

# **Same-Sex: Same Entitlements**

## **Discussion Paper 2006**

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Human Rights and Equal Opportunity Commission

16 June 2006

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## INTRODUCTION

### LAW COUNCIL OF AUSTRALIA

1. The Law Council of Australia (**Law Council**) is the peak national representative body of the Australian legal profession. It represents approximately 50,000 Australian lawyers, through their representative state and territory bar associations and law societies.
2. For more than 70 years, the Law Council as the national organisation of the legal profession has worked to promote the administration of justice, access to justice and improvement of the law for the benefit of the Australian community.
3. The legal restriction on same-sex marriages is an important rule of law and human rights issue. The Law Council advocates for the removal of legal restrictions preventing the marriage of same-sex couples and the elimination of discrimination of same-sex couples. All people are equal before the law and should be entitled to the same fundamental rights.

### THE INQUIRY

4. The Law Council welcomes the inquiry of the Human Rights and Equal Opportunity Commission (**HREOC**) into discrimination against same-sex couples regarding access to financial and work related entitlements and benefits.
5. The Law Council is pleased that HREOC will investigate discrimination against homosexual people and the inequality of treatment of same-sex relationships compared with opposite-sex relationships in relation to access to financial and work related entitlements and benefits.
6. This review is an important step in addressing the exclusion of same-sex couples from an entitlement to long held rights enjoyed by heterosexual couples and providing for consistency in policy across different pieces of legislation. The Law Council welcomes future law reforms addressing inequality of access to entitlements initiated by this review.
7. The Law Council has reviewed the discussion paper and seeks to raise important issues and concerns in its submission. Due to the short timeframe provided for consultation, the Law Council has focussed on particular financial and work related entitlements and benefits provided under federal law, and highlights its main issues and concerns in respect of these areas.

- (1) Australian Taxation System;

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- (2) Superannuation Entitlements;
  - (3) Judicial Pensions; and
  - (4) Social Security Benefits.

## PRELIMINARY COMMENTS

### LEGAL RECOGNITION OF SAME-SEX COUPLES

8. The Law Council notes that the national inquiry is conducted with the aspiration of removing discrimination of same-sex couples and their children in relation to financial and work related entitlements while current government policy prevents legal recognition of their union.
9. The Law Council strongly believes that it would be difficult to tackle discrimination of homosexual people without the federal government changing the law which outlaws the marriage of same-sex couples. The Law Council believes that the law of the land must lead by example in this regard.
10. State and territory governments have recognised the contradiction in Commonwealth public policy and are addressing the issue within the scope of their powers.
11. In Tasmania, the *Relationships Act* 2003 granted couples including same-sex couples the opportunity to register a deed of relationship in relation to a “significant or caring relationship”. It fell short only of calling those relationships “marriage”, though for all intents and purposes the outcome was intended to be the same.
12. The recent enactment of the *Civil Unions Act* 2006 (**Act**) of the ACT was intended to achieve similar outcomes to the Tasmanian *Relationships Act* 2003. The Act enabled couples including same sex couples to enter into and register a civil union which is defined as a legally recognised relationship that may be entered into by two people regardless of sex. The legislation was due to take effect on 25 June 2006.
13. On 13 June 2006, the Commonwealth government acted to invalidate the ACT law to take effect from midnight on this day.
14. There is now no legal basis for the formation of civil unions in the Australian Capital Territory.
15. The Law Council strongly believes that the Government should review its policy which prevents the legal recognition of the same-sex relationships. The Law Council firmly believes Federal government policy is out of step with principles of equality before the law that is embraced by the Australian community.

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16. Alternatively, the Law Council suggests that the terms of reference of this inquiry should be expanded to enable a study of community attitudes and perceptions on the issue of whether the relationship of same-sex couples should be recognised under the law. The background to this issue is considered below.
  17. In August 2004 amendments were made to the *Marriage Act 1961* (the "Marriage Act") reinforcing the common law position in Australia that a legally valid marriage can only exist between one man and one woman to the exclusion of all others.
  18. The consequence of the 2004 amendments to the Marriage Act is that for a sector of the population, the full range of legal rights, protections and obligations conferred by marriage will, without further action by the Parliament, remain unattainable. The amendments intentionally preclude any common law development that might assist in the development of the concept of marriage to include same sex couples and, in doing so, they discriminate against a sector of the population.
  19. The legal restriction on same-sex marriages is an important rule of law and human rights issue. All people are equal before the law and should be entitled to the same fundamental rights such as the right to marry. As espoused in article 26 of the International Covenant on Civil and Political Rights (**ICCPR**),  
  
"All persons are equal before the law and are entitled without any discrimination to the equal protection of the law..."
  20. The United Nations Human Rights Committee which is mandated to promote and protect human rights in accordance with international human rights laws and treaties determined that discrimination against homosexual people is prohibited pursuant to article 26.<sup>1</sup>
  21. The Law Council is concerned that current Australian law with respect to same-sex marriages is inconsistent with the rule of law and Australia's human rights obligations under the ICCPR and places Australia at risk of criticism for enacting laws contrary to international obligations.<sup>2</sup> Same-sex marriages are now legally recognised in jurisdictions including the Netherlands, Belgium, Spain, Canada and South Africa. There is also legal recognition of the union of same-sex couples in a number of other foreign jurisdictions including France, Germany, New Zealand, Denmark, Finland, Norway, Portugal, Sweden, Switzerland, the United Kingdom and the Czech Republic.
  22. According to the Explanatory Memorandum to the Marriage Amendment Bill 2004, the intention of the *Marriage Amendment Act 2004* was "to give effect to the Government's commitment to protect the institution of

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<sup>1</sup> Young v Australia (941/2000), at [10.4]; Toonen v Australia (488/1992);

<sup>2</sup> Young v Australia (941/00), at [10.4]; Toonen v Australia (488/1992);

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marriage by ensuring that marriage means a union of a man and a woman and that same-sex relationships cannot be equated with marriage”.

23. The Law Council acknowledges that the institution of marriage evolved from religious law and doctrine. As recognised in the judgment in *Hyde v Hyde*<sup>3</sup>, religious law dictated that marriage was the union of a man and a woman to the exclusion of all others
24. In *Hyde v. Hyde*<sup>4</sup> the judicial comments made in the course of articulating the definition of marriage, are telling:

“What, then, is the nature of this institution as understood in Christendom? Its incidents may vary in different countries, but what are its essential elements and invariable features? If it be of common acceptance and existence, it must need (however varied in different countries in its minor incidents) have some pervading identity and universal basis. I conceive that marriage, as understood in Christendom, may for this purpose be defined as the voluntary union for life of one man and one woman, to the exclusion of all others.”

25. It appears that the definition of marriage espoused in *Hyde* 140 years ago was relevant to a society where marriage and religion were believed to be inseparable.
26. Australia is a modern, pluralistic society in which marriage and religion are not inextricably intertwined. From the perspective of the state, marriage is now a civil institution. Modern governments have enacted laws in relation to marriage and in doing so have brought marriage into secular law. For instance, section 51 (xxi) of the Australian Constitution makes reference to the power of the Commonwealth Parliament to make laws with respect to marriage. In doing so, the Constitution recognises that marriage, although often celebrated in a religious context, has a basis in civil law.
27. The Law Council believes that marriage should be considered a civil right which should be made available to all people regardless of sex. In circumstances where people of the same sex wish to marry, there seems to be no good reason why the state should stand in the way.
28. Prior to legislative amendment to the definition of marriage, the High Court foreshadowed that the concept of marriage may evolve. McHugh J, in *Re Wakim; Ex parte McNally*<sup>5</sup> said:

“The level of abstraction for some terms of the Constitution is, however, much harder to identify than that of those set out above. Thus, in 1901 'marriage' was seen as meaning a voluntary union of life between one man and one woman to the exclusion of all others. If that level of

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<sup>3</sup> (1866) LR 1 P & D 130

<sup>4</sup> (1866), L.R. 1 P. & D. 130, at p. 133

<sup>5</sup> (1999) 198 CLR 511 at p. 553

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abstraction were now accepted, it would deny the Parliament of the Commonwealth the power to legislate for same sex marriages, although arguably 'marriage' now means, or in the near future may mean, a voluntary union for life between two people to the exclusion of others.”

29. The unfortunate consequence of legal inequality created by legal restrictions on preventing marriage of same sex couples is that discrimination in the law impacts community cohesion. The legal inequality between same-sex unions and opposite-sex unions permeates other spheres of life.
30. Further, the Law Council strongly believes that if the law does not legally recognise same-sex unions it would be highly inappropriate to reduce entitlements which would be available to them as individuals which is consistent with their current legal status.

## **TERMS OF REFERENCE**

31. As discussed earlier, the Law Council suggests that the terms of reference of this inquiry should be expanded to enable HREOC to determine community attitudes and values on the issue of whether the relationship of same-sex couples should be recognised under the law
32. The Law Council suggests that the terms of reference be expanded to consider not only entitlements and benefits but also other forms of discrimination against same-sex couples under state and federal law. The terms of reference should consider criminal law including sentencing law and the law of evidence, and laws regulating adoption and access to invitro fertilisation.

## **FINANCIAL AND WORK RELATED ENTITLEMENTS AND BENEFITS**

### **ACQUISITION OF INVESTMENTS IN AUSTRALIA**

33. The *Foreign Acquisition & Takeovers Act 1975* regulates the foreign acquisition of certain land interests and foreign control of particular businesses and mineral rights.
34. Unless there is an exemption, certain types of proposals made by “foreign interests” to invest in Australia require approval and need to be notified to the Government. “Foreign interests” includes a natural person not ordinarily resident in Australia.
35. According to s 3(t) of the *Foreign Acquisition & Takeovers Regulations 1989* (Regulations), there is likely to be an exemption for foreign persons purchasing residential real estate as joint tenants with their Australian citizen spouse.

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36. Pursuant to s 2 of the Regulations a “spouse” is defined to include “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”. Based on this definition it appears that the exemption does not extend to same-sex couples. Consequently, foreign persons in a same-sex relationship must seek foreign investment approval for the acquisition of any residential real estate or vacant land.
  37. The Law Council recommends that the *Foreign Acquisition & Takeovers Act 1975* be amended to allow same-sex couples to obtain the same treatment as opposite-sex couples in married or de-facto relationships. Subject to evidence of a bona-fide relationship, there is no good policy reason to discriminate between same-sex and opposite-sex couples.

## **AUSTRALIAN TAXATION SYSTEM**

38. The Australian taxation system aspires to be fair and equitable consistent with social justice principles as this promotes respect and compliance.<sup>6</sup> Generally, fairness is considered to be achieved if people in similar circumstances are treated equally. In respect of taxation policy, this equates to the principles of “horizontal and vertical equity” which underlies the Australian taxation law. Horizontal equity requires that people with similar abilities or incomes should pay the same amount of taxes. Vertical equity espouses that people with a greater ability to pay should pay more taxes than those with a more limited ability to pay. This principle underlies Australia’s progressive income tax system in which the income tax rates increase with a person’s ability to pay.<sup>7</sup>
39. Inconsistent with notions of equity and fairness, the Law Council submits that the current income tax legislation (with rare exception) systematically discriminates against same-sex couples.
40. The following analysis of some of the tax provisions demonstrates that much of the current taxation system ignores the existence of same-sex relationships in determining entitlements and benefits.

### **Taxation Rebates**

41. The Law Council acknowledges that the provision of rebates to reduce a taxpayer’s tax liability is a method of achieving to some extent, horizontal and vertical equity by recognising that people have different personal burdens and responsibilities. The provision of rebates ensures that factors other than income are considered in determining the appropriate amount

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<sup>6</sup> Ralph Committee, Review of Business Taxation, “A Strong Foundation – Establishing objectives, principles and processes” Discussion Paper, November 1998, Overview, at para 39; Review of Business Taxation Final Report, A Tax System Redesigned: More certain, equitable and durable (Canberra AGPS, July 1999) at p 105

<sup>7</sup> Review of Business Taxation Final Report, A Tax System Redesigned: More certain, equitable and durable (Canberra AGPS, July 1999) at p 104 -105

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of tax that is imposed. For instance, two people each earning the same amount of income may not be in the same economic position where one person has dependents. Accordingly, the provision of rebates recognises that it may not be fair for people in receipt of the same level of income to pay the same amount of tax.

### **Dependant Rebates**

42. For the purposes of the dependant rebates, a spouse includes a legal or de-facto husband or wife pursuant to s 995-1(1) of the *Income Tax Assessment Act* 1997 or s 6(1) of the *Income Tax Assessment Act* 1936. Accordingly, partners of a same-sex relationship are not entitled to dependant rebates. This is confirmed in Interpretative Decision ID 2002/211.

### **Housekeeper Rebate**

43. A rebate is available in some circumstances where a taxpayer engages a housekeeper to care for young children and invalid relatives or spouses in receipt of a disability support pension.
44. Based on the limited definition of “spouse”, the housekeeper rebate is unable to be claimed in respect of a partner of a same-sex relationship who is in receipt of a disability support pension.

### **Medical Expenses Rebate**

45. The medical expenses rebate is applied to eligible medical expenditure incurred by the taxpayer in respect of him or herself or in respect of dependants pursuant to s 159P *Income Tax Assessment Act* 1936. Dependant for the purposes of this rebate includes a spouse or a child of the taxpayer less than 21 years of age. As discussed above, the meaning of spouse in s 6(1) of the *Income Tax Assessment Act* 1936 or s 995-1 of the *Income Tax Assessment Act* 1997 excludes a partner in same-sex relationships. It’s unclear whether a child of a taxpayer can include a child in the care of a non biological and non adoptive carer who is a partner in a same-sex relationship with the child’s biological or adopted parent.

### **Family Tax Assistance**

46. Family Tax Assistance comprising the Family Tax Benefit Part A, Family Tax Benefit Part B and Child Care Benefits are payments which are exempt from tax. A taxpayer is eligible for family assistance if they satisfy an income test which takes into consideration the income of the taxpayer’s family. The “family income” for this purpose is the total amount derived by the taxpayer and the taxpayer’s partner. The definition of partner is taken from s 4(1) of the *Social Security Act* 1991 and means a “member of the couple”. A member of a couple does not include members of a same-sex couple.

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47. The Law Council notes that in this regard, same-sex couples may benefit from the lack of recognition of the union on the basis that under the Family Tax Assistance legislation, a partner in a same-sex relationship may be treated as a sole parent.

### **Medicare Levy and Medicare Levy Surcharge**

48. Ordinarily, an individual taxpayer who is a resident of Australia may be liable to pay a medicare levy pursuant to s 251S of the *Income Tax Assessment Act 1936* which is determined by reference to the taxable income.
49. Individual taxpayers considered to be high income earners without appropriate hospital insurance coverage may also be liable for a Medicare levy surcharge which is imposed on taxable income and reportable fringe benefits.
50. Taxpayers with dependents may be entitled to an exemption or a reduction of the medicare levy and also the medicare levy surcharge. For this purpose, the meaning of dependent pursuant to s 251R(3) includes a “spouse” which is defined as a man or a woman living together in a marital or de facto relationship.
51. Interestingly, where a same-sex couple has care of a child (as defined in s 251R(3)), it appears that one of the partners in the same-sex relationship, usually the biological parent may be treated as a single parent for the purposes of the medicare levy and medicare levy surcharge.
52. The Law Council believes that current law may provide an unintended benefit by not recognising the union and thereby entitling a person in a same-sex relationship to claim an exemption or a reduction of a medicare levy or a surcharge on the basis of circumstances distorted by the law.
53. The Law Council recommends that the definition of dependant pursuant to s 251R be amended to include partners in a same-sex relationship and their children. The Law Council notes that the meaning of dependants for the purposes of the medicare levy and surcharge was originally intended for married couples. However, in 1990 amendments were passed to take account of partners of a de facto relationship. It is now time to take account of partners of a same-sex relationship.

### **Capital Gains Tax**

54. Broadly, a capital gain or loss made in relation to a taxpayer’s main residence is ignored for capital gains tax purposes pursuant to s 118-110(1) of the *Income Tax Assessment Act 1997*. In relation to marital or de facto relationships, the exemption applies to one main residence between the couple. Where the spouse has interest in another main residence, an election must be made as to which residence will constitute the family’s main residence. Where different residences are nominated by each spouse as their main residence, the exemption is divided pursuant to

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s 118-170(3)(4). Similar provisions apply where a dependent child has a different main residence pursuant to s 118-175.

55. For the purposes of the main residence exemption for capital gains tax, a spouse does not include a partner of same-sex relationships. This is an example of the positive consequences at least for homosexual couples of not recognising same-sex relationships.
56. The Law Council believes that subject to legal recognition of same-sex relationships, such disparities in the law should be addressed to ensure that same-sex and opposite-sex relationships are treated alike.

### **Superannuation Entitlements and Pensions**

57. The *Superannuation Industry (Supervision) Act 1993* does not expressly recognise same-sex relationships. However, the *Superannuation Legislation Amendment (Choice of Superannuation Funds) Act 2004* gave effect to the announcement of “Fairer Treatment for Interdependent Relationships” by the Minister for Revenue and Assistant Treasurer on 27 May 2004. The amendments expanded the definition of ‘dependant’ in relation to the payment of superannuation benefits on death and the taxation consequences of the receipt of death benefit eligible termination payments.
58. The relevant definitions of ‘dependant’ in the *Income Tax Assessment Act 1936* (ITAA 1936), the *Superannuation Industry (Supervision) Act 1993* (SIS Act) and the *Retirement Savings Accounts Act 1997* were amended to include interdependency relationships. These Acts relate to the payment of superannuation benefits on death and taxation of death benefit eligible termination payments.
59. The previous definition of ‘dependant’ in subsection 27A(1) of the *Income Tax Assessment Act 1936* included a spouse (current or former), a bona fide de facto, a child under age 18 and someone who is financially dependent on the person.
60. The new laws include all those individuals falling within the previous definition of ‘dependant’ and those who were living in an ‘interdependency relationship’ with the deceased individual (at the time of death).
61. An interdependency relationship refers to a close personal relationship between two people living together, where they provide for the financial and domestic support and personal care of each other. Also included are individuals maintaining a close personal relationship but not living together due to physical, intellectual or psychiatric disability.
62. It appears that same-sex couples are likely to fall within the scope of an “interdependency relationship” where the conditions are satisfied - though, it is not automatic.

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63. The Law Council recognises that interdependency relationship was designed to cover all kinds of relationships (for example, between two sisters or a mother and child) where one party relies upon the other for certain support. The Law Council welcomes this change which was long over due.
  64. The implications of the amendments include that dependents who fall within the expanded definition are, subject to the superannuation scheme, likely to be entitled to the payment of death benefits and to be entitled to have concessional tax treatment which is applicable to death benefit eligible termination payments.

### **Judicial Pensions**

65. The *Judges Pensions Act* 1968 (Cth) makes provision for pensions for judges and their families. In the event of death, there may be an entitlement for a surviving spouse and or children to receive a pension.
66. The *Judges Pensions Act* 1968 (Cth) and similar state and territory legislation have failed to broaden the relevant definitions to take account of “interdependent relationships” as discussed above. The Law Council is pleased that some states and territories including the Australian Capital Territory have addressed this issue. Refer to s 37U of the *Supreme Court Act* 1933 (ACT). That said, section 4AB of the Commonwealth *Judges’ Pensions Act* 1968 defines a marital relationship by reference to a man and a woman and thereby discriminates against same-sex couples. This is inconsistent with current superannuation policy and should be rectified.
67. The Law Council is critical of the inconsistent manner in which important and fundamental changes occur in legislation. The Law Council notes that changes made to expand the definition of “dependent” in the superannuation and taxation law in respect of death benefits (as discussed above) did not flow to other parts of the taxation legislation and associated superannuation legislation. For instance, the *Judges’ Pensions Act* 1968 would have benefited considerably from an amendment to the definition of “dependent”.

### **Social Security Benefits**

68. According to the *Social Security Act* 1991, it appears that the relevant rates and entitlements to payment of certain pensions, benefits and allowances fail to take same-sex relationships appropriately into account. As discussed earlier, the term “partner” instead of “spouse” is used in this Act. Despite the modernised terms, the definition of a “partner” refers to being a member of a couple which excludes a member of a same-sex couple.
69. It appears that this may be advantageous for same-sex couples in some circumstances as it enables a person to claim benefits at a single rate

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rather than a reduced rate on the basis that the partner is in receipt of income.

70. The Law Council believes that social security benefits and other similar benefits from other agencies should not be altered until there is full legal recognition of same-sex couples in Australia.
71. The Law Council strongly believes that to take into consideration the existence of a union in determining entitlements without providing equal benefits and legal recognition of that fact would produce unjust results.

## Attachment A

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### *Profile – Law Council of Australia*

The Law Council of Australia is the peak national representative body of the Australian legal profession. The Law Council was established in 1933. It is the federal organisation representing approximately 50,000 Australian lawyers, through their representative bar associations and law societies (the “constituent bodies” of the Law Council).

The constituent bodies of the Law Council are, in alphabetical order:

- ACT Bar Association;
- Bar Association of Queensland;
- Law Institute of Victoria;
- Law Society of the ACT;
- Law Society of NSW;
- Law Society of the Northern Territory;
- Law Society of South Australia;
- Law Society of Tasmania;
- Law Society of Western Australia;
- New South Wales Bar Association;
- Northern Territory Bar Association;
- Queensland Law Society;
- South Australian Bar Association
- The Victorian Bar; and
- Western Australian Bar Association.

The Law Council speaks for the Australian legal profession on the legal aspects of national and international issues, on federal law and on the operation of federal courts and tribunals. It works for the improvement of the law and of the administration of justice.

The Law Council is the most inclusive, on both geographical and professional bases, of all Australian legal professional organisations.