Law Institute Victoria

# Submission

## Workplace Relations Section

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

To: Human Rights and Equal Opportunity Commission (HREOC)

A submission from the Workplace Relations Section of the Law Institute of Victoria (Submission: WPR.7)

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## 1 Introduction

The Human Rights and Equal Opportunity Commission (HREOC) published a Discussion Paper, *Same-Sex Same Entitlements: A National Inquiry into Discrimination against People in Same-Sex Relationships: Financial and Work-Related Benefits*. The goals of the inquiry are to:

(a) Inquire into laws regarding financial and employment-related entitlements and benefits, including:

- the impact on equal enjoyment of human rights by same-sex couples and any children of the couple;
- the impact on equal opportunity in employment for same-sex couples.

(b) Ascertain whether commonwealth, state or territory laws are inconsistent with human rights of same-sex couples and their children, or if those laws nullify equal opportunity in employment.

(c) Report to the Minister including recommendations on action that should be taken by the federal government to protect and promote human rights and equal opportunity and comply with international obligations.

The Law Institute of Victoria (LIV) supports the principles of non-discrimination and equality before the law, as set out in Articles 2 and 26 of the International Covenant on Civil and Political Rights (ICCPR). It is hoped that this inquiry will assist in addressing systemic discrimination against same-sex couples and their children in Australia.

The LIV welcomes the opportunity to comment on the HREOC discussion paper and through a working group comprising members of the Workplace Relations, Administrative Law & Human Rights, Family Law and Young Lawyers' Sections has prepared this submission. The LIV would be pleased to meet with HREOC to discuss this submission further as part of the inquiry process.

This submission will provide an examination of areas of federal law in which reform is needed to address the discrimination experienced by same-sex couples and their children:

(a) superannuation;
(b) tax concessions;
(c) Medicare Levy;
(d) workplace relations;
(e) family law issues;
(f) migration laws; and
(g) veteran's issues.

The submission also considers concerns with Victorian laws, specifically in relation to wills and intestacy.

## 2 Recommendations

The LIV makes the following ten recommendations in its submission;

1. The LIV recommends that the definition of spouse be extended to include same-sex couples. The LIV commends the federal government on its extension of

interdependent relationships for the purpose of assigning beneficiary status to same-sex couples. However, it also calls on the federal government to extend benefits such as superannuation co-contributions to same-sex couples and considers that only by extending definition of spouse to include same-sex couples complete equality be achieved in superannuation laws.

2. The LIV calls on the federal government to expand the definition of 'spouse', as it applies to taxation law, to include same-sex relationships. This expanded definition would ensure that all taxpayers in relationships have equal standing under relevant taxation law.

3. The LIV recommends that the definition of 'spouse' be expanded to include same-sex couples. This will allow affected taxpayers to pool their income for calculations of Medicare levy and/or surcharge liability and entitle them to relevant reductions where available.

4. The LIV supports the various states and territories referring their powers over domestic relationships or de facto couples to the federal government so there can be uniformity in relation to the law concerning all married, non-married, heterosexual or same-sex couples.

5. The LIV recommends that in the upcoming legislative reforms, the federal government extends the provisions of the Family Law Act to couples in same-sex as well as heterosexual relationships in referring states.

6. The LIV recommends that the words "of the opposite sex to the employee" and "as the employee's husband or wife" be deleted from the definition of "de facto spouse". This would remove the need to have to rely on the reference to "a member of employee's household", and would give equal recognition to the care and support needs and responsibilities of same-sex partners. It would also address the inequity in the entitlement to compassionate leave that currently exists for same-sex couples and their families.

7. The LIV recommends that parental leave of up to one week be extended to same-sex partners.

8. The LIV recommends that the Interdependency visa category under the *Migration Act* 1958 (Cth) be abolished and that same-sex relationships be recognised within the de facto category.

9. The LIV recommends that the Victorian government implements a civil union relationship recognition scheme. Where same-sex couples avail themselves of this scheme:

   (a) It will provide same-sex couples with admissible legal proof as to the status of the surviving domestic partner and their eligibility for primary inheritance rights and obtaining letters of administration.

   (b) *The Administration and Probate Act* should be amended to recognise the rights of same-sex couples to primary inheritance irrespective of the duration of the relationship on par with a de jure spouse.

10. The LIV recommends that the

   (a) *Veterans Entitlements Act* 1986 be reviewed and a view to removing all discriminatory provisions and provide for equality of treatment for same-sex couples in order to meet Australia's obligations under the ICCPR and ILO and particularly in light of the decision in *Young v Australia*.

(b) Discriminatory definitions under the *Military Rehabilitation and Compensation Act* 2004 (Cth) should be amended to provide for equality of treatment for same-sex couples.

## 3 Executive summary

In order to address issues of inequality before the law for same-sex couples and their children, it is necessary to look beyond amendments to federal and state legislation. It is noted however that such changes are a fundamental first step and the LIV makes the following recommendations.

The definition of "spouse" in superannuation legislation should be extended to include same-sex couples. The federal government should also extend benefits such as superannuation co-contributions to same-sex couples.

The federal government should expand the definition of 'spouse', as it applies to taxation law, to include same-sex relationships. This expanded definition would ensure that all taxpayers in relationships have equal standing under relevant taxation law.

With respect to the Medicare levy, the definition of 'spouse' should be expanded to include same-sex couples. This will allow affected taxpayers to pool their income for calculations of Medicare levy and/or surcharge liability and entitle them to relevant reductions where available.

The LIV recommends that the federal government extends the provisions of the *Family Law Act* to couples in same-sex as well as heterosexual relationships in states that have referred their powers to the federal government with respect to domestic relationships or de facto couples.

The LIV recommends that the definition of "de facto spouse" in the *Workplace Relations Act* 1996 (Cth) be amended so as to not exclude same-sex couples and that parental leave of up to one week be extended to same-sex partners.

In relation to Australia's migration laws, it is recommended that the Interdependency visa category under the *Migration Act* 1958 (Cth) and Migration Regulations 1994 be abolished and that same-sex relationships be recognised within the de facto category.

Finally, the LIV recommends that the Victorian government implements a civil union relationship recognition scheme which would provide same-sex couples with admissible proof of the status of the surviving domestic partner and their eligibility for primary inheritance rights and obtaining letters of administration. The *Administration and Probate Act* should also be amended to recognise the rights of same-sex couples to primary inheritance irrespective of the duration of the relationship as is the case with a *de jure* spouse.

## 4 Background

Recently in Victoria, there have been significant legal reforms seeking to improve equality for same-sex couples, primarily through the removal or amendment of discriminatory provisions in Victorian legislation. In 2001, the Victorian government passed the *Statute Law Amendment (Relationships) Act* and the *Statute Law Further amendment (Relationships) Act* as part of this process. In this legislation, the gender-neutral definition of "domestic partner" was introduced into Victorian Acts, creating greater equality before the law for same-sex couples.

There is still much to be done to achieve *actual* equality before the law. There remain areas of law in Victoria which require reform and much federal legislation is also in need of extensive review.

Further, the LIV notes that the removal of discriminatory provisions from state and federal legislation is only one part of what needs to be a multi-layered strategy in Australia. It is also necessary to implement a system which provides for formal legal recognition of same-sex relationships. To this end, the LIV notes with concern the recent decision of the federal government to override the *Civil Unions Act* 2006 (ACT). Finally, there must also be access to more effective remedies for those who experience discrimination, particularly at the federal level.

## 5 Superannuation

Superannuation law is primarily set out in the *Superannuation Industry (Supervision) Act* 1993 (SIS) and the *Superannuation Industry (Supervision) Regulations* 1994 (SIS Regs).

Section 10 of SIS includes a definition of "spouse" which includes legally married spouses (i.e. husband and wife of different genders) together with a person who lives with another person as the husband or and wife of that person, although not legally married. In the absence of any court decisions that interpret this to include same-sex couples, it is widely considered that same-sex couples do not fall within the definition of spouse.

In itself, this creates an inequality where heterosexual de facto couples are treated differently to same-sex de facto couples. This inequality is both of perception and of fact given that to determine a same-sex couple's entitlements, different rules will apply. The main differences are highlighted below.

### 5.1 Nomination of beneficiaries on death

Each superannuation fund has a set of rules that determine, among other issues, how a member can nominate a beneficiary to receive his or her superannuation on death.

Commonly a member can make either:

(a) a non-binding nomination, which may influence the superannuation trustee but is not binding; or

(b) a binding nomination, which can only be in favour of the member's spouse, child or person with whom the member is in an interdependency relationship, or their estate.

The fact that a member can make a binding nomination for their same-sex partner through an interdependency relationship is a positive step for same-sex couples. However, it still places same-sex relationships within an obviously different and probably lower category of relationships. Compared to the position of a de facto couple, it can be expected that a person in a same-sex relationship will have a harder job understanding themselves and making others understand what constitutes an "interdependency relationship", and establishing to others' satisfaction that they were in one.

Further, it still leaves potential disadvantages for same-sex couples because:

(a) the deceased member's family might challenge whether an interdependency relationship existed; or

(b) the fund's rules might not provide for nominations for interdependency relationships, either due to deliberate act or because the rules were not updated; or

(c) the fund's rules might not provide for any binding nomination, leaving the matter entirely within the trustee's discretion.

Further, the broad discretions given to superannuation funds by the legislative regime mean that the particular fund to which a deceased person belongs has significant impact on the way their same-sex partner will be treated by the fund after their death.

For example, the Commonwealth Public Service Superannuation fund specifically, and in bold print, excludes same-sex couples from being considered dependents, unless a specific range of criteria is met. In contrast, the Victorian Public Service fund emphasises the interdependency provisions, perhaps indicating that the trustee of that fund would be more likely to accept same-sex couples as dependents. REST Superannuation's explanatory material suggests that it would accept same-sex couples as dependents, however there appear to be restrictions in the small print. The likely approach of other funds is difficult to ascertain, however even limited research suggests the choice of fund could make a big impact on the way superannuation is allocated after death.

Some employers have established their own business-specific funds, with trust deeds that specifically recognise same-sex couples as a category of dependents. This means there is a presumption of dependency, rather than making entitlements contingent on having to prove interdependence.

The reasonable benefit limit (RBL) on death payments can also be extended to children, step-children and adopted children. The children of a person's same-sex partner are not treated as dependents.

### 5.2 Entitlement to benefits on death where no nomination made

If no nomination is made, the trustee must use its discretion, depending on the rules of the super fund. Commonly, payment will be made to the member's "dependants". This may include a spouse, child or a person in an interdependency relationship, but it depends on the rules of the super fund. This can create greater uncertainty for same-sex couples as opposed to heterosexual couples who are married, where a fund's rules and/or practice will almost invariably give priority to a legal spouse.

### 5.3 Contributions - splitting

Recent legislative changes permit a spouse to make superannuation contributions to his or her spouse's superannuation account. This can be useful for couples where one spouse:

(a) pays tax at a higher rate than the other spouse; and/or

(b) does not work and is unable to contribute to the super system.

The legislation specifically restricts this benefit to "spouses" which, as noted above, is limited to heterosexual couples.

### 5.4 Co-contribution

Further, 'co-contribution' benefits are not available to same-sex couples. The LIV is concerned that same-sex couples are only considered as beneficiaries in financial planning and security matters after the death of a same-sex partner, rather than while the partnership is active.

### 5.5 Family law - splitting on separation

If heterosexual couples separate, the family law provisions permit the super fund of one partner to be split in order to provide super for the other, as part of the financial settlement of the separation. However this is not available to same-sex couples.

### 5.6 Differing tax treatment

Upon receipt of a death benefit from a super fund, a spouse is entitled to concessionary tax treatment. The same concessions extend to persons in an interdependency relationship or who were financially dependant on the deceased. However a same-sex partner, who receives the death benefit but does not fall within the definition of interdependency or financial dependency, does not get this concession.

Heterosexual couples are entitled to a spouse contribution rebate, where one spouse contributes to the other spouse's super fund. This rebate is not available to same-sex couples.

### 5.7 Recommendation

***The LIV recommends that the definition of spouse be extended to include same-sex couples. The LIV commends the federal government on its extension of interdependent relationships for the purpose of assigning beneficiary status to same-sex couples. However, it also calls on the federal government to extend benefits such as superannuation co-contributions to same-sex couples and considers that only by extending definition of spouse to include same-sex couples complete equality be achieved in superannuation laws.***

## 6 Tax concessions

The narrow definition of "spouse" within the *Income Tax Assessment Act* 1936 restricts same-sex couples from benefiting from a range of taxation concessions.

### 6.1 Tax rebates

#### 6.1.1 Application of tax law

The restriction of same-sex couples in accessing areas such as dependent spouse tax offsets and health care rebates have significant implications for these taxpayers. The administration of certain government incentives by the Australian Tax Office (ATO) means that some of these are not correctly distributed to the community as a whole.

Examples that result from this disparity include:

(a) *Inability to pool medical expenses, leading to higher individual expenses.* Same-sex couples do not benefit from the 20 per cent rebate, which applies to net medical expenses over $1500. The pool applies to the taxpayer, their spouse (married or de facto), children or others for which a dependant tax offset is provided.

(b) *Dependent spouse offset.* Partners who earn income, while their partners earn less than $6,569, cannot claim the dependent spouse offset. This can provide a further $1,572 in taxation benefits to the income-earning partner.

### 6.1.2 Current ATO decisions

The ATO has issued Interpretive Decisions specifically denying benefits to taxpayers in same-sex relationships.

Incidents where the Commissioner of Taxation has determined that same-sex partnerships do not qualify for tax benefits include:

(a) ATO ID 2002/211: Dependent Spouse Tax Offset (ITAA 1936, s159J)

(b) ATO ID 2002/649: Superannuation Spouse Contributions (ITAA 1936, s159T)

(c) ATO ID 2002/826: First Child Tax Offset (Baby Bonus) – transfer to same-sex partner (ITAA 1997, s 995-1).

In each Interpretive Decision, the Commissioner has relied on the Administrative Appeal Tribunal decision in *Gregory Brown v Commissioner for Superannuation* (1995) 38 ALD 344 at 349. The Commissioner has quoted the following passage in making his Interpretive Decisions:

'For whatever other changes the words "husband" and "wife" may have undergone over the years they retain, in our opinion, their complementary gender connotations. A "wife" is the female partner of a marital relationship and a "husband" the male partner.'

### 6.1.3 Impact

The Commissioner has applied a strict approach to the definition of ‘spouse’ in areas which reduce benefits available to same-sex couples. This directly reduces the access of people in same-sex relationships to entitlements in the form of taxation benefits.

The LIV also notes the following decisions of the Commissioner, which present different treatments of taxpayers in same-sex relationships:

(a) *ATO ID 2003/7*: Fringe Benefits Tax - third party recipient deemed to be an associate same-sex partner of an employee.

The Commissioner held that a same-sex partner fails to be recognised as a ‘relative’ or ‘spouse’ of a taxpayer per section 136(1) of the *Fringe Benefits Tax Assessment Act 1986.* However, the Commissioner was willing to deem a same-sex partner to be a ‘third party recipient’ ‘associate’ under s148(2) FBTAA.

(b) *GSTR 2003/6*: Goods and services tax - transfers of enterprise assets as a result of property distributions under the *Family Law Act* 1975, or in similar circumstances.

The Commissioner states at paragraph 3 that '[t]he Ruling also applies to property distributions between de facto or same-sex couple made upon their personal relationship breakdown'.

The two matters above present an inconsistent application of the Commissioner's view of same-sex relationships. While there is a hesitancy to support taxpayers in same-sex relationships to obtain benefits, the ATO is flexible in its approach in producing liabilities for such couples.

### 6.2 Recommendation

***While the ATO has not issued other public determinations or rulings in regards to same-sex relationships and entitlements, it is expected that the Commissioner would continue to apply the strict approach provided in Brown.***

***The LIV calls on the federal government to expand the definition of 'spouse', as it applies to taxation law, to include same-sex relationships. This expanded definition would ensure that all taxpayers in relationships have equal standing under relevant taxation law.***

***At present, the restriction of benefits, when contrasted with the flexible approach to enforcing liabilities, does not afford equality to taxpayers in same-sex relationships.***

## 7 Medicare Levy

The Medicare levy is administered by the ATO and is calculated by reference to the definition of 'spouse' in the *Income Tax Assessment Act* 1936*.*

The exclusion of same-sex relationships in taxation matters outlined above applies equally to benefits available under the Medicare levy and Medicare Levy Surcharge system (MLS).

Taxpayers can claim an exemption or reduction in the Medicare levy payable if they meet certain income threshold requirements. Based on the definition of 'spouse', taxpayers in same-sex relationships cannot benefit from access to low income exceptions for families.

The MLS (1 per cent of income in addition to the 1.5 per cent Medicare levy) applies to individuals who earn in excess of $50,000 per annum. This can be offset against a dependant's income. For MLS purposes, the ATO considers a dependant to be a 'spouse' or a child. Same-sex partners cannot pool income to reduce the Medicare levy or surcharge payable.

### 7.1 Recommendation

***The LIV recommends that the definition of 'spouse' be expanded to include same-sex couples. This will allow affected taxpayers to pool their income for calculations of Medicare levy and/or surcharge liability and entitle them to relevant reductions where available.***

## 8 Family law

The LIV notes that at present, owing to constitutional limitations, many of the provisions of the *Family Law Act* 1975 (Cth) (as amended) apply only to married couples and their children.

By reason of a referral of powers by all states (other than Western Australia) between 1988 and 1990, the Family Court and Federal Magistrates Court have a jurisdiction in relation to parenting procedures involving all children.

In contrast, the powers of the Family Court and the Federal Magistrates Court to make orders for a property settlement or adjustment, or the payment of spousal maintenance, are confined to parties who are or have been married. As far as parties who are or have been in domestic or de facto relationships are concerned, they may seek such relief, if able to do so at all, through the state and territory courts.

All states and territories have legislated in relation to this issue. The legislative provisions, however, do vary between the various states. For example:

(a) In some jurisdictions, it is possible to seek an order that a former de facto or domestic partner pay maintenance for the other partner (for example, in New South Wales and the Northern Territory). In other jurisdictions (for example, Victoria), no such power exists.

(b) The weight given to an agreement, which is analogous to a pre-nuptial agreement between the de facto or domestic partners, varies between different jurisdictions. Generally, more weight is given to the agreement in New South Wales, Queensland, Tasmania and the Northern Territory, as opposed to Victoria and Western Australia.

(c) In addition, there is a great breadth of remedies available to married couples under the Family Law Act, which are either not available or are available on a more restricted basis to heterosexual and homosexual de facto couples under the various state arrangements, including the following:

- The powers in the *Family Law Act* provide a financially weaker spouse, who has the care of the children, with an extra sum by the way of property settlement or adjustment for that reason or like reasons.
- There are wider, less restrictive powers regarding orders for one party to pay maintenance over the other (the New South Wales and Northern Territory provisions appear to require, as a pre-condition for maintenance support, the Applicant to either have the care of children or have suffered hardship by virtue of the relationship).
- There is a comprehensive and detailed division (Part VIIIA) of the *Family Law Act*, in relation to Binding Financial Agreements, giving married couples greater certainty by which they can structure their financial arrangements either before, during or after marriage.
- There is power under the *Family Law Act* to make superannuation splitting orders, which effectively permit the Family Court and Federal Magistrates Court greater flexibility to “divide” the superannuation of married spouses between them.
- There is a comprehensive division (Part VIIIAA) giving the Family Court and Federal Magistrates court the power to make orders binding third parties.

The LIV considers that it is unacceptable for same-sex couples to be treated differently to heterosexual couples with respect to the breakdown of those relationships.

The LIV also believes that it is undesirable to have significant legislative differences between the various states and territories in relation to de facto and domestic relationships, given that couples can and do own property and assets in various states and territories and, during the course of their relationship, may spend significant time in different states and territories. The results can therefore be significant uncertainty as to which is the appropriate jurisdiction to hear a dispute between the couples, and similar confusion regarding the appropriate law to be applied.

Further, the Family Court of Australia is a specialist court and its judicial officers have expertise in the issues arising from relationship breakdowns. Accordingly, there is merit in the view that issues arising from all relationship breakdowns ought to be dealt with by such a specialist court, rather than the various supreme courts of the states and territories.

For these reasons, the LIV supports the various states and territories referring their powers over domestic or de facto couples to the federal government so there can be uniformity in relation to the law concerning all couples, whether married or not and whether heterosexual or same-sex.

In this regard, it is noted that three states - New South Wales, Victoria and Queensland - have referred their power to the federal government. While it would be preferable for all states to make such a referral, the LIV understands that the federal Attorney-General plans to introduce the *Family Law (De Facto Relationship) Amendment Bill,* acting on this referral of power, late in 2006 with a view to such legislation becoming effective from 2007.

It is of concern to the LIV, however, that the federal government has advised that it will legislate only in relation to heterosexual couples in domestic and de facto relationships, rather than all couples. For reasons mentioned above and elsewhere in this submission, such a limitation would create unwarranted and unjustifiable discrimination between couples in heterosexual relationships as opposed to couples in same-sex relationships. The latter will be denied the range of remedies available to the former, which are detailed above.

The LIV accordingly urges the federal government to reconsider and extend the provisions of the *Family Law Act* to couples in same-sex as well as heterosexual relationships in referring states.

In the event that the federal government declines to act on this recommendation, it is the firm view of the LIV that the resulting arrangements will create unwarranted and unjustifiable discrimination between heterosexual and same-sex couples in each of the referring states. In this case, the LIV will ask the state governments in each of the referring states to amend the legislation applicable to de facto and domestic couples so that provisions mirror the relevant provisions of the *Family Law Act*.

This alternative suggestion is considered a “second best” on the basis that same-sex couples still need to go through the more formal and expensive processes of litigation through the state courts, rather than through the Family Court or the Federal Magistrates Court, to resolve their dispute. It will at least, however, have the effect of limiting the degree to which couples in such relationships are denied the remedies available to their heterosexual counterparts.

### 8.1 Recommendation

***The LIV supports the various states and territories referring their powers over domestic relationships or de facto couples to the federal government so there***

***can be uniformity in relation to the law concerning all married, non-married, heterosexual or same-sex couples.***

***The LIV recommends that in the upcoming legislative reforms, the federal government extends the provisions of the* Family Law Act *to couples in same-sex as well as heterosexual relationships in referring states.***

## 9 Workplace relations

This part of the submission focuses on three main entitlements that are available under the *Workplace Relations Act* 1996 (Cth) (WR Act); namely personal/carer's leave, compassionate leave and parental leave.

### 9.1 Personal/carer's leave

Section 244 of the WR Act defines personal/carer's leave as follows:

> *For the purposes of this Division, personal/carer's leave is:*
>
> *(a) paid leave (sick leave) taken by an employee because of a personal illness, or injury, of the employee; or*
>
> *(b) paid or unpaid leave (carer's leave) taken by an employee to provide care or support to a member of the employee's immediate family, or a member of the employee's household, who requires care or support because of:*
>
> - *a personal illness, or injury, of the member; or*
> - *an unexpected emergency affecting the member.*

Section 250(2) of the WR Act provides:

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

The definitions of "spouse" "de facto spouse" and "immediate family member" do not include same-sex partners. They are defined in section 240 of the WR Act, as set out below:

> *"De facto spouse" means a person of the opposite sex to the employee, who lives with the employee as the employee's husband or wife on a genuine domestic basis, although not legally married to the employee.*
>
> *"Spouse" includes the following:*
>
> *(a) a former spouse;*
>
> *(b) a de facto spouse;*
>
> *(c) a former de facto spouse.*
>
> *"Immediate family": the following are members of an employee's immediate family:*

(a) *a spouse, child, parent, grandparent, grandchild or sibling of the employee;*

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

There is no definition for "a member of the employee's household" in the WR Act, however a same-sex partner who is living with the employee would fall within the description in section 244. Thus, if a same-sex partner falls ill and requires care or support, an employee would be entitled to take carer's leave. Carer's leave would also be available to care for the children of a same-sex partner, if they were members of the employee's household.

There is some concern that even though the entitlement to take leave exists, employees may not use such leave as they are not willing to make their personal circumstances known at work. Until and unless there is equal recognition before the law for same-sex couples in all areas, this may continue to be the case.

## 9.2 Compassionate leave

The entitlement to compassionate leave is set out in section 257 of the WR Act:

*For the purposes of this Division, compassionate leave is paid leave taken by an employee:*

(a) *for the purposes of spending time with a person who:*

- *is a member of the employee's immediate family or a member of the employee's household; and*
- *has a personal illness, or injury, that poses a serious threat to his or her life; or*

(b) *after the death of a member of the employee's immediate family or a member of the employee's household.*

Similarly, an employee would be entitled to take compassionate leave in the event that a same-sex partner, or child of a same-sex partner who was a member of the household, became ill or injured in a way that posed a serious threat to life. Compassionate leave may also be taken if the same-sex partner, or their child who resided with the employee, dies.

There is some concern, however, that compassionate leave does not extend to the family of an employee's same-sex partner. The definition of "immediate family member" includes not only the employee's spouse, child, parent, grandparent, grandchild or sibling of the employee, but also the child, parent, grandparent, grandchild or sibling of the spouse of the employee. Thus, if the parent or child of a heterosexual partner became ill or died, an employee would be entitled to compassionate leave.

In contrast, if the parent or child of a same-sex partner (who was not a member of the household) became ill or died, compassionate leave would not be available.

## 9.3 Parental leave

For the purposes of this submission the relevant issue is the availability of parental leave for the same-sex partner of the person who is having the baby. Maternity leave will be available to a woman having a baby, regardless of whether she is in a same-sex or heterosexual relationship.

Section 282(1) of the WR Act provides:

> *For the purposes of this Division, paternity leave is:*
>
> *(a) a single, unbroken period of unpaid leave (short paternity leave) of up to one week taken by a male employee within the week starting on the day his spouse begins to give birth; or*
>
> *(b) a single, unbroken period of unpaid leave (long paternity leave), other than short paternity leave, taken by a male employee after his spouse gives birth to a living child so that the employee can be the child's primary care-giver.*

In section 282, paternity leave may be taken for up to one week by a *male* employee. Accordingly, there is no entitlement to parental leave for the same-sex partner of a woman who has a baby.

### 9.4 Recommendations

***The LIV recommends that the words "of the opposite sex to the employee" and "as the employee's husband or wife" be deleted from the definition of "de facto spouse". This would remove the need to have to rely on the reference to "a member of employee's household", and would give equal recognition to the care and support needs and responsibilities of same-sex partners. It would also address the inequity in the entitlement to compassionate leave that currently exists for same-sex couples and their families.***

***The LIV also recommends that parental leave of up to one week be extended to same-sex partners.***

## 10 Migration Laws

The LIV is also concerned about the operation of Australia's migration laws.

### 10.1 Case study

*My same-sex partner and I have been together for almost 11 years. We are both British citizens, although now permanent residents of Australia.*

*We moved to Australia when he was offered a secondment through his work. At that time we had been together for about seven years. This involved applying for a temporary resident's visa (457) to give him the right to work in Australia. Under current Australian migration laws, an applicant for a 457 visa can also apply to bring his or her spouse (including de facto spouse), who then has full work rights. However the relevant part of the migration legislation specifically excludes same-sex couples from this right.*

*The only way I was able to accompany my partner was to obtain a one year working holiday visa. Once here, I was fortunate to find employment where I was sponsored for my own 457 visa. If I had not been able to find such employment I would have had to return to the UK at the end of the year.*

*Subsequently, both our employers agreed to sponsor us for permanent residency. We still had to apply independently as the migration laws did not let us apply jointly as a married or heterosexual de facto could do.*

*The above is, in my opinion, an example of discrimination within the ambit of the HREOC inquiry. Australian law denies same-sex partners the right to work in circumstances where a heterosexual partner would get that right.*

*We knew of a British heterosexual de facto couple who had been together for six months. The female partner got full working rights on the strength of her boyfriend's 457 visa. Our relationship of seven years counted for nothing.*

*The above is an anomaly, given that if one partner is Australian they can apply for an overseas same-sex partner to get an Australian visa based on a co-dependant relationship. However that right is denied to same-sex couples where neither is an Australian citizen or permanent resident.*

*The federal government introduced the Interdependency visa for persons aged 18 years or over, who are in an interdependent relationship with an Australian citizen, permanent resident or eligible New Zealand citizen. The couple must have been in a relationship for at least 12 months and the visa category excludes polyamorous relationships.*

*The Interdependency visa is the only visa that is available for a person who is a same-sex partner of another person. A same-sex partner of a person cannot be included as a member of the family unit on a visa application, even if the same-sex couple has been married according to the laws of another country.*

### 10.2 Recommendation

***The current division that exists to exclude same-sex couples from the de facto category serves to stigmatise same-sex relationships.***

***It is recommended that the Interdependency visa category be abolished and that same-sex relationships be recognised within the de facto category.***

## 11 Inheritance

### 11.1 Wills and intestacy

In Victoria, there remain difficulties in the areas of wills and intestacy for same-sex couples despite the amendments introduced by *Statute Law Amendment (Relationships) Act* 2001 (Vic) and the *Statute Law Further amendment (Relationships) Act* 2001 (Vic).

The outcome of these reforms to the *Administration and Probate Act* 1958 (Vic) is that the following inheritance entitlements are now extended to the surviving partner of a same-sex or heterosexual domestic partnership:

An employer may, without the production of probate or letters of administration, transfer a deceased employee's money or property to the surviving partner or child, where the employer is satisfied that the value of the deceased employee's estate does not exceed $25,000[1].

(a) The partner of a person who dies intestate may obtain the deceased's interest in the 'shared home'. 'Shared home' is defined to mean a residence that was the principal place of residence of an intestate and the intestate's partner at the time of the intestate's death.[2]

(b) An intestate's domestic partner may obtain a specified share of the intestate's residuary estate.[3]

However, concerns remain regarding the difficulties for a surviving domestic partner in proving their relationship with the deceased in the absence of formal documentation or other public acknowledgment of the relationship.

There are also concerns that the definition of "domestic partner" in the *Administration and Probate Act* is qualified by a minimum cohabitation period of 2 years.[4] This qualification is not found in any of the other legislation amended by the *Statute Law Amendment (Relationships) Act* 2001 or the *Statute Law Further amendment (Relationships) Act* 2001.

In effect, this means that a domestic partner, who was not living with the deceased or who had been living with them for less than two years, does not have primary inheritance rights. No such condition applies to a *de jure* spouse. Surviving domestic partners, who have made considerable contributions to the estate notwithstanding the period of the relationship, are significantly disadvantaged.

A bereaved domestic partner could bring a family provision claim under Part IV family provisions of the *Administration and Probate Act*. However, the process may be a stressful and costly course of action, which may ultimately reduce the assets of the estate.

The *Administration and Probate Act* does not provide legislative guidance as to who has right to be appointed to administer the estate. Traditionally the right to apply for letters of administration to administer an estate would fall to the person with the major inheritance rights; usually a spouse or a domestic partner. This will be problematic where there is conflict between a domestic partner and the deceased's parents or children, or between two domestic partners, or between a domestic partner and spouse. This problem is compounded for a same-sex domestic partner when they are required to prove their relationship status with the deceased (including proving evidence of the duration of their relationship to satisfy eligibility requirements in the Act). This may result in delays where admissible proof is being sought by same-sex domestic partners in order to obtain letters of administration, which could then lead to same-sex domestic partners being trumped by others, such as the deceased's parents or children.

### 11.2 Recommendation

***The LIV recommends that the Victorian government implements a civil union relationship recognition scheme. Where same-sex couples avail themselves of this scheme:***

***(c) It will provide same-sex couples with admissible legal proof as to the status of the surviving domestic partner and their eligibility for primary inheritance rights and obtaining letters of administration.***

***(d) The Administration and Probate Act should be amended to recognise the rights of same-sex couples to primary inheritance irrespective of the duration of the relationship on par with a de jure spouse.***

***In addition, greater community education and awareness should be undertaken to highlight the disadvantages of not making a will.***

## 12 Veterans

Members and veterans of the Australian Defence Force (ADF) risk their lives for the safety and security of the country. Accordingly, they are entitled to the utmost respect from the Australian community and government. However, the LIV suggests that several pieces of legislation that assist these members in retirement and provide for their families if they are injured or die in service contain discriminatory provisions.[5]

## 12.1 Retirement and death benefits

Sections 38 and 39 of the *Defence Force Retirement and Death Benefits Act* 1973 (Cth) provide for a spousal pension upon the death of a contributing member or recipient member. Under section 6A, this is limited to a person married or in a marriage-like relationship with the deceased person. This excludes partners in same-sex relationships, in breach of Articles 2(1) and 26 of the ICCPR and ILO Convention 111. The LIV submits that these discriminatory provisions should be amended to provide for equality of treatment for same-sex couples.

Rule 2 and Schedule 1, Part 5, r. 9 of the Military Superannuation and Benefits Rules (a Schedule to the *Military Superannuation and Benefits Act* 1991 (Cth)) provide for superannuation benefits to go to a "spouse" upon the death of a member. This excludes partners in same-sex relationships, in breach of Articles 2(1) and 26 of the ICCPR and ILO Convention 111. The LIV submits that these discriminatory provisions should be amended to provide for equality of treatment for same-sex couples.

## 12.2 Pensions and other entitlements

The relevant legislation for defence force pensions and benefits is the *Veterans Entitlements Act* 1986 (Cth). The United Nations Human Rights Committee has already ruled in *Young v Australia* (2003) that this Act breaches Article 26 of the ICCPR for discriminating against same-sex couples. The Act provides that a partner of a veteran is the other "member of a couple". Section 5E(2)(b)(i) provides that a member of a couple must be of the opposite sex, in breach of Articles 2(1) and 26 of the ICCPR and ILO Convention 111. The Act also uses the terms "war widow", "war widower", "widow" and "widower", all of which are defined in gender-specific terms. The Act provides a range of entitlements, ranging from a higher pension rate and free medical treatment to education grants and other allowances.

The LIV submits that the *Veterans Entitlements Act* 1986 needs a thorough audit to review its operation to remove all discriminatory provisions and provide for equality of treatment for same-sex couples in order to meet Australia's obligations under the ICCPR and ILO and particularly in light of the decision in *Young v Australia*.

## 12.3 Compensation

Under the *Military Rehabilitation and Compensation Act* 2004 (Cth), a dependant of a member of the ADF is entitled to lump-sump compensation when the member dies as a result of injuries sustained in the course of service. Under s 15, a dependant can be a partner, parent, child or other relative. However, s 5 defines a partner to be a person "of the opposite sex". This excludes partners in same-sex relationships, in breach of Articles 2(1) and 26 of the ICCPR and ILO Convention 111.

The LIV submits that these discriminatory definitions should be amended to provide for equality of treatment for same-sex couples.

## 12.4 Recommendations

***The LIV recommends that the***

***(c) Veterans Entitlements Act 1986 be reviewed and a view to removing all discriminatory provisions and provide for equality of treatment for same-sex couples in order to meet Australia's obligations under the ICCPR and ILO and particularly in light of the decision in Young v Australia.***

***(d) Discriminatory definitions under the Military Rehabilitation and Compensation Act 2004 (Cth) should be amended to provide for equality of treatment for same-sex couples.***

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1 Section 32, *Administration and Probate Act* 1958.

2 Section 37A, *Administration and Probate Act* 1958.

3 Division 6 of Part 1, *Administration and Probate Act* 1958.

4 Section 3, *Administration and Probate Act* 1958.

5 Australian Broadcasting Corporation, 'Gay man fights for defence pension', *7.30 Report* (3 November 2005) http://www.abc.net.au/7.30/content/2005/s1497391.htm (accessed 26 June 2006).