



CHAPTER 14: *Aged Care*

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14.1 What is this chapter about?

This chapter examines discrimination against same-sex couples and their families in the context of residential aged care (aged care).

When people enter an aged care facility they usually have to pay certain daily fees and other payments to fund their care and residence. The *Aged Care Act 1997* (Cth) (the Aged Care Act) sets out how those fees and payments should be calculated in both public and private aged care facilities.

The Aged Care Act uses assets and income tests to calculate the various residential care fees and the liability to pay a bond.

For an opposite-sex couple, the value of the family home is exempted from the assets test if it is still occupied by the aged person's partner or close family member. However, the Aged Care Act does not recognise a same-sex couple as a genuine couple, so the family home of a same-sex couple is included in the assets test even if a same-sex partner is living in it.

Similarly, the income tests under the Aged Care Act treat a same-sex couple as two individuals rather than as a couple. This means that same-sex couples will be subject to different income thresholds than opposite-sex couples.

The end result is that a person in a same-sex couple will often pay more than a person in an opposite-sex couple when entering an aged care facility.

The discrimination against same-sex couples regarding the calculation of aged care daily fees, payments and bonds occurs because of the definitions of 'member of a couple' and 'partner' in the Aged Care Act. These definitions include married and opposite-sex de facto partners, but exclude same-sex partners.

Further, the definitions of 'dependent child' and 'close relation' may exclude the child of a lesbian co-mother or gay co-father.

The narrow definitions can affect how a same-sex couple's assets are assessed for accommodation payments and may jeopardise the ownership of the family home.

This chapter outlines how the application of assets and income tests for residential aged care fees and payments discriminate against same-sex couples. It also discusses some of the non-financial concerns that same-sex couples have about residential aged care.

The chapter identifies how the human rights of aged same-sex couples are breached. It then recommends changes to the law in order to address those breaches.

Specifically, this chapter addresses the following questions:

- Do same-sex couples pay more for aged care?
- What other issues face ageing same-sex couples?
- Does aged care legislation breach human rights?
- How should aged care legislation be amended to eliminate future breaches?

14.2 Do same-sex couples pay more for aged care?

Same-sex couples are likely to pay different fees for aged care than opposite-sex couples. Often same-sex couples will pay more than opposite-sex couples, sometimes they will pay less. Where same-sex couples do pay more, the impact can be devastating.

14.2.1 There are a range of fees for residential aged care

A person entering an aged care facility must pay both an **accommodation payment** and **daily residential care fees**. These may be reduced and/or waived if a person is facing 'genuine financial hardship'.¹

An assets test is used to determine the **accommodation payments** (in the form of an accommodation charge or an accommodation bond).

An income test is used to determine **daily residential care fees**.

The modified social security assets and income tests used to determine those fees take into account the income, assets and housing needs of the individual going into care as well as his or her partner, close relation or dependent child.

The definitions of 'partner', 'close relation' and 'dependent child' in the Aged Care Act exclude same-sex partners and may exclude a child born into and raised by a same-sex couple in some circumstances. A carer is not specifically defined.

This means that the assets and income tests apply differently to same-sex families than to opposite-sex families. The following sections explain the discriminatory impact that this can have on same-sex families.

14.2.2 A same-sex partner who owns a home will be liable for 'accommodation payments'

A person entering an aged care facility will only have to make an accommodation payment if he or she has qualifying assets valued at more than \$33 000.²

If a person is in a recognised couple then the qualifying assets include the combined asset pool of the couple. The assets are then valued at 50% of the couple's total relevant asset pool.³ In other words, a person who is a member of a recognised couple will only have to pay an accommodation payment if the average of the couple's qualifying assets is valued at more than \$33 000.⁴

The Aged Care 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 person's 'partner' (or the other 'member of a couple')⁵
- a 'dependent child' of the person⁶
- a 'close relation' of the person in certain circumstances⁷
- a carer of the person in certain circumstances.⁸

However, an elderly same-sex couple is unlikely to benefit from any of these exemptions, as described below. This means that a same-sex couple's home will almost always be counted in the assets test. So a person in a same-sex couple entering aged care will generally be liable for an accommodation payment if he or she owns a home (solely or jointly).

(a) *A same-sex partner is not a 'partner'*

The Aged Care Act defines a 'partner' as the other 'member of a couple' of which the person is also a member.⁹

A 'member of a couple' is a person who is legally married to another person or someone who lives with another person 'in a marriage-like relationship, although not legally married to the other person'.¹⁰

The term 'marriage-like relationship' is not defined in the Aged Care Act. However, as discussed in Chapter 4 on Recognising Relationships, the 1998 Federal Court decision in *Commonwealth of Australia v HREOC and Muller* suggests that the reference to a 'marriage-like relationship' will exclude a same-sex relationship.¹¹

Consequently, a member of a same-sex couple entering an aged care facility cannot exempt his or her home from the assets test, even though his or her partner is living in it.

(b) *A same-sex partner is unlikely to be a carer*

If a same-sex partner is a carer then the couple's home may be exempt from the assets test.¹² A carer is not specifically defined in the legislation but includes a person who:

- has been living in the home for at least two years; and
- is eligible to receive an income support payment (for example a Centrelink or Department of Veterans' Affairs means-tested pension or benefit).¹³

Only a limited number of people will be eligible for those payments, and therefore a limited number of same-sex partners will qualify as a carer.¹⁴

(c) *A child of a same-sex couple may be a 'dependent child'*

If a 'dependent child' is living in the house owned by the person entering an aged care facility, the home will be excluded from the assets test.¹⁵

The Aged Care Act defines a 'dependent child' to include a child where 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...¹⁶

In addition, the child must not be in full-time employment or be receiving a social security pension or benefit.¹⁷ And the child must be either under 16, or between 16 and 25 and in full-time education.¹⁸

Chapter 5 on Recognising Children notes that when children are born to a lesbian or gay couple their parents may include a birth mother, lesbian co-mother, birth father or gay co-father(s).¹⁹

This definition of 'dependent child' potentially includes the child of all of these parents. However, it may be more difficult for a lesbian co-mother or gay co-father to prove that he or she is 'legally responsible' or 'under an obligation to support' a child, than it would be for a birth mother or birth father.

The legislation does not specify what is required to prove these elements of the definition. However, a birth mother or birth father are generally the legal parents of a child and therefore are *assumed* to have legal responsibility. On the other hand, a lesbian co-mother or gay co-father may have to take additional steps to prove that legal relationship. A parenting order in favour of the lesbian co-mother or gay co-father should be sufficient. However, as Chapter 5 on Recognising Children explains, parenting orders can be expensive and may involve lengthy court proceedings.

If a same-sex couple does not have the resources to go through this process, a lesbian co-mother or gay co-father may be in a more tenuous position than a birth mother or birth father (who need little more than a birth certificate to prove that a child is a 'dependent child').

However, the impact of this potential discrimination is limited, as few people old enough to enter an aged care facility will have a child under 25 living with them in their home.

(d) *A child of a lesbian co-mother or gay co-father is not a 'close relation'*

Under the Aged Care Act, a 'close relation' of a person entering residential aged care is:

the father or mother of the person, or a sister, brother, child or grandchild of the person, or a person included in a class of persons specified in the Residential Care Subsidy Principles.²⁰

In addition, the person must have occupied the home for the past five years and must be eligible to receive an income support payment at the time.²¹

'Child' is not defined in the legislation. As discussed in Chapter 5 on Recognising Children, where there is no definition of child it is generally assumed that the legislation is only referring to the child of a birth mother or birth father. This means that the child of a lesbian co-mother or gay co-father will not qualify as that person's 'close relation'.

(e) *A same-sex couple's home will usually be counted in the assets test for accommodation payments*

Since an elderly same-sex couple is unlikely to qualify for any of the exemptions under the legislation, the couple's home will generally be counted in the assets test.

The full value of a same-sex couple's home will be taken into account in the assets test if the partner entering aged care is the sole title-holder. And half of the value will be taken into account if the partner entering aged care holds half the title of the home. The value of the home will only be exempt if the partner entering aged care has no interest in the home at all. An opposite-sex couple's home would be exempt in all these circumstances.

Therefore, most people in a same-sex relationship who own a home on their own, or with their partner, will have to make accommodation payments. Only those opposite-sex couples with sufficient assets *on top of* their home will have to make these payments.

14.2.3 A same-sex partner who owns any other assets is likely to be liable for accommodation payments

In addition to a home, there are a large range of other assets included in the assets test.²²

If a person is a member of an opposite-sex couple, the value of that person's assets and the value of his or her partner's assets will be added together and then halved for the purposes of the assets test.²³

However, if a person is a member of a same-sex couple, the full value of that person's assets will be counted and none of his or her partner's assets will be counted. This will disadvantage a same-sex couple where the partner entering aged care owns substantial assets, and the other partner owns very few assets. It could be to the advantage of the same-sex couple if the situation were reversed.

The main point is that for a same-sex couple, which partner owns what asset will determine liability for accommodation payments. In an opposite-sex couple, it does not matter who owns what assets.

14.2.4 A same-sex couple will generally pay higher accommodation payments

The assets test described above is used to decide whether, and how much, a person entering aged residential care must pay in **accommodation payments**.

Depending on the level of care a person requires, the **accommodation payment** will take the form of one of two types of payments:

- an **accommodation charge**
- an **accommodation bond**.

The following sections show that the discriminatory application of assets tests means that same-sex couples will generally pay higher **accommodation payments** than opposite-sex couples.

(a) Same-sex couples generally pay higher accommodation charges

An accommodation charge is a daily amount that is payable (in addition to daily residential care fees – see section 14.2.5) by residents who enter permanent care and need a high level of care.²⁴

The amount of the accommodation charge depends on the value of the resident's assets at the time of their entry as a permanent resident to the aged care home. Since more assets are often counted for same-sex couples they will generally pay a higher accommodation charge.

(i) More assets may be counted for same-sex couples

For a same-sex couple, but not an opposite-sex couple, the following assets will generally be counted:

● Same-Sex: Same Entitlements

- the home in which the same-sex couple lives (this asset is usually exempt for an opposite-sex couple)
- the full value of all other assets owned by the partner entering care (only the average of both partners' combined assets will be counted for an opposite-sex couple).

Therefore a person in a same-sex couple will generally pay a higher charge because more of their assets will be counted.²⁵

(ii) *The charges increase if a person has more assets*

The maximum accommodation charge of \$17.13 a day only applies if a person entering aged care has relevant assets worth \$64 263 or more.²⁶

People with assets between \$33 000 and \$64 263 may pay an accommodation charge on a sliding scale, based on the amount of assets above \$33 000.²⁷

People with less than \$33 000 in assets, respite residents, concessional residents and residents for whom a hardship determination is in place, do not have to pay an accommodation charge.²⁸

(iii) *Example comparing accommodation charges for a same-sex and opposite-sex couple*

The following example illustrates how the assets tests for accommodation payments affect same-sex and opposite-sex couples differently.

If a person enters an aged care facility and requires a high level of care, they will be asked to pay a daily accommodation charge.

Jane is entering an aged care facility requiring a high level of care. Her partner Michael will remain in their jointly owned family home.

Sean is entering an aged care facility requiring a high level of care. His partner Brian will remain in their jointly owned family home.

Because Jane is a member of an opposite-sex couple:

- *her family home will not be included in the assets test²⁹*
- *the sum total of all of Jane and Michael's other assets will be halved.³⁰*

As the following table demonstrates, despite the fact that Jane and Michael, and Sean and Brian, have the same total assets, Sean will be liable for a \$17.13 daily accommodation charge and Jane will not.

ASSETS (\$)	JANE (AND MICHAEL)	SEAN (AND BRIAN)
Home (jointly owned)	\$600,000	\$600,000
Motor vehicle (owned by Jane/Sean)	\$30,000	\$30,000
Savings account (held by Jane/Sean)	\$33,500	\$33,500
Total asset value	\$663,500	\$663,500
Assessable assets	\$31,750	\$363,500
Daily accommodation charge	Nil	\$17.13

(b) Same-sex couples generally pay higher accommodation bonds

An accommodation bond is payable (in addition to daily residential care fees – see section 14.2.5) by residents who enter permanent care at a low level of care. An accommodation bond must also be paid if a resident would like a higher standard of service and accommodation.³¹

An accommodation bond is like an interest free loan by the resident to the aged care facility.³² Accommodation bonds can be high amounts. They can cost up to tens of thousands of dollars.

Under the Aged Care Act, the facility can deduct a monthly amount from the bond, called the retention amount, for up to five years.³³ The facility can also take any interest earned from the accommodation bond.³⁴ The balance of the bond is refunded to the resident on departure, or to their estate on death.³⁵

(i) More assets are counted for same-sex couples

A person entering aged care cannot be charged a bond which would leave them with less than \$33 000 in assets.³⁶ For a member of an opposite-sex couple the couple must be left with their home plus \$66 000 in other assets. This is because the total value of both partners' assets will be halved for opposite-sex couples for the purposes of the assets test.³⁷ For a same-sex couple who owns a home, that home will automatically require them to pay the bond, irrespective of the value of the other assets of the partner entering care.

(ii) The bond increases if a person has more assets

There is no fixed formula for calculating an accommodation bond, but the amount is related to the assets of the person entering aged care. So a person in a same-sex couple will likely be asked to pay a higher bond because their home will be counted in the assets test.

(iii) A same-sex couple's home may be at higher risk

A person or couple can choose to fund an accommodation bond in any way that is convenient, either as a lump sum, as a periodic payment, or as a combination of both.³⁸

However, for many people their home is their primary, or only, asset with sufficient value to fund an accommodation bond.

The risk of having to sell or refinance a home to pay a bond will be higher for a same-sex couple whose only major asset is their home. This is because the home will be used to calculate the accommodation bond *and* it will be the only asset to support the payment of that bond.

For an opposite-sex couple in the same situation, their home will be exempt from the calculation with the likely result that no bond is payable. Thus, the home of an opposite-sex couple is much better protected than the home of a same-sex couple.

The risk to same-sex couples is described by Jim Woulfe as follows:

[W]here a member of an opposite-sex couple is incapacitated and requires nursing home care, the means test for an accommodation bond excludes the family home. However, if one member of a same-sex couple requires residential nursing care, then that person's share of

the family home is treated as an asset. What this means for us is that if either of us were ever incapacitated, we would face the possibility of being forced to sell our home out from under the other one.³⁹

Rod Swift from Gay and Lesbian Equality (WA) told the Inquiry:

If one person is being admitted to a nursing home, and the other person is staying at home, [de facto heterosexual couples and married couples] don't have to sell the family home to pay for nursing home bonds. That's not the case for a same-sex couple. They [are], even... as tenants in common... treated as individuals for that law, and would have to sell one half the house to raise the bond... this is a huge financial burden [for] same-sex couples.⁴⁰

(iv) Example comparing accommodation bonds for same-sex and opposite-sex couples

If Jane (who is a member of an opposite-sex couple) and Sean (who is a member of a same-sex couple) from the example in section 14.2.4, are both entering an aged care facility and require a low level of care, they will be asked to make an accommodation payment in the form of a bond.

The assets of both couples will be assessed in the same way as illustrated in section 14.2.4.

Jane and Michael

Jane is entering an aged care facility and Michael will remain in the family home:

<i>Total assets value</i>	\$663 500
<i>Jane's assessable assets</i>	\$31 750

A person cannot be asked to pay an accommodation bond if they are left with less than \$33 000 in assets.⁴¹ Therefore, Jane will not be required to pay an accommodation bond.

Sean and Brian

Sean is entering an aged care facility and Brian will remain in the family home:

<i>Total assets value</i>	\$663 500
<i>Sean's assessable assets</i>	\$363 500

There is no maximum accommodation bond an aged care facility can charge, but a person must be left with \$33 000 in assets. Sean could be asked to pay an accommodation bond of over \$100 000 because he has \$363 500 in assessable assets.⁴²

14.2.5 The income distribution between same-sex partners will determine the amount of daily care fees

All people entering residential aged care facilities must pay daily care fees in addition to an accommodation payment (unless they are former prisoners of war).⁴³

There are two types of daily care fees:⁴⁴

- Every person who enters a residential aged care facility must pay a **basic daily care fee** which is currently set at:

- \$30.77 for pensioners receiving a means-tested income support payment⁴⁵
- \$38.35 for non-pensioners.⁴⁶
- Part-pensioners and non-pensioners may be asked to pay an **additional income-tested fee**.⁴⁷

The amount of the daily care fee is determined by an income test using the same rules as the age and service pensions.⁴⁸ Centrelink and the Department of Veterans' Affairs assess the income for the Department of Health and Ageing for the purposes of determining daily care fees.

As discussed in Chapter 9 on Social Security, and Chapter 10 on Veterans' Entitlements, the income test applies differently to same-sex and opposite-sex couples because a same-sex couple is treated as two individuals.

(a) Only the income of the same-sex partner in care will be counted in the income test

If a person is a member of an opposite-sex couple, the income of each member of the couple is added together and then divided in half.⁴⁹

However, a same-sex partner is not recognised as a 'partner' under the Aged Care Act, the *Social Security Act 1991* (Cth) or the *Veterans' Entitlements Act 1986* (Cth), so a same-sex couple is not recognised as a couple for the purposes of the income test.

This means that only the income of the same-sex partner in care will be counted in the income test.

(b) Same-sex and opposite-sex partners will pay different daily care fees

Since same-sex partners are treated as two individuals rather than as a couple, the amount of the daily care fee paid by a member of a same-sex couple will depend on the distribution of income between that couple. For an opposite-sex couple the income distribution between partners is irrelevant.⁵⁰

Sometimes a same-sex couple will pay more than an opposite-sex couple and other times less than an opposite-sex couple.

(i) A same-sex couple may pay higher daily care fees

A resident entering care who has a higher income than his or her same-sex partner will be at a **disadvantage** when compared to an opposite-sex couple in the same position.

This is because the person entering care will not be able to combine his or her own income with that of his or her partner and divide the total amount by two for the purposes of the income test. The entirety of the income of the person entering care will be included in the income test and he or she will be charged a higher rate than a person in an opposite-sex couple.

(ii) A same-sex couple may pay lower daily care fees

A resident entering care who has a lower income than his or her same-sex partner will be at an **advantage** when compared to an opposite-sex couple in the same position.

This is because only the lower income of the person entering care will be assessed. He or she will be charged a lower rate than a member of an opposite-sex couple in similar circumstances.

14.3 What other issues face ageing same-sex couples?

There were a number of oral and written submissions to the Inquiry discussing issues facing ageing same-sex couples. Many of them are about the extra cost and financial risks associated with aged care.

The following issues do not directly relate to financial matters. However, they do relate to additional discrimination facing ageing same-sex couples.⁵¹

14.3.1 Aged care policies and codes ignore same-sex couples

A number of submissions to the Inquiry argue that federal government policies do not acknowledge the existence of older gay, lesbian, bisexual, trans and intersex (GLBTI) Australians.⁵² For example, the Australian Medical Association argues that:

[t]here is a need to recognise sexual and gender diversity within the aged care sector as this lack of recognition means that the health needs of many older people are not being adequately addressed with culturally appropriate care.⁵³

The Gay and Lesbian Rights Lobby (NSW) argues that ‘it is important that aged care policy and education reflects the diversity in aged care needs.’⁵⁴

Dr Jo Harrison, an academic in the field on ageing, states that the *User Rights Principles 1997* under the Aged Care Act make no mention of same-sex couples.⁵⁵ She argues that the Charter of Resident Rights contained within the *User Rights Principles 1997* should make explicit reference to GLBTI concerns.

A number of submissions note that the Council on the Ageing and the National Seniors Association have already recommended changes to the Code of Practice for Residential Aged Care to include same-sex couples:

Facilities [should] be provided for couples – including same-sex couples – requiring different levels of nursing care to enable them to remain together and care for each other in the same establishment should they so choose. Provision of this supportive care to elderly same-sex couples allows them the same dignity and respect as heterosexual couples in comparable situations.⁵⁶

Lesbian and Gay Solidarity (Melbourne) argue that outlawing discrimination on the grounds of sexuality could be a useful addition to the *Code of Ethics for the aged care industry*, which was developed in 2001.⁵⁷

14.3.2 Aged care facilities may not accept same-sex couples

Many submissions expressed great concern that aged care facilities will not accept and recognise the legitimacy of same-sex couples. As one person told the Inquiry:

I have recently started thinking about what will happen if or when one of us requires some sort of assisted accommodation or nursing home care and the prospect of that alienation in our elderly years because we will no longer be recognised as a couple is distressing to say the least.⁵⁸

The ALSO Foundation told the Inquiry that:

There is an assumption in many aged care facilities that older people have heterosexual partners or no partner at all and there is usually no precedence for same-sex couples to cohabit at such facilities. While it would be extremely traumatic for elderly GLBTI [gay, lesbian, bisexual, transgender and intersex] people to live without their long-term partners, their vulnerability at this time due to a lack of viable alternatives will often mean they will not complain about discriminatory practices.⁵⁹

Other concerns regarding access to aged care include:

- overt discrimination experienced by GLBTI people accessing aged care⁶⁰
- difficulties for same-sex couples seeking to access shared space within aged care facilities⁶¹
- no acknowledgement of a visiting partner⁶²
- no staff training to ensure recognition and respect for GLBTI residents and their relationships⁶³
- the failure of official forms (for registration etc) to recognise GLBTI relationships⁶⁴
- the invisibility of older GLBTI people⁶⁵
- potential discrimination when care is provided at home.⁶⁶

14.4 Does aged care legislation breach human rights?

The definitions of ‘partner’ and ‘close relation’ in the Aged Care Act exclude a same-sex partner. This means that the assets tests apply differently to same-sex couples than to opposite-sex couples. In many circumstances a same-sex couple will pay more for residential aged care than an opposite-sex couple in the same position.

Where the narrow definitions place same-sex couples at a financial disadvantage to opposite-sex couples in the same position, there will be a breach of article 26 of the *International Covenant on Civil and Political Rights*, which prohibits discrimination in any law.

Chapter 3 on Human Rights Protections explains Australia’s human rights obligations to same-sex couples in more detail.

14.5 How should aged care legislation be amended to avoid future breaches?

It is clear that same-sex couples are treated differently to opposite-sex couples when determining the fees for residential aged care. And in most cases, same-sex couples seeking to access aged care will pay higher fees than opposite-sex couples.

The Inquiry recommends amending aged care legislation to avoid future discrimination against same-sex couples seeking to access aged care.

The following sections summarise the causes of the problem and how to fix them.

14.5.1 Narrow definitions are the main cause of discrimination

Same-sex couples are generally worse off than opposite-sex couples because the definitions in aged care legislation fail to include same-sex couples and families.

The primary cause of the discrimination lies in the definition of ‘member of a couple’ in the *Aged Care Act 1997* (Cth). That definition does not consider a same-sex partner to be a member of a couple.

The definition of ‘close relation’ is also a problem because it does not appear to include the children of a lesbian co-mother or gay co-father.

The definition of ‘dependent child’ may include the child of a lesbian co-mother and gay co-father as well as the child of the birth parents. But in the absence of parenting presumptions or adoption, the lesbian co-mother or gay co-father may need to get a parenting order to prove the relationship. This can be expensive and complicated.

14.5.2 The solution is to amend the definitions and clearly recognise both same-sex parents

Since the main problem with the Aged Care Act is the narrow scope of legislative definitions, the solution is to amend those definitions so they are inclusive, rather than exclusive, of same-sex couples and families.

Chapter 4 on Recognising Relationships presents two alternative approaches to amending federal law to remove discrimination against same-sex couples.

The Inquiry’s preferred approach for bringing equality to *same-sex couples* is to:

- retain the current terminology used in federal legislation (for example retain the term ‘member of a couple’ in the Aged Care Act)
- redefine the terms in the legislation to include same-sex couples (for example, redefine ‘member of a couple’ to include a person in a ‘de facto relationship’)
- insert a new definition of ‘de facto relationship’ which includes same-sex couples.

Chapter 5 on Recognising Children sets out how to better protect the rights of both the *children of same-sex couples* and the parents of those children.

The Inquiry recommends that the federal government implement parenting presumptions in favour of a lesbian co-mother of a child conceived through assisted reproductive technology (ART). This would mean that a lesbian co-mother of an ART child would automatically be a ‘close relation’ of the child (in the same way as the father in an opposite-sex couple would be a ‘close relation’).

Chapter 5 also suggests that it should be easier for a lesbian co-mother or gay co-father to adopt a child. Again, if this occurred then they would also be assumed as parents under the legislation and the child would automatically qualify as a 'close relation' or 'dependent child'.

Finally, Chapter 5 suggests that federal legislation should clearly recognise the status of a person who has a parenting order from the Family Court of Australia. This would mean that the child of a gay co-father or lesbian co-mother with parenting orders would more clearly qualify as a 'dependent child' under the Aged Care Act.

The following list sets out the definitions which would need to be amended according to these suggested approaches.

The Inquiry notes that if the government were to adopt the alternative approach set out in Chapter 4 on Recognising Relationships then different amendments may be required.

14.5.3 A list of legislation to be amended

The Inquiry recommends amendments to the following legislation discussed in this chapter:

Aged Care Act 1997 (Cth)

'close relation' (s 44.11(1) – no need to amend if a lesbian co-mother and gay co-father and their children may be recognised through reformed parenting presumptions or adoption laws)

'de facto relationship' (insert new definition)

'dependent child' (s 44.11(2) – amend to clarify the role of a parenting order; otherwise no need to amend if the child of a lesbian co-mother or gay co-father may also be recognised through reformed parenting presumptions or adoption laws)

'member of a couple' (amend s 44.11(1) to replace 'marriage-like relationship' with 'de facto relationship')

'partner' (s 44.11(1) – no need to amend if 'member of a couple' is amended)

'young person' (s 44.11(3) – no need to amend)

Endnotes

- 1 Australian Government, Department of Health and Ageing, *5 Steps to Entry into Residential Aged Care*, June 2006, p26, http://www.health.gov.au/internet/wcms/publishing.nsf/Content/ageing-rescare-resentry_a.htm-copy2, viewed 14 March 2007.
- 2 Australian Government, Department of Health and Ageing, Aged Care Australia, *Help with aged care homes*, updated 03 August 2006, <http://www.agedcareaustralia.gov.au/internet/agedcare/publishing.nsf/Content/Accommodation+payments#PaymentAssessed>, viewed 5 April 2007.
- 3 *Aged Care Act 1997* (Cth), s 44.10(3).
- 4 Relevant assets include accounts held with banks, building societies, credit unions, bonds, shares, superannuation assets from which lump sums can be drawn, real estate, businesses, farms and surrender value of life insurance policies: *Residential Care Subsidy Principles 1997*, s 21.15. The *Residential Care Subsidy Principles 1997* were made under the *Aged Care Act 1997* (Cth), s 96(1).
- 5 'Partner' and 'member of a couple' include a person who lives with another person 'in a marriage-like relationship, although not legally married to the other person': *Aged Care Act 1997* (Cth), ss 44.11(1), 44.10(2)(a).
- 6 *Aged Care Act 1997* (Cth), s 44.10(2)(a).
- 7 *Aged Care Act 1997* (Cth), s 44.10(2)(c).
- 8 *Aged Care Act 1997* (Cth), s 44.10(2)(b).
- 9 *Aged Care Act 1997* (Cth), s 44.11(1).
- 10 *Aged Care Act 1997* (Cth), s 44.11(1).
- 11 *Commonwealth of Australia v HREOC and Muller* (1998) EOC 92–931.
- 12 *Aged Care Act 1997* (Cth), s 44.10(2)(b).
- 13 *Aged Care Act 1997* (Cth), s 44.10(2)(b). See also Australian Government, Department of Health and Ageing, *The Residential Care Manual*, April 2005, para 8.3.2.5, <http://www6.health.gov.au/internet/wcms/publishing.nsf/Content/ageing-manuals-rcm-rcmindx1.htm~ageing-manuals-rcm-rcmindx109.htm>, viewed 14 March 2007. Under the *Aged Care Act 1997* (Cth), sch 1, an income support payment includes a social security benefit, job search allowance, a social security pension; a youth training allowance under the *Social Security Act 1991* (Cth), s 23(1); a service pension or income support supplement under the *Veterans' Entitlement Act 1986* (Cth). A social security pension includes a carer payment: *Social Security Act 1991* (Cth), s 23(1).
- 14 See Chapter 9 on Social Security.
- 15 *Aged Care Act 1997* (Cth), s 44.10(2)(a).
- 16 *Aged Care Act 1997* (Cth), s 44.11(2)(a).
- 17 *Aged Care Act 1997* (Cth), s 44.11(2)(b).
- 18 *Aged Care Act 1997* (Cth), s 44.11(3).
- 19 For an explanation of these terms see the Glossary of Terms.
- 20 *Aged Care Act 1997* (Cth), s 44.11(1). The *Residential Care Subsidy Principles 1997* do not specify any other category of person as a 'close relation': *Residential Care Subsidy Principles 1997* (Cth).
- 21 *Aged Care Act 1997* (Cth), s 44.10(2)(c).
- 22 Assets include (but are not limited to): accounts, interest-bearing deposits, fixed deposits, bonds, debentures, shares, investments in property trusts, real estate, businesses, farms, loans, motor vehicles, boats, caravans, surrender value of life insurance policies, investment collections, superannuation from which lump sums can be withdrawn, household contents and personal effects. Australian Government Department of Health and Ageing, *The Residential Care Manual*, April 2005, para 6.3.5.1.5 at: <http://www6.health.gov.au/internet/wcms/publishing.nsf/Content/ageing-manuals-rcm-rcmindx1.htm~ageing-manuals-rcm-rcmindx107.htm>, viewed 21 March 2007.
- 23 *Aged Care Act 1997* (Cth), s 44.10(3).

- 24 Australian Government, Department of Health and Ageing, *The Residential Care Manual*, April 2005, para 8.3.1.1, <http://www6.health.gov.au/internet/wcms/publishing.nsf/Content/ageing-manuals-rcm-rcmindx1.htm~ageing-manuals-rcm-rcmindx109.htm>, viewed 14 March 2006. This does not apply to a person who accesses care on an 'extra services' basis. Instead they may be asked to pay an accommodation bond, regardless of the level of care they require. An 'extra services' place provides a significantly higher standard of accommodation and services to residents, but not a higher standard of care, para 14.2, <http://www6.health.gov.au/internet/wcms/publishing.nsf/Content/ageing-manuals-rcm-rcmindx1.htm~ageing-manuals-rcm-rcmindx115.htm>, viewed 14 March 2007.
- 25 See ACON, Submission 281; Australian Coalition for Equality, Submission 228; Tasmanian Gay and Lesbian Rights Group, Submission 233; ALSO Foundation, Submission 307b; Action Reform Change Queensland and Queensland AIDS Council, Submission 270a; Gay and Lesbian Rights Lobby (NSW), Submission 333.
- 26 Australian Government, Department of Health and Ageing, *The accommodation charge*, September 2006 – March 2007, <http://www.health.gov.au/internet/wcms/publishing.nsf/Content/ageing-publicat-qcoa-15info.htm>, viewed 5 April 2007.
- 27 Australian Government, Department of Health and Ageing, *The accommodation charge*, September 2006 – March 2007, <http://www.health.gov.au/internet/wcms/publishing.nsf/Content/ageing-publicat-qcoa-15info.htm>, viewed 5 April 2007.
- 28 Australian Government, Department of Health and Ageing, *The Residential Care Manual*, April 2005, para 8.3.3.2, <http://www6.health.gov.au/internet/wcms/publishing.nsf/Content/ageing-manuals-rcm-rcmindx1.htm~ageing-manuals-rcm-rcmindx109.htm>, viewed 19 February 2006; Australian Government, Department of Health and Ageing, *The accommodation charge*, September 2006 – March 2007, <http://www.health.gov.au/internet/wcms/publishing.nsf/Content/ageing-publicat-qcoa-15info.htm>, viewed 14 March 2007. The Secretary to the Department of Health and Ageing may make a financial hardship determination in favour of someone if the Secretary is satisfied that paying the maximum accommodation charge would cause the care recipient financial hardship: *Aged Care Act 1997* (Cth), s 44.31(1).
- 29 *Aged Care Act 1997* (Cth), s 44.10(2).
- 30 *Aged Care Act 1997* (Cth), s 44.10(3).
- 31 Australian Government, Department of Health and Ageing, *5 Steps to Entry into Residential Aged Care*, p5, http://www.health.gov.au/internet/wcms/publishing.nsf/Content/ageing-rescare-resentry_a.htm-copy2, viewed 14 March 2007. See also Australian Government, Department of Health and Ageing, *The Residential Care Manual*, April 2005, para 14.2, <http://www6.health.gov.au/internet/wcms/publishing.nsf/Content/ageing-manuals-rcm-rcmindx1.htm~ageing-manuals-rcm-rcmindx109.htm>, viewed 14 March 2007.
- 32 The facility must use income from the loan to improve its building standards, and the quality and range of its aged care services. Australian Government, Department of Health and Ageing, *5 Steps to Entry into Residential Aged Care*, p23, [http://www.health.gov.au/internet/wcms/publishing.nsf/Content/5D86020729E69196CA256F1900106532/\\$File/06working.pdf](http://www.health.gov.au/internet/wcms/publishing.nsf/Content/5D86020729E69196CA256F1900106532/$File/06working.pdf), viewed 14 March 2007.
- 33 The maximum retention amount is currently \$273.50 per month: Australian Government, Department of Health and Ageing, *Accommodation bonds*, September 2006 – March 2007, <http://www.health.gov.au/internet/wcms/publishing.nsf/content/ageing-publicat-qcoa-16info.htm>, viewed 14 March 2007.
- 34 The maximum permissible interest rate which can be charged by the Australian Government Department of Health and Ageing is announced quarterly. From January 1 2007 to 31 March 2007 the maximum permissible interest rate was 10.37%: Australian Government, Department of Health and Ageing, *Maximum Bond Interest Rate*, <http://www.aodgp.gov.au/internet/wcms/publishing.nsf/Content/ageing-finance-gic.htm-copy2>, viewed 14 March 2007.
- 35 Australian Government, Department of Health and Ageing, *The Residential Care Manual*, April 2005, para 8.3.1.2, <http://www6.health.gov.au/internet/wcms/publishing.nsf/Content/ageing-manuals-rcm-rcmindx1.htm~ageing-manuals-rcm-rcmindx109.htm>, viewed 14 March 2007.
- 36 Australian Government, Department of Health and Ageing, *Accommodation bonds*, September 2006 – March 2007, <http://www.health.gov.au/internet/wcms/publishing.nsf/content/ageing-publicat-qcoa-16info.htm>, viewed 5 April 2007.

- 37 *Aged Care Act 1997* (Cth), s 44.10(3).
- 38 Australian Government Department of Health and Ageing, *The Residential Care Manual*, April 2005, para 8.3.1.2. <http://www6.health.gov.au/internet/wcms/publishing.nsf/Content/ageing-manuals-rcm-rcmindx1.htm~ageing-manuals-rcm-rcmindx109.htm>, viewed 20 March 2007.
- 39 Jim Woulfe, Opening Statement, Sydney Hearing, 26 July 2006. See also Jim Woulfe, Submission 50; Jennifer Cahalan, Submission 239.
- 40 Rod Swift, Perth Hearing, 9 August 2006. See also Jennifer Cahalan, Submission 239.
- 41 Australian Government, Department of Health and Ageing, *Accommodation bonds*, September 2006 – March 2007, <http://www.health.gov.au/internet/wcms/publishing.nsf/content/ageing-publicat-qcoa-16info.htm>, viewed 5 April 2007.
- 42 Australian Government, Department of Health and Ageing, *The Residential Care Manual*, April 2005, para 8.3.3.2, <http://www6.health.gov.au/internet/wcms/publishing.nsf/Content/ageing-manuals-rcm-rcmindx1.htm~ageing-manuals-rcm-rcmindx109.htm>, viewed 19 February 2006.
- 43 Australian Government, Department of Health and Ageing, *The Residential Care Manual*, April 2005, para 7.3.2.2, <http://www6.health.gov.au/internet/wcms/publishing.nsf/Content/ageing-manuals-rcm-rcmindx1.htm~ageing-manuals-rcm-rcmindx108.htm>, viewed 9 March 2007.
- 44 Australian Government, Department of Health and Ageing, *5 Steps to Entry into Residential Aged Care*, p18, http://www.health.gov.au/internet/wcms/publishing.nsf/Content/ageing-rescare-reentry_a.htm-copy2, viewed 14 March 2007.
- 45 Australian Government, Department of Health and Ageing, *Residential care fees for full pensioners*, <http://www.health.gov.au/internet/wcms/Publishing.nsf/Content/ageing-publicat-qcoa-12info.htm>, viewed 5 April 2007.
- 46 Australian Government, Department of Health and Ageing, *Residential care fees for self funded retirees*, <http://www.health.gov.au/internet/wcms/publishing.nsf/Content/ageing-publicat-qcoa-14info.htm>, viewed 5 April 2007.
- 47 Australian Government, Department of Health and Ageing, *5 Steps to Entry into Residential Aged Care*, p18, http://www.health.gov.au/internet/wcms/publishing.nsf/Content/ageing-rescare-reentry_a.htm-copy2, viewed 4 October 2006.
- 48 Australian Government, Department of Health and Ageing, *The Residential Care Manual*, April 2005, para 7.3.4.2, <http://www6.health.gov.au/internet/wcms/publishing.nsf/Content/ageing-manuals-rcm-rcmindx1.htm~ageing-manuals-rcm-rcmindx108.htm>, viewed 14 March 2007.
- 49 *Aged Care Act 1997* (Cth), s 44.24, adopting the definition in *Social Security Act* (Cth) s 1064-E2.
- 50 A single person under the income test must pay \$0.25 for every dollar he or she earns over the single person income threshold (\$64). Additional income-tested income fees are capped at \$52.56. A person who is a member of a couple pays \$0.25 for every dollar of a couple's combined non-pension income over the income test free area for a member of a couple (\$114 per week), divided by two. Australian Government, Department of Health and Ageing, *The Residential Care Manual*, April 2005, para 7.3.4.1, <http://www6.health.gov.au/internet/wcms/publishing.nsf/Content/ageing-manuals-rcm-rcmindx1.htm~ageing-manuals-rcm-rcmindx108.htm>, viewed 5 April 2007.
- 51 See also ACON, Submission 281; Australian Medical Association, Submission 314; Dr Jo Harrison, Submission 183.
- 52 ACON, Submission 281; ALSO Foundation, Submission 307b.
- 53 Australian Medical Association, Submission 314.
- 54 Gay and Lesbian Rights Lobby (NSW), Submission 333.
- 55 Dr Jo Harrison, Adelaide Hearing, 28 August 2006.
- 56 Australian Coalition for Equality, Submission 228. See also Tasmanian Gay and Lesbian Rights Group, Submission 233.
- 57 Lesbian and Gay Solidarity (Melbourne), Submission 89a.
- 58 Name Withheld, Submission 138.
- 59 ALSO Foundation, Submission 307b. See also, Blue Mountains Forum, 16 November 2006; Dr Jo Harrison, Adelaide Hearing, 28 August 2006; Murray Bridge Forum, 29 August 2006.
- 60 Dr Jo Harrison, Adelaide Hearing, 28 August 2006.

- 61 Gay and Lesbian Rights Lobby (NSW), Submission 333.
- 62 Gay and Lesbian Rights Lobby (NSW), Submission 333; Dr Jo Harrison, Adelaide Hearing, 28 August 2006.
- 63 Gay and Lesbian Rights Lobby (NSW), Submission 333; Lesbian and Gay Solidarity, Submission 89a.
- 64 Gay and Lesbian Rights Lobby (NSW), Submission 333.
- 65 Dr Jo Harrison, Adelaide Hearing, 28 August 2006; J Harrison, 'Pink lavender and grey: Gay, lesbian, bisexual, transgender and intersex ageing in Australian gerontology', *Gay and Lesbian Issues and Psychology Review*, vol 1, no 1, 2005, p12.
- 66 Lesbian and Gay Solidarity (Melbourne), Submission 89a.