guarantee of the liability of a company cannot be enforced against a director or their spouse, de facto spouse or relative;³⁹⁹
- an offer of securities does not need disclosure to investors if it is made to a senior manager of the body or a related body or their spouse, parent, child, brother or sister;⁴⁰⁰ and
- a product disclosure statement is not required where an offer of securities is made to a senior manager of the responsible entity or of a related body corporate or their spouse, parent, child, brother or sister.⁴⁰¹

³⁹⁶ *Corporations Act 2001* (Cth) s 9.

³⁹⁷ *Corporations Act 2001* (Cth) s 9. Section 9 defines “related entity” of a body corporate as including a variety of people, including spouses, de facto spouses and relatives.

³⁹⁸ *Corporations Act 2001* (Cth) s 213.

³⁹⁹ *Corporations Act 2001* (Cth) s 440J.

⁴⁰⁰ *Corporations Act 2001* (Cth) s 708(12)(a).

⁴⁰¹ *Corporations Act 2001* (Cth) s 1012D(9).

Impact on same-sex couples – current advantages

Obligations under the Act include the following:

- directors and their spouses and de facto spouses are “related parties” of a public company;⁴⁰²
- proscription of the receipt of benefits related to the company by a person who holds or has held a board or managerial office in the company, their spouse, de facto spouse, relative or associate;⁴⁰³
- priority of payments to employees when a company is winding up, excluding an employee who is a director or spouse of a director;⁴⁰⁴
- relation back rights for certain transactions involving a relative or spouse of a company director;⁴⁰⁵
- requirement of a compliance committee when less than half of the directors of a company are external directors (an external director must not be a relative or de facto spouse of a person who has a material interest in the responsible entity or a related body corporate);⁴⁰⁶ and
- requirement that at least three members of a compliance committee are external members (an external member must not be a relative or de facto spouse of a person who has a material interest in the responsible entity or a related body corporate).⁴⁰⁷

Same-sex partners are excluded from both the benefits and limitations of the above provisions.

Bankruptcy Act 1966 (Cth)

The *Bankruptcy Act 1966* (Cth) governs bankruptcy and insolvency, including the administration of bankrupt estates and the extent to which creditors can gain control over the current and former property of a bankrupt.

Definitions used in the Act

“Close relative” and “relative” include the “spouse or de facto spouse” of a person.⁴⁰⁸ “De facto spouse” is defined as exclusively opposite-sex.⁴⁰⁹ (See Appendix II, Table 2, Spouse 3.)

“Child” is defined to include an adopted, step or an ex-nuptial child, of the person and so would exclude a non-biological or non-adoptive child.⁴¹⁰

⁴⁰² *Corporations Act 2001* (Cth) s 228.

⁴⁰³ *Corporations Act 2001* (Cth) ss 200B, 200C, 200D.

⁴⁰⁴ *Corporations Act 2001* (Cth) s 556.

⁴⁰⁵ *Corporations Act 2001* (Cth) s 567.

⁴⁰⁶ *Corporations Act 2001* (Cth) s 601JA.

⁴⁰⁷ *Corporations Act 2001* (Cth) s 601JB.

⁴⁰⁸ *Bankruptcy Act 1966* (Cth) s 5(1).

⁴⁰⁹ *Bankruptcy Act 1966* (Cth) s 5(1).

⁴¹⁰ *Bankruptcy Act 1966* (Cth) s 5(1).

Impact on same-sex couples

Benefits under the Act include:

- exemption of certain property from division among the creditors of a bankrupt, including policies of life insurance or endowment on behalf of a spouse, rights in respect of injury or death caused to a spouse and property transferred to a spouse by a trustee under Part VIII of the *Family Law Act 1975* (Cth);⁴¹¹
- exemption allowing a bankrupt to continue legal proceedings in his or her own name in respect of a personal injury or death caused to a spouse;⁴¹² and
- provision that a trustee may make such allowance out of the estate as he or she thinks just to the bankrupt, the spouse or the family of the bankrupt.⁴¹³

A same-sex partner is excluded from all of the above provisions.

The income limit of the bankrupt is increased by a set percentage per dependant, up to a maximum of four “dependants”.⁴¹⁴ A bankrupt must declare the income of their dependants⁴¹⁵ but may request a lower contribution based upon hardship, including the illness of a dependant, the costs of child-care required to stay in employment, and a spouse or other person residing with the bankrupt who ordinarily contributes to the cost of maintaining the household being unable to do so through unemployment, illness or injury.⁴¹⁶

“Dependant” means:

- “(a) the person resides with the bankrupt;
- (b) the person is wholly or partly dependent on the bankrupt for economic support;
- (c) the income derived (or likely to be derived) by the person during the contribution assessment period is not more than the amount prescribed by the regulations for the purposes of this paragraph.”⁴¹⁷

Therefore a same-sex partner who was wholly or partially dependent on the bankrupt *would* be included in the income limit provisions. Similarly a non-biological or non-adoptive child would be covered. However, unlike a heterosexual partner or biological child, they would need to prove financial dependence to be included.⁴¹⁸

⁴¹¹ *Bankruptcy Act 1966* (Cth) s 116(2).

⁴¹² *Bankruptcy Act 1966* (Cth) s 60(4).

⁴¹³ *Bankruptcy Act 1966* (Cth) s 134(ma).

⁴¹⁴ *Bankruptcy Act 1966* (Cth) s 139K.

⁴¹⁵ *Bankruptcy Act 1966* (Cth) s 139U.

⁴¹⁶ *Bankruptcy Act 1966* (Cth) s 139T.

⁴¹⁷ *Bankruptcy Act 1966* (Cth) s 139K.

⁴¹⁸ The only relationship-based obligation under the Act relates to undervalued transactions made within five years of bankruptcy, and transactions to defeat the claims of creditors. These provisions state that no consideration is received in a transaction if the transferee is the spouse or de facto spouse of the transferor and they made a deed in favour of the transferor, or promised to marry, or to become the “de facto spouse” of, the transferor, to give love or affection to the transferor or if the transferee granting the transferor a right to live at the transferred property, unless the grant relates to a transfer or settlement of property, or an agreement, under the *Family Law Act 1975* (Cth): *Bankruptcy Act 1966*

Foreign Acquisition and Takeovers Act 1975 (Cth)

The *Foreign Acquisition and Takeovers Act 1975* (Cth) regulates the foreign acquisition of land interests, businesses and mineral rights. Unless there is an exemption, investments by a “foreign” corporation, government or person require notification and approval.

Various provisions of the Act include the investment activities or interests of an “associate” of the foreign interest. “Associate” includes a spouse or child.⁴¹⁹

Definitions used in the Act

“Spouse” is not defined in the Act, however it is defined in the Foreign Acquisition and Takeovers Regulations 1989 (Cth) that operate under the Act as a person who lives with the person “as the husband or wife of the person.”⁴²⁰ (See Appendix II, Table 2, Spouse 1.) This definition has been interpreted to exclude same-sex couples.⁴²¹

Impact on same-sex couples

A foreign person is exempt from provisions of the Act concerning the acquisition of urban land if that person is purchasing residential real estate as joint tenants with a “spouse” who is an Australian citizen.⁴²² This exemption would not cover a same-sex couple of mixed Australian and foreign citizenry who were jointly purchasing a home.

Financial Sector (Shareholdings) Act 1998 (Cth)

The *Financial Sector (Shareholdings) Act 1998* (Cth) limits shareholdings in financial sector companies, generally to 15%. The shareholding limit applies to a person and their “associates”.⁴²³

Definitions used in the Act

“Associate” includes a “relative”.⁴²⁴ “Relative” includes a parent, spouse or someone who lives with the person “as the husband or wife of the person”.⁴²⁵ (See Appendix II, Table 2, Spouse 1.) This wording has been interpreted to exclude same-sex couples.⁴²⁶

“Relative” also includes the “son, daughter or remoter issue of the person”, which would exclude a non-biological or non-adoptive child.

(Cth) ss 120, 121. While same-sex partners are excluded from the definition of spouse, it would still be open to a court to find that any such promise between same-sex partners was devoid of consideration.

⁴¹⁹ *Foreign Acquisition and Takeovers Act 1975* (Cth) s 6(a).

⁴²⁰ Foreign Acquisition and Takeovers Regulations 1989 (Cth) reg 2.

⁴²¹ See *Re Brown and Commissioner for Superannuation* (1995) 21 AAR 378.

⁴²² Foreign Acquisition and Takeovers Regulations 1989 (Cth) reg 3(t).

⁴²³ *Financial Sector (Shareholdings) Act 1998* (Cth) s 8.

⁴²⁴ *Financial Sector (Shareholdings) Act 1998* (Cth) sch 1 s 4.

⁴²⁵ *Financial Sector (Shareholdings) Act 1998* (Cth) sch 1 s 2.

⁴²⁶ See *Re Brown and Commissioner for Superannuation* (1995) 21 AAR 378.

Impact on same-sex couples

A same-sex couple could acquire a 30% interest in a financial sector company, while a heterosexual couple would be limited to a 15% holding.

Insurance Acquisitions and Takeovers Act 1991 (Cth)

The *Insurance Acquisitions and Takeovers Act 1991* (Cth) regulates the assets or leasing of assets of insurance companies, as well as agreements relating to the directors of such companies.

Definitions used in the Act

“Associate” includes “relative”.⁴²⁷ Relative includes a “de facto spouse”.⁴²⁸ “De facto spouse” is defined as someone who lives with the person “as the husband or wife of the person.” (See Appendix II, Table 2, Spouse 1.) This definition has been interpreted to exclude same-sex couples.⁴²⁹

“Relative” also includes the “son, daughter or remoter issue of the person”, which would exclude a non-biological or non-adoptive child.

Impact on same-sex couples

A number of provisions concern the conduct or share holdings of a person and their “associates”.⁴³⁰ For example there are limitations on the control of an insurance company by someone who is “not a fit and proper person”; this provision defines a person with “influence” over a company as someone who, in conjunction with associates, has a 15% shareholding.⁴³¹ Same-sex couples are not limited to a 15% shareholding as heterosexual couples are.

Education Services for Overseas Students Act 2000 (Cth)

The *Education Services for Overseas Students Act 2000* (Cth) regulates the provision of education to overseas students through registration and disclosure requirements. Many of these requirements also cover the “associates” of a person.

Definitions used in the Act

“Associate” includes a spouse or de facto spouse, child or spouse’s child, and parent or spouse’s parent.⁴³² There is no definition of “de facto spouse” in the Act. The use of the word “spouse” would exclude same-sex couples if the interpretation of the Federal Court in *Muller* (1998) continues to be followed.⁴³³

⁴²⁷ *Financial Sector (Shareholdings) Act 1998* (Cth) s 7(1)(a).

⁴²⁸ *Financial Sector (Shareholdings) Act 1998* (Cth) s 4.

⁴²⁹ See *Re Brown and Commissioner for Superannuation* (1995) 21 AAR 378.

⁴³⁰ *Insurance Acquisitions and Takeovers Act 1991* (Cth) ss 14, 36, 50.

⁴³¹ *Insurance Acquisitions and Takeovers Act 1991* (Cth) s 5.

⁴³² *Education Services for Overseas Students Act 2000* (Cth) s 6(1).

⁴³³ *Commonwealth of Australia v HREOC & Muller* (1998) EOC 92-931.

There is no definition of “child” in the Act; the term would likely be interpreted to exclude a non-biological or non-adoptive child.

Impact on same-sex couples

Obligations imposed on a person and their associate include:

- a registered provider must disclose that an “associate” of the provider has committed any of a range of offences, or has had their registration cancelled or suspended;⁴³⁴
- consideration of the conduct of an “associate” in granting registration;⁴³⁵
- the Immigration Minister may suspend the registration of a provider if a significant number of students are entering and not completing their studies at either a provider or an “associate’s” facility;⁴³⁶ and
- the Minister has powers to suspend, vary or cancel a licence based on breaches by a provider or their “associate”.⁴³⁷

Same-sex partners are not included in the above provisions.

Broadcasting Services Act 1992 (Cth)

The *Broadcasting Services Act 1992* (Cth) regulates radio and television broadcasters in Australia, including, among other things, controls over the diversity of ownership.

The Act takes into account the interests of an “associate” in determining whether a person is in control of a broadcasting licence, newspaper or company.⁴³⁸

Definitions used in the Act

“Associate” includes a person’s spouse (including a de facto spouse), a parent, child, brother or sister of the person.⁴³⁹ There is no definition of “de facto spouse” under the Act. The use of the word “spouse” would exclude same-sex couples if the interpretation of the Federal Court in *Muller* (1998) continues to be followed.⁴⁴⁰ There is no definition of “child” in the Act; the term would likely be interpreted to exclude a non-biological or non-adoptive child.

Impact on same-sex couples

Same-sex families may lawfully hold a larger interest in media ownership than similarly situated heterosexual families.

⁴³⁴ *Education Services for Overseas Students Act 2000* (Cth) ss 11, 17.

⁴³⁵ *Education Services for Overseas Students Act 2000* (Cth) s 9.

⁴³⁶ *Education Services for Overseas Students Act 2000* (Cth) s 97.

⁴³⁷ *Education Services for Overseas Students Act 2000* (Cth) s 83.

⁴³⁸ *Broadcasting Services Act 1992* (Cth) sch 1.

⁴³⁹ *Broadcasting Services Act 1992* (Cth) s 6(1).

⁴⁴⁰ *Commonwealth of Australia v HREOC & Muller* (1998) EOC 92-931.

Pooled Development Funds Act 1992 (Cth)

The *Pooled Development Funds Act 1992* (Cth) establishes a scheme under which companies that provide certain kinds of capital can become pooled development funds which entitles them to more competitive tax treatment.

The Act generally limits the shares in a pooled development fund to 30% for a person and their “associates”.⁴⁴¹

Definitions used in the Act

“Associates” includes parents, children and the spouse or a de facto spouse of the person.⁴⁴² “De facto spouse” is defined as exclusively opposite-sex.⁴⁴³ (See Appendix II, Table 2, Spouse 3.)

There is no definition of child in the Act; the term would likely be interpreted to exclude a non-biological or non-adoptive child.

Impact on same-sex couples

A same-sex couple may hold a 60% share in a pooled development fund, whereas a heterosexual couple would be limited to 30%.

Australian Meat and Live-Stock Industry Act 1997 (Cth)

The *Australian Meat and Live-Stock Industry Act 1997* (Cth) regulates the meat and live-stock industry.

Definitions used in the Act

“Associate” includes a “spouse” or “de facto spouse”.⁴⁴⁴ There is no definition of “de facto spouse” in the Act. The use of the word “spouse” would exclude same-sex couples if the interpretation of the Federal Court in *Muller* (1998) continues to be followed.⁴⁴⁵

Impact on same-sex couples

The power to suspend, cancel or refuse to grant a live-stock export licence includes consideration of the conduct of an “associate”.⁴⁴⁶ This power does not include consideration of the conduct of a same-sex partner.

⁴⁴¹ *Pooled Development Funds Act 1992* (Cth) s 31(1).

⁴⁴² *Pooled Development Funds Act 1992* (Cth) s 31(2).

⁴⁴³ *Pooled Development Funds Act 1992* (Cth) s 4(1).

⁴⁴⁴ *Australian Meat and Live-Stock Industry Act 1997* (Cth) s 3(b).

⁴⁴⁵ *Commonwealth of Australia v HREOC & Muller* (1998) EOC 92-931.

⁴⁴⁶ *Australian Meat and Live-Stock Industry Act 1997* (Cth) s 25A.

ABORIGINAL LAND AND ORGANISATIONS

Aboriginal Land Grant (Jervis Bay Territory) Act 1986 (Cth)

The *Aboriginal Land Grant (Jervis Bay Territory) Act 1986* (Cth) grants land in the Jervis Bay Territory to the Wreck Bay Aboriginal Community.

Definitions used in the Act

“Relative” includes a parent, or grandparent of the member or of his or her spouse and a child or other lineal descendant of the member, of his or her spouse, or child of any specified relative.⁴⁴⁷ A non-biological or non-adoptive child would not be included in this definition.

“Spouse” is defined as including someone living with the person “as the person’s spouse”.⁴⁴⁸ (See Appendix II, Table 2, Spouse 5.) Although there is nothing in the definition that expressly requires the parties to be opposite-sex, the use of “as” a spouse has been taken by the Federal Court in *Muller* (1998) to exclude same-sex couples.⁴⁴⁹

Impact on same-sex couples

Where a registered member has the benefit of a lease of Aboriginal Land for use for domestic purposes, that benefit is capable of transmission, by will or under a law relating to intestacy in force in the Territory, to a “relative” of the member.⁴⁵⁰

Aboriginal Councils and Associations Act 1976 (Cth)

The *Aboriginal Councils and Associations Act 1976* (Cth) provides for the constitution of Aboriginal Councils and Incorporated Associations.

Definitions used in the Act

“Spouse” is defined as including someone living with the person “as the person’s spouse” (see Appendix II, Table 2, Spouse 5). If the interpretation of the Federal Court in *Muller* (1998) continues to be followed, this would exclude a same-sex partner.⁴⁵¹

Impact on same-sex couples

A person who is not Aboriginal, or the spouse of an Aboriginal person, is not eligible to be a member of an Incorporated Aboriginal Association.⁴⁵²

⁴⁴⁷ *Aboriginal Land Grant (Jervis Bay Territory) Act 1986* (Cth) s 37(1).

⁴⁴⁸ *Aboriginal Land Grant (Jervis Bay Territory) Act 1986* (Cth) s 37(1).

⁴⁴⁹ *Commonwealth of Australia v HREOC & Muller* (1998) EOC 92-931. I argue in the Introduction to this paper that the reasoning in the decision is questionable.

⁴⁵⁰ *Aboriginal Land Grant (Jervis Bay Territory) Act 1986* (Cth) s 42.

⁴⁵¹ *Aboriginal Councils and Associations Act 1976* (Cth) s 3. *Commonwealth of Australia v HREOC & Muller* (1998) EOC 92-931.

⁴⁵² *Aboriginal Councils and Associations Act 1976* (Cth) s 49.

MARRIAGE

Marriage Act 1961 (Cth)

Definitions used in the Act

The common law meaning of marriage in Australia has always required the parties to be of different sexes.⁴⁵³ Prior to 2004 this requirement was also implied (through the form of words mandated for civil ceremonies), but not expressly stated in the *Marriage Act*.

In 2004 the *Marriage Amendment Act 2004* (Cth) passed. The amendments inserted a statutory definition of marriage as “the union of a man and a woman to the exclusion of all others, voluntarily entered into for life.”⁴⁵⁴ This was said to give effect to “the Government's commitment to protect the institution of marriage by ensuring that marriage means a union of a man and a woman and that same-sex relationships cannot be equated with marriage.”⁴⁵⁵

The amendments also altered s 88E of the *Marriage Act* to prevent Australian courts from making a declaration of validity concerning a same-sex marriage contracted overseas.⁴⁵⁶ Such a declaration could have been made, prior to the amendments, under Part VA of the *Marriage Act 1961* (Cth) granting recognition to foreign marriages (enacting Australia's obligations under the Hague Marriage Convention)⁴⁵⁷ or under private international law rules,⁴⁵⁸ although no such claim had actually been heard by any court at the time of the amendments.

The *Marriage Act* thus excludes same-sex couples in two distinct ways: it prevents a same-sex couple from marrying within Australia, and it excludes a same-sex couple who have married overseas from having any recognition of their marriage within Australian law.

Impact on same-sex couples

This paper has detailed the widespread equality of status granted to heterosexual de facto couples and married couples in federal law. There are only a handful of differences in coverage or rights granted between such couples, and most of these differences are progressively being eliminated. The same is true of the status of

⁴⁵³ *Hyde v Hyde* (1866) LR 1 P&D 130; *Re Kevin* (2001) 165 FLR 404; *A-G (Cth) v Kevin* (2003) 172 FLR 300.

⁴⁵⁴ *Marriage Amendment Act 2004* (Cth) sch 1.

⁴⁵⁵ Explanatory Memorandum, Marriage Amendment Bill 2004 (Cth) 1. See also Commonwealth, *Parliamentary Debates*, House of Representatives, 24 June 2004, 31459 (Philip Ruddock, Attorney-General).

⁴⁵⁶ Section 88EA of the *Marriage Act 1961* (Cth) now provides: “A union solemnised in a foreign country between:

- (a) a man and another man; or
- (b) a woman and another woman;

must not be recognised as a marriage in Australia.”

⁴⁵⁷ *Convention on Celebration and Recognition of the Validity of Marriages*, open for signature 14 March 1978, 1901 UNTS 131 (entered into force 1 May 1991).

⁴⁵⁸ See Peter Nygh, “The Consequences for Australia of the New Netherlands Law Permitting Same Gender Marriages” (2002) 16 *Australian Journal of Family Law* 139.

heterosexual de facto couples and married couples in state and territory law. In a legal sense, then, there is no longer anything “special” about marriage, as heterosexual couples receive virtually identical rights and obligations regardless of whether they marry.

However if same-sex couples were recognised as de facto couples in federal law (and an equitable form of parenting recognition were introduced), the exclusion from formal marriage would still result in some disadvantages.

Firstly, heterosexual couples have a choice regarding the legal manner in which their relationship is recognised – through marriage or de facto status. Same-sex couples continue to be denied such choice. Being able to choose whether and whom to marry, and having a form of recognition that is given the same title and status as that granted to other citizens, has been recognised by courts in Canada, Massachusetts and South Africa as a key aspect of human dignity and equality before the law, protected by Constitutional equality guarantees.⁴⁵⁹

Secondly, marriage offers a largely portable status. In the absence of express exclusions, such as that in s 88E of the *Marriage Act*, couples who marry in one jurisdiction have a form of recognition that travels with them if they visit or move to another jurisdiction. De facto status is a specific rather than generic status; that is it is granted by each and every statute in which it appears, and so does not flow through to other laws (unless they expressly adopt it) or travel to other jurisdictions.

Thirdly, marriage offers a proof of status. Formal marriage is not always conclusive as to the existence or duration of the relationship. For example the Minister for Immigration can decide that a marriage, although legal, is not “genuine” for immigration purposes. Also a partner to a marriage is entitled to claim property acquired prior to that marriage. However marriage is a simple and widely accepted form of proof. While de facto couples can prove the existence of a relationship through a wide range of everyday documents such as wills, leases or mortgages, there may be uncertainty as to which forms of proof are authoritative or accepted, as well as a higher evidentiary burden compared to married couples.

Fourthly, while there is a one-month notice period before any marriage can occur in Australia, the rights that flow from the marriage once formalised are usually instantaneous (although note there are a few exceptions such as recent marriages in relation to certain death benefits). While most state laws (with the exception of South Australia) do not require a set period of cohabitation generally for recognition as a de facto couple, there are a few areas of law in each jurisdiction that do have time requirements. These laws concern significant financial entitlements, primarily death benefits, inheritance and property division, and in most cases include a discretion to waive the requirement if the circumstances justify it. It is therefore arguable that time requirements in such limited instances are adapted and appropriate.

⁴⁵⁹ See eg: *Egale Canada Inc v Canada (Attorney-General)* (2003) 225 DLR (4th) 472; *Halpern v Canada (Attorney-General)* (2003) 225 DLR (4th) 529; *Hendricks v Quebec (Attorney-General)* [2002] RJQ 2506; *SCC Reference Re Same-sex Marriage* [2004] 3 SCR 689; *Goodridge v Dept of Health* 798 NE 2d 941 (2003); *Opinion of the Justices to the Senate* 802 NE 2d 565 (2004); *Minister for Home Affairs & Anor v Fourie and Anor* [2005] ZACC 1.

Having noted these practical legal distinctions is not to suggest that the symbolic impact of formal exclusion is unimportant from a human rights perspective. In the South African case of *Fourie*, a unanimous Constitutional Court highlighted the effects of exclusion from the choice to marry thus:

The exclusion of same-sex couples from the benefits and responsibilities of marriage, accordingly, is not a small and tangential inconvenience resulting from a few surviving relics of societal prejudice destined to evaporate like the morning dew. It represents a harsh if oblique statement by the law that same-sex couples are outsiders, and that their need for affirmation and protection of their intimate relations as human beings is somehow less than that of heterosexual couples. It reinforces the wounding notion that they are to be treated as biological oddities, as failed or lapsed human beings who do not fit into normal society, and, as such, do not qualify for the full moral concern and respect that our Constitution seeks to secure for everyone. It signifies that their capacity for love, commitment and accepting responsibility is by definition less worthy of regard than that of heterosexual couples.

It should be noted that the intangible damage to same-sex couples is as severe as the material deprivation. To begin with, they are not entitled to celebrate their commitment to each other in a joyous public event recognised by the law. They are obliged to live in a state of legal blankness in which their unions remain unmarked by the showering of presents and the commemoration of anniversaries so celebrated in our culture. It may be that, as the literature suggests, many same-sex couples would abjure mimicking or subordinating themselves to heterosexual norms. Others might wish to avoid what they consider the routinisation and commercialisation of their most intimate and personal relationships, and accordingly not seek marriage or its equivalence. Yet what is in issue is not the decision to be taken, but the choice that is available. If heterosexual couples have the option of deciding whether to marry or not, so should same-sex couples have the choice as whether to seek to achieve a status and a set of entitlements and responsibilities on a par with those enjoyed by heterosexual couples. It follows that, given the centrality attributed to marriage and its consequences in our culture, to deny same-sex couples a choice in this respect is to negate their right to self-definition in a most profound way.⁴⁶⁰

⁴⁶⁰ *Minister for Home Affairs & Anor v Fourie and Anor* [2005] ZACC 1 [71]-[72] (Sachs J for the court), citations within text omitted.

APPENDIX I:
**List of Amendments Required to Include Same-Sex Families
in Federal Law**

Current at 1 September 2006

Aboriginal Councils and Associations Act 1976 (Cth)

Insert definition of child
s 3 replace definition of “spouse”

Aboriginal Land Grant (Jervis Bay Territory) Act 1986 (Cth)

s 37(1) replace definition of “relative”, “spouse”, “child”

Age Discrimination Act 2004 (Cth)

Insert definition of child
s 29(4) replace definition of “near relative”

Aged Care Act 1997 (Cth)

s 44.11 replace definition of close relation, member of a couple,
partner, dependent child

Australian Citizenship Act 1948 (Cth)

Insert definition of spouse or de facto spouse

Australian Meat and Live-Stock Industry Act 1997 (Cth)

Insert definition of de facto spouse

Bankruptcy Act 1966 (Cth)

s 5(1) replace definition of child, de facto spouse, close
relative, relative
s 139K replace definition of dependant

Broadcasting Services Act 1992 (Cth)

Insert definition of de facto spouse

s 5 replace definition of child
sch 5 replace definition of child

Child Support (Assessment) Act 1989 (Cth)

s 5 replace definition of parent, “member of a couple”
s 7B(1) define legal guardian

Civil Aviation (Carriers’ Liability) Act 1959 (Cth)

s 12(5), s 35(5) replace definition of members of the passenger’s family,
insert definition of child

Commonwealth Electoral Act 1918 (Cth)

s 4(1) replace definition of spouse, child

Corporations Act 2001 (Cth)

Insert definition of child
s 9 replace definition of de facto spouse

Defence Act 1903 (Cth)

Insert definition of spouse or de facto partner

Defence Force Retirement and Death Benefits Act 1973 (Cth)

s 6A replace definition of marital relationship, spouse
s 3 replace definition of child

Defence Force (Home Loans Assistance) Act 1990 (Cth)

s 3 replace definition of spouse, child

Defence Housing Authority Act 1987 (Cth)

s 12(1A) replace definition of spouse

Disability Discrimination Act 1992 (Cth)

Insert definition of spouse or de facto partner
s 4(1) replace definition of relative

Education Services for Overseas Students Act 2000 (Cth)

Insert definition of de facto spouse, child

Evidence Act 1995 (Cth)

sch 1 sec 3 pt 1 replace definition of de facto spouse
sch 1 pt 2 cl 10(1) replace definition of child
s 73(1)(b) replace “a man and a woman” with “a couple”

Family Law Act 1975 (Cth)

s 4 replace definition of child
s 90MD replace definition of spouse
s 60H(1) replace “woman was married to a man”
s 60H(3) replace with provision clarifying that sperm or egg
 donor is not a parent under the FLA
s 60H(4) replace provision with new definition of de facto
 relationship

Federal Magistrates Act 1999 (Cth)

See Federal Magistrates Amendment (Disability and Death Benefits) Bill
2006:
pt 2 div 2 cl 9E replace definition of eligible spouse, marital relationship
pt 2 div 2 cl 9F replace definition of eligible child

Financial Sector (Shareholdings) Act 1998 (Cth)

sch 1 s 2 replace definition of relative

Financial Transactions Reports Act 1988 (Cth)

Insert definition of spouse and de facto spouse

Foreign Acquisition and Takeovers Act 1975 (Cth)

Insert definition of spouse

Foreign Acquisition and Takeovers Regulations 1989 (Cth)

reg 2 replace definition of spouse

Foreign States Immunities Act 1985 (Cth)

Insert definition of spouse

Fringe Benefits Tax Assessment Act 1986 (Cth)

s 136(1) replace definition of spouse, child

Governor-General Act 1974 (Cth)

s 2B replace definition of marital relationship

Health Insurance Act 1973 (Cth)

s 10AA replace definition of members of a person's family,
dependent child

Higher Education Funding Act 1988 (Cth)

Insert definition of spouse

Higher Education Support Act 2003 (Cth)

Insert definition of spouse

Income Tax Assessment Act 1936 (Cth)

s 6(1) replace definition of spouse, child, relative
s 27A(1) replace definition of dependant
s 251R(3) replace definition of dependant
s 159 dependant (for Medical Expense Rebate)
s 159TC replace definition of spouse
s 102AGA(2)(a) replace definition of family breakdown
s 102AGA replace term "natural parent"

Income Tax Assessment Act 1997 (Cth)

s 995.1 definitions of spouse and child will be automatically changed by
virtue of amendments to the *Income Tax Assessment Act 1936 (Cth)*

s 61.490 definition of partner will be automatically changed by virtue of
amendments to *A New Tax System (Family Assistance) Act 1999 (Cth)*

s 995.1 replace definition of relative
s 126.5 replace "de facto marriage" with "de facto relationship"
s 126.15 replace "de facto marriage" with "de facto relationship"
s 52.105 delete gendered references

Insurance Acquisitions and Takeovers Act 1991 (Cth)

Insert definition of spouse

s 4 replace definition of “relative”

International Organisations (Privileges and Immunities) Act 1963 (Cth)

Insert definition of spouse

Judges’ Pensions Act 1968 (Cth)

s 4AC replace definition of spouse
s 4AB replace definition of marital relationship
s 4 replace definition of child

Judicial and Statutory Officers (Remuneration and Allowances) Act 1984 (Cth)

Insert definition of spouse

Life Insurance Act 1995 (Cth)

Insert definition of child
sch 1 s 8 replace definition of spouse

Marriage Act 1961 (Cth)

s 5 replace definition of marriage
s 46 replace “man and a woman”
s 88EA delete the provision

Medicare Levy Act 1986 (Cth)

Entitlements will be automatically changed by virtue of amendments to the
Income Tax Assessment Act 1936 (Cth).
ss 8, 8B, 8C, 8D, 8G replace “Married person” with “member of a couple”

Members of Parliament (Life Gold Pass) Act 2002 (Cth)

s 4 replace definition of spouse
s 4 replace “widow” and “widower”

Migration Act 1958 (Cth)

Insert definition of spouse, child, parent
s 238 delete definition of interdependency relationship

Migration Regulations 1994

reg 1.03 replace definition of dependent child
reg 1.15A replace definition of “spouse”
reg 1.09A delete definition of “interdependent relationship”

Military Rehabilitation and Compensation Act 2004 (Cth)

Insert definition of child
s 5 replace definition of partner, eligible young person

Military Superannuation and Benefits Act 1991 (Cth)

sch 1 r 7(4) replace definition of spouse

sch 1 pt 5 r 9(c) replace definition of spouse
sch 1 pt 5 r 12 delete this provision
sch 1 r 2 pt 1 replace definition of child

National Health Act 1953 (Cth)

Insert definition of child
s 4 replace definition of de facto spouse
s 84 replace definition of child

A New Tax System (Family Assistance) Act 1999 (Cth)

Insert definition of child
s 3 definition of member of a couple and partner should be automatically changed by virtue of amendments to the *Social Security Act 1991 (Cth)*.

A New Tax System (Goods and Services Tax) Act 1999 (Cth)

Insert definition of spouse

Parliamentary Contributory Superannuation Act 1948 (Cth)

s 4B replace definition of marital relationship
s 19AA(5) replace definition of child

Parliamentary Entitlements Act 1990 (Cth)

s 3 replace definition of spouse, dependent child

Passenger Movement Charge Collection Act 1978 (Cth)

s 3 replace definition of spouse, child

Petroleum Retail Marketing Franchise Act 1980 (Cth)

Insert definition of spouse
s 3 replace definition of child

Pooled Development Funds Act 1992 (Cth)

Insert definition of child
s 4(1) replace definition of de facto spouse

Privacy Act 1988 (Cth)

Insert definition of child
Insert definition of de facto spouse

Proceeds of Crime Act 2002 (Cth)

Insert definition of de facto partner

Public Service Act 1999 (Cth)

Insert definition of spouse

Remuneration Tribunal Act 1973 (Cth)

Insert definition of spouse or de facto partner

Retirement Savings Accounts Act 1997 (Cth)

s 20(2) replace definition of spouse
s 20(3) replace definition of child
s 20A delete interdependency relationship

Safety, Rehabilitation and Compensation Act 1988 (Cth)

Insert definition of child
s 4(1) replace definition of spouse, dependant

Seafarers Rehabilitation and Compensation Act 1992 (Cth)

s 3 replace definition of spouse, prescribed child

Sex Discrimination Act 1984 (Cth)

s 4(1) replace definition of de facto spouse, marital status,
family responsibilities, child

Social Security Act 1991 (Cth)

Insert definition of child
s 4(2) replace definition of member of a couple
s 4(3) replace criteria for forming opinion about relationship
s 5(1) replace definition of parent
ss 408-408GI replace provisions with gender neutral terms
s 1067C replace definition of Youth Allowance couple

Superannuation Act 1976 (Cth)

s 8B(2) replace definition of surviving spouse
s 8A(1) replace definition of marital relationship
s 3(1) replace definition of child

Superannuation Act 1990 (Cth)

r 1.1.1 replace definition of spouse
r 1.1.1 replace definition of child

Superannuation Act 2005 (Cth)

Section 10 of the Act provides for a trust deed to establish the PSSap fund,
and all relevant definitions and entitlements are contained within the Deed.
In the PSSap Trust Deed:
Replace definition of spouse

Superannuation Industry (Supervision) Act 1993 (Cth)

s 10 replace definition of spouse, child
s 10A delete definition of interdependency relationship

Veterans' Entitlements Act 1986 (Cth)

| | |
|---------|--|
| s 5E | replace terms "widow" and "widower" |
| s 5E(2) | replace definition of member of a couple |
| s 5F(1) | replace definition of child |
| s 118NA | replace definition of "partner" |

Workplace Relations Act 1996 (Cth)

| | |
|-------|---------------------------------------|
| s 240 | replace definition of de facto spouse |
| s 263 | replace definition of de facto spouse |
| s 240 | replace definition of child |

APPENDIX II:
**Current Definitions of Couple Relationships in State, Territory
and Federal Law**

Current at 1 September 2006

Introduction

When considering the rights granted to same-sex couples and families at federal level it is useful to draw on the approach of the state and territory governments.

Commencing with NSW in 1999, every state and territory except South Australia has undertaken legislative reform affording wide-ranging recognition to gay and lesbian partnerships within their jurisdiction. These reforms place same-sex couples on an equal footing with heterosexual de facto relationships in literally hundreds of pieces of state and territory law. (South Australia had a Bill before Parliament in 2004 and 2005 to the same effect; this is likely to be reintroduced in 2006.⁴⁶¹)

The various states and territories used different terminology in their reforms. NSW, Queensland, Western Australia and the Northern Territory use the terms “de facto relationship” and “de facto partner”. Victoria and the ACT use “domestic relationship” and “domestic partner”, while Tasmania uses the term “significant relationship”.

These differences in terminology are not significant in effect, as each jurisdiction adopted a common set of criteria for the determination of the existence of such relationships. As a result of the reforms there is now a far higher degree of consistency, both within states and between states, in the rights granted to unmarried couples and the definitions used to characterise them.

The most important difference between states and territories in the definitions used is in the requirement of cohabitation. Tasmania does not require that the couple live together. Victoria has two definitions of “domestic” relationship, only one of which requires the couple to live together. The definition requiring cohabitation is used in Victorian laws that relate to financial rights or economic dependence, while the definition that does not require cohabitation is used in mostly health-related areas and laws that concern emotional interdependence.

Tasmanian law differs from all other jurisdictions in that it includes a provision that the couple can prove the existence of the relationship by registering under the Act. The *Civil Unions Act 2006* (ACT) would have had the same effect had it not been disallowed by the Governor-General under s 35 of the *Australian Capital Territory (Self-Government) Act 1988* (Cth).

Very few laws in any of the jurisdictions – the principal exception being those concerning inheritance and property division – include a requirement that the relationship be of a specific duration (usually two years) to qualify. All property-division laws with a time requirement also include discretion to waive the requirement.

The proposed South Australian reforms are the exception to this trend, suggesting a three-year cohabitation requirement for recognition in all state law (at present there is a five-year time requirement for heterosexual de facto couples in South Australian law).

⁴⁶¹ In 2004 and 2005 the South Australian Labor government struggled to pass the Statutes Amendment (Relationships) Bill 2004 (SA) as it did not control the Legislative Council. Following the South Australia election in March 2006, the Labor government now has control of both houses and is expected to reintroduce the Bill.

The reform process also introduced consistency within each state: for example, prior to 1999 there were at least eight definitions of “de facto relationship” in use in NSW legislation.⁴⁶²

There are currently over a dozen substantively different definitions of “spouse”, “de facto spouse”, “marital relationship” and “partner” in use in federal law, and more than double that number if minor differences in word order and expression are also taken into account. There are also over 20 federal Acts in which terms such as “spouse” and “de facto spouse” are used without any definition at all.

De facto relationship and de facto partner are the most commonly used terms in state and territory law. The meaning of these terms is well understood and the courts have developed case law around borderline determinations.

The following definition is suggested as a possible option to cover both same-sex and heterosexual unmarried couples in a consistent manner in federal law. Comments are invited on this definition.

Option for Discussion – A New Definition of De Facto Relationship in Federal Law

Uniformity could be introduced into federal law through the use of a common definition that provides that “spouse” includes a “de facto relationship” or “domestic relationship”. Alternately, every time federal legislation refers to “spouses” an additional category could be added, ie “spouse or de facto partner”.

“De facto” is the term used here as it is the one in most common use in Australian law to date, however some jurisdictions have preferred the term “domestic”. If “domestic relationship” were the preferred terminology, it need simply be substituted for the words “de facto” in the suggested definition below.

The definition below is a simplified version of that in use in the ACT (See below Table 1, ACT.) It draws together the core elements of the de facto category across most Australian law, that of living together in a committed relationship as a couple.

The criteria to determine the existence of a relationship are also drawn from the ACT. This list of factors to consider in determining the genuineness of a relationship is consistent with all of the other states and territories. In common with state and territory law, this list does not require that any one factor be present, and allows the courts to consider any additional relevant factors.

⁴⁶² See discussion in Reg Graycar and Jenni Millbank, “The Bride Wore Pink ... To the *Property (Relationships) Amendment Act 1999*: Relationships Law Reform in New South Wales” (2000) 17 *Canadian Journal of Family Law* 227.

A possible definition for “de facto relationship”

*“1. De facto relationship means:
the relationship between 2 people living together as a couple on a genuine domestic basis.*

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

- a. the length of their relationship*
- b. how long and under what circumstances they have lived together*
- c. whether there is a sexual relationship between them*
- d. their degree of financial dependence or interdependence, and any arrangements for financial support, between or by them*
- e. the ownership, use and acquisition of their property, including any property that they own individually*
- f. their degree of mutual commitment to a shared life*
- g. whether they mutually care for and support children*
- h. the performance of household duties*
- i. the reputation, and public aspects, of the relationship between them*

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

4. A de facto relationship may be between a couple of the same sex or different sex.”

Other options for proving a de facto relationship

Two additional options are raised as a way to provide couples with an additional aspect of formality, or certainty, as to the status of their relationship, through a form of documentary proof.

Although it is not generally difficult to prove the existence of a de facto relationship, there is considerable uncertainty about what is required to do so and what forms of proof are authoritative. Either of the options listed, although not *required* to prove the existence of a relationship, could be used to do so.

Option 1 is drawn from the Superannuation Industry (Supervision) Regulations 1994 (Cth), r 1.04AAAA.

Option 2 is drawn from *Relationships Act 2003* (Tas) s 4(2).

Option 1.

Subsection 2 could include:

“k. the existence of a statutory declaration signed by either or both of the couple stating that they are, or were, in a de facto relationship.”

Option 2.

Subsection 5 could provide:

“If a relationship is registered under section [of the relevant Act], registration is proof of the relationship from that date.”

If so, Sub (3) should include “The fact that a relationship is not registered as provided for in (5) is not relevant to a determination under (2).”

Interdependent Relationship

The category of “interdependency relationship”, is used in a small number of current federal laws. This term has the effect of permitting same-sex couples to access some entitlements that would not otherwise be available to them.

However, in the view of the author of this research paper, it is preferable to use the term “de facto” relationship over “interdependency” relationship for the following three reasons.

Firstly, the term “interdependency relationship” may be overly broad for the range of legislation in which it is used. Most of the legislation under discussion in this paper confines rights to spouses and children, and only in a few instances extends to a broader range of non-couple relationships. Live-in couple relationships are not the only ones to give rise to emotional and financial interdependence between partners, but they are the relationships that are most likely to do so. If “interdependency relationship” were used as part of a general reform, it could have the unintended consequence of covering an overly broad range of relationships (for example friends living together). While other forms of close relationships may give rise to emotional or financial ties in certain circumstances, those situations may not be so predictable, nor so widespread.

Secondly, using an “interdependency” relationship category instead of a “de facto” relationship category would create further inconsistencies between federal law and state and territory laws.

Thirdly, some gay and lesbian groups have rejected the use of the category “interdependency” to describe their relationships because it does not characterise same-sex partners as committed and intimate couples. It therefore suggests that same-sex couples are different to, and lesser than, similarly situated heterosexual couples.

Comments are invited on this view.

Table 1: State and Territory Definitions

| State | Legislation | Term | Definition | Criteria |
|--|--|--------------------------|---|---|
| NSW | <i>Property (Relationships) Act 1984</i> | De Facto Relationship | “between two adult persons: (a) who live together as a couple, and (b) who are not married to one another or related by family.” s 4(1) | <p>“In determining whether two persons are in a de facto relationship, all the circumstances of the relationship are to be taken into account, including such of the following matters as may be relevant in a particular case:</p> <ul style="list-style-type: none"> (a) the duration of the relationship, (b) the nature and extent of common residence, (c) whether or not a sexual relationship exists, (d) the degree of financial dependence or interdependence, and any arrangements for financial support, between the parties, (e) the ownership, use and acquisition of property, (f) the degree of mutual commitment to a shared life, (g) the care and support of children, (h) the performance of household duties, (i) the reputation and public aspects of the relationship.” s4(2) <p>“No finding in respect of any of the matters mentioned in subsection (2) (a)–(i), or in respect of any combination of them, is to be regarded as necessary for the existence of a de facto relationship, and a court determining whether such a relationship exists is entitled to have regard to such matters, and to attach such weight to any matter, as may seem appropriate to the court in the circumstances of the case.” S 4(3)</p> |
| Victoria | <i>Property Law Act (1958)</i> | 1. Domestic Relationship | “The relationship between two people who, although not married to each other, are living or have lived together as a couple on a genuine domestic basis (irrespective of gender).” s 275(1) | Section 275(2) lists criteria that mirror exactly those in the NSW legislation for “de facto relationship”, with the exception that factor (h) in the NSW list, “the performance of household duties”, is omitted. |
| A different definition, not requiring cohabitation | | 2. Domestic Partner | “an adult person to whom the person is not married but with whom the person is in a relationship as a couple where | The following Acts use this definition and not the definition found in the <i>Property Law Act (1958)</i> : <i>Alcoholics and Drug-dependent Persons Act 1968 (Vic)</i> ; <i>Coroners Act 1985 (Vic)</i> ; <i>Health Records Act 2001 (Vic)</i> ; <i>Human Tissue Act 1982 (Vic)</i> ; <i>Crimes (Family</i> |

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| appears in certain other Acts. | | | one or each of them provides personal or financial commitment and support of a domestic nature for the material benefit of the other, irrespective of their genders and whether or not they are living under the same roof, but does not include a person who provides domestic support and personal care to the person- (a) for fee or reward; or (b) on behalf of another person or an organisation (including a government or government agency, a body corporate or a charitable or benevolent organisation” | <i>Violence) Act 1987 (Vic); Victims of Crime Assistance Act 1996 (Vic); Co-operative Housing Societies Act 1958 (Vic); Motor Car Traders Act 1986 (Vic); Partnership Act 1958 (Vic); Prostitution Control Act 1994 (Vic); Retirement Villages Act 1986 (Vic); Second-Hand Dealers and Pawnbrokers Act 1989 (Vic); Trustee Companies Act 1984 (Vic); Guardianship and Administration Act 1986 (Vic); Architects Act 1991 (Vic); Crimes (Mental Impairment and Unfitness to be Tried) Act 1997 (Vic); Discharged Servicemen's Preference Act 1943 (Vic); Estate Agents Act 1980 (Vic); Firearms Act 1996 (Vic); Legal Practice Act 1996 (Vic); Meat Industry Act 1993 (Vic); Racing Act 1958 (Vic); Water Act 1989 (Vic); Witness Protection Act 1991 (Vic); Road Safety Act 1986 (Vic); Magistrates Court Act 1989 (Vic); Liquor Control Reform Act 1998 (Vic); Local Government Act 1989 (Vic); Wrongs Act 1958 (Vic); Fair Trading Act 1999 (Vic); Gambling Regulation Act 2003 (Vic); Health Services Act 1988 (Vic).</i> |
| Queensland | <i>Acts Interpretation Act 1954</i> | De Facto Partner | “Either 1 of 2 persons who are living together as a couple on a genuine domestic basis but who are not married to each other or related by family.” s 32DA(10) | Section 32DA(2) provides a list of criteria that mirrors exactly those in the NSW legislation. |
| Western Australia | <i>Interpretation Act 1984</i> | De Facto Relationship | “A relationship (other than a legal marriage) between 2 persons who live together in a marriage-like relationship.” s 13A(1) | “It does not matter whether — (a) the persons are different sexes or the same sex; or (b) either of the persons is legally married to someone else or in another de facto relationship.” s 13A(3) “The following factors are indicators of whether or not a de facto relationship exists between 2 persons, but are not essential”. s 3A(2) The criteria listed are substantially the same as those listed in the NSW legislation. The exception being that factor (h) in the NSW list, “the performance of household duties”, is omitted. Other factors are the same in substance, but are expressed in slightly different wording to the NSW legislation. |
| Northern | <i>De Facto Relationships</i> | De Facto Relationship | “2 persons are in a de facto | Section 3A(2) provides a list of criteria that mirrors exactly those in |

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| Territory | <i>Act 1991</i> | | relationship if they are not married but have a marriage-like relationship.” s 3A(1) | the NSW legislation. “The following matters are irrelevant: (a) the persons are different sexes or the same sex; (b) either of the persons is married to another person; (c) either of the persons is in another de facto relationship”. s 3A(3) |
| ACT | <i>Legislation Act 2001</i> | Domestic Partnership “Domestic partner” or “Domestic partnership” includes a reference to a spouse of a person: s169(1) | “The relationship between 2 people, whether of a different or the same sex, living together as a couple on a genuine domestic basis.” s 169(2) | “Example of indicators to decide whether 2 people are in a domestic partnership 1. the length of their relationship 2. whether they are living together 3. if they are living together—how long and under what circumstances they have lived together 4. whether there is a sexual relationship between them 5. their degree of financial dependence or interdependence, and any arrangements for financial support, between or by them 6. the ownership, use and acquisition of their property, including any property that they own individually 7. their degree of mutual commitment to a shared life 8. whether they mutually care for and support children 9. the performance of household duties 10. the reputation, and public aspects, of the relationship between them. An example is part of the Act, is not exhaustive and may extend, but does not limit, the meaning of the provision in which it appears”. s 169(2) |
| | <i>Domestic Relationships Act 1994</i> | Domestic relationship This definition is specific to this Act, the definition in the <i>Legislation Act 2001</i> is the general one in use in ACT law. | “means a personal relationship between 2 adults in which one provides personal or financial commitment and support of a domestic nature for the material benefit of the other and includes a domestic partnership but does not include a legal marriage.” s 3 | |
| Tasmania | <i>Relationships Act 2003</i> | Significant relationship | “A relationship between two adult persons (a) who have a relationship as a couple; and (b) who are not married to one | Section 4(3) provides a list of criteria that mirrors exactly those listed in the NSW legislation for “de facto relationship”. Section 4(4) provides that no factor is required. Section 4(2) provides that if a significant relationship is registered |

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| | | | another or related by family.” s 4(1) | under Part 2 of the Act, proof of registration is proof of the relationship. |
| South Australia | Statutes Amendment (Relationships) Bill 2004 | De Facto Partner | “A person is, on a certain date, the de facto partner of another (irrespective of the sex of the other) if he or she is, on that date, cohabiting with that person as a couple on a genuine domestic basis (other than as a legally married couple) and he or she (a) has so cohabited with that other person continuously for the period of 3 years immediately preceding that date; or (b) has during the period of 4 years immediately preceding that date so cohabited with that other person for periods aggregating not less than 3 years.” s 74 | Section 74(6) provides a list of criteria that mirrors exactly those in the NSW legislation. |

Table 2: Federal Law

| Term | Definition | List of Statutes Which Apply | Criteria |
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| “De facto spouse” or “spouse” | | The actual usage may be “spouse” which <i>includes</i> the definition, or “de facto spouse” which is said to <i>mean</i> the definition. | |
| 1. Spouse | “Another person who, although not legally married to the person, lives with the person on a <i>bona fide</i> [or genuine] domestic basis as the husband or wife of the person.” | <p><i>Income Tax Assessment Act 1936</i> (Cth) s 6(1); <i>Income Tax Assessment Act 1997</i> (Cth) s 995.1; <i>Passenger Movement Charge Collection Act 1978</i> (Cth) s 3; <i>Fringe Benefits Tax Assessment Act 1986</i> (Cth) s 136(1); <i>Superannuation Industry (Supervision) Act 1993</i> (Cth) s 10; <i>Retirement Savings Accounts Act 1997</i> (Cth) s 20(2); <i>Life Insurance Act 1995</i> (Cth) sch 1 s 8; Foreign Acquisition and Takeovers Regulations 1989 (Cth) reg 2; <i>Superannuation Act 1990</i> (Cth) sch 1 r 1.1.1.</p> <p>Semantic variation: <i>Commonwealth Electoral Act 1918</i> (Cth) s 4(1); <i>Income Tax Assessment Act 1936</i> (Cth) s 251R; <i>Medicare Levy Act 1986</i> (Cth) s 8D.</p> <p>Definition used as a subset of “relative” in: <i>Financial Sector (Shareholdings) Act 1998</i> (Cth) sch 1 s 2; <i>Insurance Acquisitions and Takeovers Act 1991</i> (Cth) s 4.</p> | |
| 2. Spouse | “A person of the opposite sex who, although not legally married to the first-mentioned person, lives with that person as the husband or wife of that person on a genuine domestic basis.” | <p><i>Defence Housing Authority Act 1987</i> (Cth) s 12(1A); <i>Sex Discrimination Act 1984</i> (Cth) s 4(1).</p> <p>Minor semantic variations and changes of word order in: <i>Workplace Relations Act 1996</i> (Cth) ss 240, 263; <i>Safety, Rehabilitation and Compensation Act 1988</i> (Cth) s 4(1); <i>Military Superannuation and Benefits Act 1991</i> (Cth) sch 1 r 7(4); <i>Evidence Act</i></p> | |

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| | | <i>1995 (Cth) sch 1 s 3 pt 1; Seafarers Rehabilitation and Compensation Act 1992 (Cth) s 3.</i> | |
| 3. Spouse | “A person of the opposite sex to the person who lives with the person as his or her spouse, on a permanent and <i>bona fide</i> domestic basis, although not legally married to the person.” | <i>Defence Force (Home Loans Assistance) Act 1990 (Cth) s 3.</i> Semantic variations in: <i>Corporations Act 2001 (Cth) s 9; Bankruptcy Act 1966 (Cth) s 5(1); Pooled Development Funds Act 1992 (Cth) s 4(1).</i> | |
| 4. Spouse | “A person who is living with another person of the opposite sex on a <i>bona fide</i> domestic basis although not legally married to that other person”. | <i>National Health Act 1953 (Cth) s 4</i> | |
| 5. Spouse | “A person who is living with the member as the spouse of the member on a genuine domestic basis although not legally married to the member.” | <i>Parliamentary Entitlements Act 1990 (Cth) s 3.</i> Semantic variations in: <i>Aboriginal Land Grant (Jervis Bay Territory) Act 1986 (Cth) s 37(1) and Aboriginal Councils and Associations Act 1976 (Cth) s 3.</i> | |
| 6. Spouse | “(a) they: (i) are of opposite sexes; and (ii) are not married to each other under a marriage that is recognised as valid for the purposes of the Act; and (iii) are not within a relationship that is a prohibited relationship for the purposes of subsection 23B (2) of the <i>Marriage Act 1961</i> ; and (b) they are of full age, that is: (i) if either of the persons is domiciled in Australia — both of them have turned 18; or (ii) if neither of the persons is domiciled in Australia — both of them have turned 16; and (c) the Minister is satisfied that: | <i>Migration Regulations 1994 reg 1.15A(2).</i> | |

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| | (i) they have a mutual commitment to a shared life as husband and wife to the exclusion of all others; and (ii) the relationship between them is genuine and continuing; and (iii) they: (A) live together; or (B) do not live separately and apart on a permanent basis.” | | |
| 7. Spouse | No definition | <i>Disability Discrimination Act 1992 (Cth); Financial Transactions Reports Act 1988 (Cth); Australian Citizenship Act 1948 (Cth); Foreign States Immunities Act 1985 (Cth); International Organisations (Privileges and Immunities) Act 1963 (Cth); Proceeds of Crime Act 2002 (Cth); Petroleum Retail Marketing Franchise Act 1980 (Cth); Higher Education Funding Act 1988 (Cth); Higher Education Support Act 2003 (Cth).</i> | |
| 8. De Facto Spouse | No definition | <i>Age Discrimination Act 2004 (Cth); Health Insurance Act 1973 (Cth); Education Services for Overseas Students Act 2000 (Cth); Broadcasting Services Act 1992 (Cth); Australian Meat and Live-Stock Industry Act 1997 (Cth); Financial Transactions Reports Act 1988 (Cth); Civil Aviation (Carriers Liability) Act 1959 (Cth)</i> | |
| 9. De Facto Partner | No definition | <i>Proceeds of Crime Act 2002 (Cth)</i> | |
| Marital Relationship | “(1) For the purposes of this Act, a person had a <i>marital relationship</i> with another person at a particular time if the person ordinarily lived with that other person as that other person’s husband or wife on a permanent and <i>bona fide</i> domestic basis at that time.” | <i>Superannuation Act 1976 (Cth) s 8A(1); Defence Force Retirement and Death Benefits Act 1973 (Cth) s 6A; Governor-General Act 1974 (Cth) s 2B; Judges’ Pensions Act 1968 (Cth) s 4AB(1); Parliamentary Contributory Superannuation Act 1948 (Cth) s 4B.</i> | |
| Member of a | | | |

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| Couple | | | |
| 1. Member of a Couple | <p>“(a) the person is legally married to another person and is not, in the Secretary’s opinion (formed as mentioned in subsection (3)), living separately and apart from the other person on a permanent or indefinite basis; or</p> <p>(b) all of the following conditions are met:</p> <p>(i) the person has a relationship with a person of the opposite sex (in this paragraph called the partner);</p> <p>(ii) the person is not legally married to the partner;</p> <p>(iii) the relationship between the person and the partner is, in the [decision-maker’s] opinion (formed as mentioned in subsections (3) and (3A)), a marriage-like relationship;</p> <p>(iv) both the person and the partner are over the age of consent applicable in the State or Territory in which they live;</p> | <p><i>Social Security Act 1991</i> (Cth) s 4(2); <i>A New Tax System (Family Assistance) Act 1999</i> (Cth) s 3; <i>Income Tax Assessment Act 1997</i> (Cth) s 61.490; <i>Veterans’ Entitlements Act 1986</i> (Cth) s 5E(2). (factor (iv) omitted).</p> | <p>“(a) the financial aspects of the relationship, including:</p> <p>(i) any joint ownership of real estate or other major assets and any joint liabilities; and</p> <p>(ii) any significant pooling of financial resources especially in relation to major financial commitments; and</p> <p>(iii) any legal obligations owed by one person in respect of the other person; and</p> <p>(iv) the basis of any sharing of day-to-day household expenses;</p> <p>(b) the nature of the household, including:</p> <p>(i) any joint responsibility for providing care or support of children; and</p> <p>(ii) the living arrangements of the people; and</p> <p>(iii) the basis on which responsibility for housework is distributed;</p> <p>(c) the social aspects of the relationship, including:</p> <p>(i) whether the people hold themselves out as married to each other; and</p> <p>(ii) the assessment of friends and regular associates of the people about the nature of their relationship; and</p> <p>(iii) the basis on which the people make plans for, or engage in, joint social activities;</p> <p>(d) any sexual relationship between the people;</p> <p>(e) the nature of the people’s commitment to each other, including:</p> <p>(i) the length of the relationship; and</p> <p>(ii) the nature of any companionship and</p> |

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| | (v) the person and the partner are not within a prohibited relationship for the purposes of section 23B of the <i>Marriage Act 1961</i> .” | | emotional support that the people provide to each other; and (iii) whether the people consider that the relationship is likely to continue indefinitely; and (iv) whether the people see their relationship as a marriage-like relationship.” <i>Social Security Act 1991</i> (Cth) s 4(3). This criterion is also adopted in: <i>A New Tax System (Family Assistance) Act 1999</i> (Cth) s 3; <i>Income Tax Assessment Act 1997</i> (Cth) s 61.490. |
| 2. Member of a Couple | “(a) a person who is legally married to another person, and is not living separately and apart from the person on a permanent basis; or (b) a person who lives with another person in a marriage-like relationship, although not legally married to the other person.” | <i>Aged Care Act 1997</i> (Cth) s 44.11 | |
| Partner | | | |
| 1. Partner | “The other member of a couple.” | <i>Social Security Act 1991</i> (Cth) ss 4(1), 4(2); <i>A New Tax System (Family Assistance) Act 1999</i> (Cth) s 3; <i>Income Tax Assessment Act 1997</i> (Cth) s 61.490; <i>Veterans’ Entitlements Act 1986</i> (Cth) s 5E(2); <i>Aged Care Act 1997</i> (Cth) s 44.11. | |
| 2. Partner | “A person of the opposite sex to the member in respect of whom at least one of the following applies: (a) if the member is a member of the Aboriginal race of Australia or a descendant of Indigenous inhabitants of the Torres Strait Islands—the person is recognised as the member’s husband or wife by the custom prevailing in the tribe or group to which the | <i>Military Rehabilitation and Compensation Act 2004</i> (Cth) s 5. | |

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| | <p>member belongs;</p> <p>(b) the person is legally married to the member;</p> <p>(c) the person lives with the member as his or her partner on a bona fide domestic basis although not legally married to the member.”</p> | | |
| 3. Partner | <p>“Any person who lives with the specified office holder on a genuine domestic basis as the partner of the office holder.”</p> | <p><i>Determination 2004/03 Official Travel by Office Holders</i>, made by the Remuneration Tribunal under the <i>Remuneration Tribunal Act 1973</i> (Cth) ss 5(2A), 7(3) and 7(4).</p> | |
| Interdependent | | | |
| 1. Interdependent Partner | <p>“A person who, regardless of gender, is living in a common household with the member in a bona fide, domestic, interdependent partnership, although not legally married to the member.”</p> | <p><i>Defence Act 1903</i> (Cth) s 9A by virtue of Defence Instructions (General) DI(G) PERS 53-1 of 1 December 2005</p> | <p>In order to be recognised, a person <i>must</i> first complete a statutory declaration and attach documentary evidence from a prescribed list: see Item 9 and Annex A and B of the Instructions.</p> |
| 2. Interdependent Relationship | <p>“(a) between 2 persons who are not:</p> <p>(i) spouses, or other relatives, of each other under any of the regulations; or</p> <p>(ii) members of the same family unit under any of the regulations otherwise than because of an agreement to marry; and</p> <p>(b) that is acknowledged by both; and</p> <p>(c) that involves:</p> <p>(i) residing together; and</p> <p>(ii) being closely interdependent; and having a continuing commitment to mutual emotional and financial support.”</p> | <p><i>Migration Act 1958</i> (Cth) s 238</p> | |

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| <p>3. Interdependent Relationship</p> | <p>“(a) they are not within a prohibited degree of relationship; and (b) they have both turned 18; and (c) the Minister is satisfied that: (i) they have a mutual commitment to a shared life to the exclusion of any spouse relationships or any other interdependent relationships; and (ii) the relationship between them is genuine and continuing; and (iii) they: (A) live together; or (B) do not live separately and apart on a permanent basis.”</p> | <p>Migration Regulations 1994 reg 1.09A(2)</p> | <p>The Minister must have regard to all the circumstances of the relationship, including, in particular: “(a) the financial aspects of the relationship, including: (i) any joint ownership of real estate or other major assets; and (ii) any joint liabilities; and (iii) the extent of any pooling of financial resources, especially in relation to major financial commitments; and (iv) whether one party to the relationship owes any legal obligation in respect of the other; and (v) the basis of any sharing of day-to-day household expenses; and (b) the nature of the household, including: (i) any joint responsibility for care and support of children, if any; and (ii) the persons’ living arrangements; and (iii) any sharing of responsibility for housework; and (c) the social aspects of the relationship, including: (i) the opinion of the persons’ friends and acquaintances about the nature of the relationship; and (ii) any basis on which the persons plan and undertake joint social activities; and (iii) whether the persons represent themselves to other persons as being in an interdependent relationship; and (d) the nature of the persons’ commitment to each other, including: (i) the duration of the relationship; and (ii) the length of time during which the persons have lived together; and (iii) the degree of companionship and emotional support that the persons draw from each other; and (iv) whether the persons themselves see the relationship as a long-term one. (6) If 2 persons have been living together at the same address for 6 months or longer, that fact is to be taken to be strong evidence that the relationship is genuine and continuing, but a relationship of shorter duration is not to be taken not to be genuine and continuing only for that reason.” Migration Regulations 1994 reg 1.09A(5), (6).</p> |
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| <p>4. Interdependency Relationship</p> | <p>“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.”</p> | <p><i>Superannuation Industry (Supervision) Act 1993</i> (Cth) s 10A; <i>Income Tax Assessment Act 1936</i> (Cth) s 27AAB; <i>Superannuation Act 2005</i> (Cth) by virtue of s 10 cl 1.2.1 of the PSSap Trust Deed.</p> | <p>“(a) all of the circumstances of the relationship between the persons, including (where relevant): (i) the duration of the relationship; and (ii) whether or not a sexual relationship exists; and (iii) the ownership, use and acquisition of property; and (iv) the degree of mutual commitment to a shared life; and (v) the care and support of children; and (vi) the reputation and public aspects of the relationship; and (vii) the degree of emotional support; and (viii) the extent to which the relationship is one of mere convenience; and (ix) any evidence suggesting that the parties intend the relationship to be permanent; (b) the existence of a statutory declaration signed by one of the persons to the effect that the person is, or (in the case of a statutory declaration made after the end of the relationship) was, in an interdependency relationship with the other person.” <i>Superannuation Industry (Supervision) Regulations 1994</i> (Cth) reg 1.04AAAA</p> |
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APPENDIX III:
**Options for the Definition of Parent-Child Relationships in
Federal Law**

Option for Discussion – A New Definition of ‘Child’ in Federal Law

The definition of “child” under federal law is far more varied and uncertain than that of “spouse”. Most federal legislation implicitly assumes that a child is a biological child without any express provision or definition regarding the relationship between parent and child. So for example, definitions generally refer only to a child’s age, or whether they are financially dependent. Numerous Acts provide simply that “child” includes an adopted or ex-nuptial child – however note that today it is very unlikely that Acts without such express provision would be interpreted as excluding children who were adopted or born outside of marriage.

The issue for same-sex families with children is that, unlike most heterosexual families, there is always one parent who does not have a biological relationship with the child. In lesbian families formed through assisted reproductive technologies (ART), the child has only one legal parent under state law governing parental status; the birth mother.

All states and territories deem a consenting male partner of a woman who has conceived an ART child to be a parent, but most do not do so to a female partner. Most state laws still do not provide for same-sex couples to adopt a child in the way that heterosexual couples can (either an unrelated child or step-parent adoption of a child born to one partner). However, the laws of some states and territories have changed in recent years.⁴⁶³

Automatic parental status is now granted to a consenting female partner of the birth mother in the same manner as that granted to a male partner in Western Australia, the Northern Territory and the ACT (“the recognition states”).⁴⁶⁴ If a child is born in a recognition state, the non-biological mother can be entered on the birth register as the second parent. The recognition states also have provision for amendment of the birth register for ART children born prior to the amendments. The extent to which the status granted under new laws flows through to the federal legislation discussed in this report is very unclear.

Another major issue for same-sex families is the status of biological fathers. While state and territory law severs the legal relationship between a sperm donor and child, the *Family Law Act 1975* (Cth) is ambiguous on this point if a woman is not in a married or heterosexual de facto relationship.

At present, the prevailing view is that a sperm donor is not a legal father under state law or the *Family Law Act*. Yet some men, particularly gay men, are known donors with relationships to their biological children who are being raised in lesbian-led families. In many of these families, this relationship is avuncular or ‘family friend’ in nature, but in some families the biological father may have a close relationship with the child and may see himself, and be seen by the child, as a parental figure. A form of parenting recognition that can encompass such a wide range of roles is difficult to create in a legal regime that is centred on a dichotomy of parent/not parent, ie all rights or none, and limited to children only having two parents.

⁴⁶³ Note that same-sex couples are presently eligible to apply to adopt children in Western Australia and the ACT: see *Adoption Act 1994* (WA) ss 38, 39(1)(e)(i); *Adoption Act 1993* (ACT) s 18(1)(b). In Tasmania, registered same-sex couples can only apply to adopt a child related to one partner: see *Adoption Act 1988* (Tas) s 20.

⁴⁶⁴ See *Artificial Conception Act 1985* (WA) s 6A; *Status of Children Act 1978* (NT) s 5DA; *Parentage Act 2004* (ACT) s 8(4).

Although adoption is commonly seen as the method by which adults with no biological relationship with a child gain legal rights as a parent, this is not an adequate method of parenting recognition for a number of reasons.

First, adoption is in the control of state governments and so cannot be made more accessible through changes to federal law. Secondly, and more importantly, even where same-sex couples are not excluded from state and territory adoption laws, adoption is ill-adapted to the needs of same-sex families.

Adoption is a formal process requiring a court application and orders; it is expensive, time-consuming and would likely be under-utilised. Most states have presumptions against step-parent adoptions, based on the assumption that they sever the legal relationship with a separated parent. This is not the case for same-sex families formed through ART where there is in fact no other second legal parent.

The non-biological mother in a lesbian family having a child through ART is not a step-parent who joins a family after it has been formed; she is in the same position as a male partner in a couple having a child through donor conception and so should be treated in the same way, ie presumed automatically to be a parent rather than having to go through a formal process to gain recognition. (Although, like heterosexual families, same-sex families may also dissolve and re-reform with new partners, thus requiring access to step-parent recognition when similarly situated.)

The aim of any reform would ideally be to give the broadest and most accessible range of legal protections to children being raised in same-sex families, while still having certainty as to which relationships were covered in each statute.

One avenue for reform is the inclusion in federal law of specific provisions that include the consenting female partner of an ART child. This could be done either through the creation of a new definition of child to include a female partner of an ART child in all federal law independent of the state presumptions, or through a definition of child that completely adopts the state parenting presumptions for ART children (although the latter would then only cover children from those states that had already extended recognition to the co-mothers of ART children). Neither of these options requires that parents take any positive steps to “opt-in”, so they are accessible and grant broad coverage. This also offers certainty of application.⁴⁶⁵

Another possible reform option is to incorporate into all federal law the broad purposive definition of child currently in use in a small number of Acts; that is, someone to whom the person acts in the place of a parent. This avenue is also a broad-based presumption that does not require active steps on the part of parents. However it may lack certainty of application.

Alternately, the definition of child in all federal law could be amended to include a person with parenting orders granting parental responsibility under the *Family Law Act 1975* (Cth). This avenue does require that parents apply for court orders, so is less accessible than the other options.

A simplified list of options, with the pros and cons of each, is laid out in the table below. This is only a very basic outline of the different approaches that are possible. Comment is invited

⁴⁶⁵ Although parents of existing children in the recognition states can apply to amend the birth register to include both mothers' names, they do not *need* to do so to acquire parental rights.

on the models, their coverage of affected families, and on any practical issues with their application.

A series of examples is then given to explain how each model would operate. These options are raised for discussion, they are not recommendations. Suggestions for additional options are invited.

| | Advantages | Disadvantages |
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| <p>Option 1</p> <p>Create a new federal definition of “child” that includes as a parent the consenting female partner of a woman who has a child born through assisted conception.</p> <p>This could be done through inserting the definition separately into each Act, or through reference to a principal Act containing the new definition, eg the <i>Family Law Act 1975</i> (Cth) or the <i>Acts Interpretation Act 1901</i> (Cth).</p> | <ul style="list-style-type: none"> • Covers all lesbian couples with children born through assisted conception. • Requires no formal legal process in the way that adoption does. • Treats children born through assisted conception equally in same-sex and heterosexual families. • Could be retrospective or prospective in operation. | <ul style="list-style-type: none"> • Federal law would be inconsistent with state law in the remaining states that do not recognise a female partner in this manner. • Does not cover adopted children in same-sex families where only one partner is the legal (adoptive) parent. • Does not cover children of donor fathers and their male partners in multi-parent lesbian-led families. |
| <p>Option 2</p> <p>Create a new federal definition of “child” that reflects, in their entirety, the state parenting presumptions for ART children.</p> <p>This could be done through inserting the definition separately into each Act, or through reference to a principal Act containing the new definition, eg the <i>Family Law Act 1975</i> (Cth) or the <i>Acts Interpretation Act 1901</i> (Cth).</p> | <ul style="list-style-type: none"> • Covers children born through assisted conception to lesbian families from recognition states. • Requires no formal legal process in the way that adoption does. • Is consistent with state and territory law. • Would be retrospective in operation because the state legislation is retrospective, so very broad coverage. | <ul style="list-style-type: none"> • Does not cover children born through ART to lesbian parents from the non-recognition states, and so would treat children unequally based upon where they were born or were living. • May not cover children born overseas. • Does not cover adopted children in same-sex families where only one partner is the legal (adoptive) parent. • Does not cover children where donor fathers and their male partners are |

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| | | <p>involved in multi-parent lesbian-led families.</p> <ul style="list-style-type: none"> • Retrospectivity could be overly broad, ie covering families that have long-since separated and had no expectation of or need for recognition. |
| <p>Option 3</p> <p>Insert into some or all federal Acts a “functional family” definition of child. This could be done by utilising the broad purposive definition of child currently in use in a small number of Acts, ie:</p> <p>A. “child includes a child living with a person as a member of their family” or</p> <p>B. “a child to whom the person acts in the place of a parent”.</p> | <ul style="list-style-type: none"> • Covers children in all same-sex families regardless of the manner of the child’s birth, ie not limited to ART families. • Could include children of involved donor fathers and their male partners in multi-parent lesbian-led families. • Could include more than two adults as parents of a child. • Could include a parent’s partner who was not involved in the child’s conception, but comes to have a parental role with the child, ie a step-parent. | <ul style="list-style-type: none"> • Uncertainty as to whether the category could recognise more than two adults as parents of a child. • May be difficult to prove. • Unclear whether adult children are covered. <p>A.</p> <ul style="list-style-type: none"> • Does not cover children who do not live with the adult, and so for eg, would exclude the non-biological parent-child relationship in separated same-sex families if the child ceases to live with the person. <p>B.</p> <ul style="list-style-type: none"> • Uncertainty over how to determine the parental status of donor fathers who may occupy a wide variety of roles from occasional contact to more involved contact, or less commonly, a parental role. |

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| <p>Option 4</p> <p>Insert into all federal Acts a definition of child that includes a child “for whom a person has sole or shared parental responsibility” as defined by the <i>Family Law Act 1975</i> (Cth).</p> | <ul style="list-style-type: none"> • Certainty over who is a parent. • Could cover children in many kinds of same-sex families regardless of the manner of the child’s birth, ie not limited to ART families • Could include more than two adults as parents. • Could include children of involved donor fathers and their male partners in multi-parent lesbian-led families. | <ul style="list-style-type: none"> • Requires a court order and so is limited in coverage to children whose parents have the knowledge, commitment and funds to pursue orders. • Expires when the child turns 18. |
| <p>Option 5</p> <p>Option 1 and 4 could be pursued in conjunction.</p> | <ul style="list-style-type: none"> • This combination has the benefit of certainty offered by Option 4, as well as the ease and breadth of coverage offered by Option 1. • Option 4 augments the lack of coverage in Option 1. | |

How the Reforms Would Work

The following are some general example to illustrate the way that different options could work for various family forms.

For example, under Option 1 a lesbian couple who had a child through ART would both have parental status in federal law. This would work for them if they were both the primary parents of the child, as is the case in most lesbian families.

However in a small number of lesbian-led families, the biological father, usually a gay man (and often his male partner also), are also intended to be involved in a parental role. Option 1 alone cannot encompass this family constellation. Option 3 could encompass such a family, but may be uncertain or overly broad and could lead to confusion in the many families where known donors have a friendly, but not parental, role. Option 4 allows for involved biological and non-biological fathers to be recognised through a more certain avenue.

It is possible that gay men may form a family with the assistance of a surrogate mother. It is the birth mother and her male partner who are the legal parents of such a child regardless of the child's genetic connections. In the ACT there is provision, in limited circumstances, for the transfer of parental status from the birth parents to the commissioning parents, but this is not the case anywhere else in Australia.⁴⁶⁶ So, generally speaking, neither a biological father nor his male partner is the legal parent of a child born through surrogacy. Option 1 is focused on women who have children through ART and so does not work for a gay male couple who have a child through surrogacy. Any law to transfer parental status, such as that in the ACT, or to permit the couple to adopt the child, would have to be enacted at a state or territory level. Among the options outlined, option 3 or 4 therefore offers the most comprehensive coverage to such a couple in federal law.

It has long been possible in all states and territories for a person in a same-sex relationship to apply to adopt a child as an individual applicant. In that case, there is only one legal parent. Option 1 would not cover the other parent of an adopted child. Any change to adoption law would have to be achieved at a state or territory level. Among the options outlined, option 3 or 4 therefore offers the most comprehensive coverage to such a couple in federal law.

Another possible family form is where a lesbian or gay man has had a biological child without another legal parent but also without a same-sex partner (for example if a lesbian had an ART child as a single mother, or a gay man had a child with a woman who has since died). At some later point the parent may enter into a relationship with a partner who takes on a parental role with regard to the child. Most state adoption laws exclude same-sex couples from step-parent adoption provisions and/or contain a presumption against step-parent adoption. Any change to step-parent provisions would have to be achieved at state level. Among the options outlined, option 3 or 4 therefore offers the most comprehensive coverage to such a couple in federal law.

These examples suggest that none of the options alone will work for all same-sex families.

⁴⁶⁶ *Parentage Act 2004* (ACT) div 2.5, in particular s 24.

Comments are invited on the best option or combination of options.