



CHAPTER 15: *Migration*

CHAPTER CONTENTS

15.1	What is this chapter about?	344
15.2	How can the same-sex partner of an Australian citizen or resident get a visa?	344
15.2.1	A same-sex partner is not a 'spouse'	345
15.2.2	A same-sex partner may be in an 'interdependent relationship'	345
15.2.3	The only visas available to same-sex partners are Interdependency visas	345
15.2.4	Interdependency visas may cost more than Spouse visas	345
15.2.5	It can be difficult to prove entitlement to an Interdependency visa	346
15.2.6	Interdependency visas may impact on job opportunities	346
15.3	How can a same-sex couple migrate to Australia together?	347
15.3.1	A same-sex partner is not a 'member of the family unit'	347
15.3.2	A same-sex partner is not a 'member of the immediate family'	348
15.3.3	The only visa available to a non-Australian same-sex couple is the 457 visa	348
15.3.4	A same-sex couple will usually have to make separate visa applications	348
15.3.5	Separate applications cost more and can have long term financial impact	348
15.4	Do migration laws breach human rights?	349
15.5	How should federal migration laws be amended to avoid future breaches?	349
15.5.1	Narrow definitions are the main cause of discrimination	349
15.5.2	The solution is to amend the definitions	350
15.5.3	A list of legislation to be amended	350
	Endnotes	351

15.1 What is this chapter about?

This chapter discusses the impact of migration laws on same-sex couples.

Many same-sex couples who appeared at the Inquiry's community forums talked about the problems they face in getting visas. They highlighted the limited options available to a same-sex couple wanting to migrate to Australia as a couple. They talked about the additional expense and disruption to their lives in proving their entitlement to a visa. And they talked about the indignity of being treated differently to genuine opposite-sex couples.

There is only one category of visa available to the same-sex partner of an Australian permanent resident or citizen – the Interdependency visa category. The Interdependency visa is similar to the Spouse visa available to an opposite-sex partner of an Australian resident or citizen but it may be more expensive to apply for the Interdependency visa in some circumstances.

There is also only one category of visa which allows a same-sex partner of a primary visa applicant to accompany them to migrate to Australia – the Temporary Business (Long Stay) 457 visa (the 457 visa). This compares to the myriad of visas available to an opposite-sex couple wishing to migrate to Australia together. The result is that each member of a same-sex couple may have to qualify separately for a visa. If one is not successful, the couple will be separated across the world.

Same-sex couples are denied access to the range of visas available to opposite-sex couples because a same-sex partner does not qualify as a 'spouse' and is therefore not a 'member of the family unit' in the Migration Regulations 1994 (Cth) (Migration Regulations).

This chapter briefly sets out what visas are available to a same-sex couple and the impact that limited visa options may have on them.

Specifically, this chapter address the following questions:

- How can the same-sex partner of an Australian citizen or resident get a visa?
- How can a same-sex couple migrate to Australia together?
- Do migration laws breach human rights?
- How should federal migration laws be amended to avoid future breaches?

15.2 How can the same-sex partner of an Australian citizen or resident get a visa?

Until 1991, the only visa available to an Australian's partner was the Spouse visa (or Prospective Marriage visa) and a same-sex partner could not qualify.

When the Interdependency category of visa was introduced in 1991, a same-sex partner of an Australian citizen or permanent resident could apply to stay in, or come to, Australia.¹

However, the Inquiry has been told that it may be harder for a same-sex partner to qualify for an Interdependency visa than it is for an opposite-sex partner to qualify for a Spouse visa. It

may also be more expensive to obtain that visa. Further, because the visa marks the partner as a same-sex partner, there may be a higher risk of discrimination in the workplace.

15.2.1 A same-sex partner is not a 'spouse'

Under the Migration Regulations a person can only be a 'spouse' if he or she is married or in a 'de facto relationship' with a person of the opposite-sex.² The *Migration Act 1958* (Cth) does not recognise a marriage between same-sex partners which took place outside Australia.³

Thus, a same-sex partner can never be a 'spouse'.

15.2.2 A same-sex partner may be in an 'interdependent relationship'

The Migration Regulations define an 'interdependent relationship' to be a relationship between any two people where:

- there is a 'mutual commitment to a shared life';
- the relationship is 'genuine and continuing'; and
- they live together.⁴

Thus, a same-sex partner can be a member of an 'interdependent relationship'.

15.2.3 The only visas available to same-sex partners are Interdependency visas

Since a same-sex partner cannot be a 'spouse', he or she will not qualify for a Spouse visa or a Prospective Marriage visa.⁵

However, a same-sex partner can qualify for a permanent Interdependency visa if he or she is in an 'interdependent relationship'.⁶

The Department of Immigration and Citizenship (DIAC) affirms that:

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. Under Australian law, only opposite-sex relationships can constitute a spouse relationship (ie. de jure (married) or de facto).⁷

15.2.4 Interdependency visas may cost more than Spouse visas

The same-sex partner of an Australian resident or citizen may pay more than double the amount than an opposite-sex partner to apply for a visa in Australia.

The cost of applying for a Spouse visa in Australia is as follows:

- \$650 for those who hold a valid Prospective Marriage visa and have married their partner

● Same-Sex: Same Entitlements

- \$820 for those who entered Australia on a Prospective Marriage visa, have married their partner, but do not hold a current visa
- \$1990 for those who hold any other visa.⁸

An Interdependency visa costs \$1990 regardless.⁹

As the same-sex partner of an Australian resident or citizen can only apply for an Interdependency visa, he or she will always pay the highest application fee.

15.2.5 It can be difficult to prove entitlement to an Interdependency visa

There are substantial hurdles to proving both a genuine opposite-sex 'de facto relationship' and a same-sex 'interdependent relationship'. However, several people suggested to the Inquiry that it may be harder for a same-sex couple to prove an interdependent relationship.¹⁰

Anthony Pannuzzo and Daniel Milano write in their submission:

We started collecting information from the beginning, information that would prove our interdependency. We collected letters and cards addressed to us both (including envelopes as the immigration department loves to see post marks – legal proof), we collected legal documents, bank statements, leases, wills drawn up in each others names. What we would have given for a marriage licence. Or any form of federally recognised paperwork stating we were a couple who shared each others lives.¹¹

A woman at the Inquiry's Canberra forum said the following:

Proving interdependency for immigration is the same process for both straight and gay couples but the nature of the evidence and the interviews is very different. We accumulated 15 A4 binders of proof over 2 years. Straight couples provided their marriage certificate and a couple of bills. But they didn't need to provide the same level of evidence. The immigration interview was much more intrusive and detailed. For example, 'what colour is your partner's toothbrush?', rather than 'how was your wedding?'. So there can be differential treatment even when the wording of the law is the same.¹²

15.2.6 Interdependency visas may impact on job opportunities

Some submissions to the Inquiry raised issues of workplace discrimination as a possible outcome of Interdependency visas for same-sex partners. The Anti-Discrimination Commission Queensland comments:

As evidence of their eligibility to work legally in Australia, persons with a Subclass 310 [Interdependency] visa are required to produce the visa when applying for employment. Committee members suggest that some Australian employers are familiar with the Subclass 310 visa category and aware that it is issued to same-sex couples. They expressed concern that gay and lesbian persons who are temporary residents under this visa category are particularly vulnerable to employment discrimination.

This approach to partner migration is differential and places individuals in the precarious position of having their sexual preference flagged each time they apply for paid work in Australia. Committee members further noted that this approach to partner migration does not encourage diversity in Australia's workforce and shows no regard for privacy.¹³

One person talked about her experience as follows:

There's this thing with getting your Visa when you immigrate to Australia: If you're in a same sex couple under the Partner Migration Program, you have to nominate that you are an 'Interdependent' rather than married or de facto which heterosexual couples qualify for. This means that when you get your Visa you will have 'Interdependent' or number 814, permanently on your Visa showing that you belong to a particular sub-class and in this case "same sex."

Now I am usually asked to show my Visa when I apply for jobs. How do I know that people aren't saying: 'Oh, sub-class 814, that means she's gay! We don't want that kind working here!' I mean, what difference does it make to my professional qualifications what gender my partner is? That's a really bad kind of discrimination and it can have disastrous financial consequences.¹⁴

The Anti-Discrimination Commission Queensland recommends that the Spouse visa category (for opposite-sex couples) and the Interdependency visa category be merged into a single Partner/Domestic Relationship visa category.¹⁵

15.3 How can a same-sex couple migrate to Australia together?

Usually, when one member of a family obtains a work visa, business visa, student visa, migrant visa, graduate visa, temporary resident visa or other visa, the remainder of the family can accompany that person for the duration of the primary visa.

However, there is only one visa available to same-sex couples who wish to accompany each other to Australia: the Temporary Business (Long Stay) 457 visa (the 457 visa).

This is because a same-sex partner does not qualify as a 'spouse' and therefore cannot be a 'member of the family unit'. And most visas only allow people who are a 'member of the family unit' to accompany the primary visa holder.¹⁶

There may also be some visas available to a 'member of the immediate family'.¹⁷ This definition also excludes a same-sex partner because it relies on the definition of a 'spouse'.

Elizabeth Franklin and Vivianne Arnold articulate the impact of restricted visa categories as follows:

Same-sex couples suffer discrimination in immigration provisions that affect[s] their ability to live and work together in Australia. The ability for a couple to live and work together in the same country is a crucial financial and work-related entitlement and benefit, and a basic human rights issue.¹⁸

15.3.1 A same-sex partner is not a 'member of the family unit'

A 'member of the family unit' includes a person's 'spouse' but does not include a person in an 'interdependent relationship'.¹⁹ As discussed above, a same-sex partner does not qualify as a person's 'spouse' under the Migration Regulations. So a same-sex partner cannot be a 'member of the family unit'.

15.3.2 A same-sex partner is not a 'member of the immediate family'

The definition of a 'member of the immediate family' also includes a 'spouse' but not a person in an 'interdependent relationship'.²⁰ Thus a same-sex partner cannot be a 'member of the immediate family'.

15.3.3 The only visa available to a non-Australian same-sex couple is the 457 visa

On 1 July 2006, the visa rules for 457 visas were amended so that a person in an 'interdependent relationship' can accompany a person who has been granted a 457 visa.²¹ The 457 visa grants residency for between three months and four years.²²

15.3.4 A same-sex couple will usually have to make separate visa applications

If neither member of a same-sex couple is an Australian citizen or permanent resident, and one is granted a temporary visa other than a 457 visa, the other will have to apply for a visa on his or her own merits if he or she wishes to accompany a same-sex partner to Australia.

15.3.5 Separate applications cost more and can have long term financial impact

The fact that a migrant same-sex couple cannot generally make a joint visa application can put that couple at a considerable financial disadvantage. It can also create a great deal of unnecessary stress in terms of life planning.

Some of those disadvantages are as follows.

Firstly, in a joint application only the primary applicant must meet all the eligibility criteria, although the partner (or secondary applicant) must still meet health and character tests.

Secondly, it will cost more in both money and time to make two applications rather than one.

Thirdly, it is unlikely that both members of a couple will get the same visas at the same time with the same benefits and conditions. It is also possible that the second person does not qualify for a visa at all.

This may mean that one partner is left behind – either temporarily or for longer periods – and the couple must maintain two households in two countries. It may also mean that one partner has to leave Australia at different times than the other to get a visa renewed. Alternatively one partner may accompany the other on a temporary visa, like a tourist visa, and be denied the right to work during that time. An opposite-sex couple will not have to face any of these expenses or disruptions to their life.

Doug Pollard comments that if he had been able to work during the extensive period of time in which he was trying to get a visa in Australia, he might still have superannuation savings now:

When [my partner] was transferred to Australia by his company more than ten years ago, on a working visa, despite the fact that we had been together for three years, I was not allowed to come with him as his spouse.

Because we are not a young couple – I am 56 this year, my partner 53 – I had great difficulty in getting a visa in my own right, and we had to rely on a series of tourist visas, failed visa applications and appeals to stay together until he eventually gained permanent residency and I could apply as his dependent partner. Eventually we both took Australian citizenship.

For more than five years I was unable to work, and had to leave the country regularly, never knowing if I would be allowed back.

This not only imposed a great strain on our relationship, but also a considerable financial burden. It rendered me unemployable – I have only, finally, gained regular paid (part-time) employment this year, after working as an unpaid volunteer for years to re-establish my credentials.

If our relationship had been recognised at the outset, as a heterosexual marriage would have been, none of this would have happened. I might, for example, still have my own superannuation fund, instead of having to rely on my partners.²³

15.4 Do migration laws breach human rights?

Excluding a same-sex partner from the definition of ‘spouse’ in the Migration Regulations means that there are only two visa categories available to same-sex couples. Those two categories are available because of the introduction of the ‘interdependent relationship’ criteria.

While this interdependency criteria has brought improvements for same-sex couples, there are still a large range of visas denied to a same-sex partner simply because of his or her sexuality. This will breach article 26 of the *International Covenant on Civil and Political Rights* (ICCPR), which protects non-discrimination and equal treatment under the law. Chapter 3 on Human Rights Protections explains these principles more fully.

15.5 How should federal migration laws be amended to avoid future breaches?

Introducing a definition of ‘interdependent relationship’ to cover same-sex couples has opened up access to two discrete visa categories, but it has not brought equality to same-sex couples.

15.5.1 Narrow definitions are the main cause of discrimination

The main problem is that the definition of ‘spouse’ in the Migration Regulations excludes a same-sex partner. This is because it relies on a definition of ‘de facto relationship’ which can only include people of the opposite-sex. The problem is compounded because the definition of a ‘member of the family unit’ and ‘member of the immediate family’ relies on the definition of a ‘spouse’.

15.5.2 The solution is to amend the definitions

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 laws (for example retain the term 'spouse' – which includes a 'de facto relationship' – in the Migration Regulations)
- redefine the terms in the laws to include same-sex couples (for example, redefine 'de facto relationship' to include a same-sex relationship)

15.5.3 A list of legislation to be amended

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

Migration Regulations 1994 (Cth)

'member of the family unit' (reg 1.12 – no need to amend if 'spouse' is amended)

'member of the immediate family' (reg 1.12AA – no need to amend if 'spouse' is amended)

'spouse' (reg 1.15A(2) – amend criteria of 'de facto relationship' to include same-sex couples)

Endnotes

- 1 Migration Regulations (Amendment) 1991 No. 60 (Cth), regs 17, 19, 20, 28, 31. See also S. Warne, 'Moving in the Right Direction: Migration for same-sex couples', *Alternative Law Journal*, vol 19, no 5, Oct 1994, p219. The permanent interdependency visas are now called the Partner (Residence)(Class BS), Subclass 814 (Interdependency) visa and the Partner (Migrant)(Class BC), Subclass 110 (Interdependency) visa: Migration Regulations 1994 (Cth), sch 1. The temporary interdependency visas are now called the Partner (Temporary)(Class UK), Subclass 826 (Interdependency) visa and the Partner (Provisional)(Class UF), Subclass 310 (Interdependency) visa: Migration Regulations 1994 (Cth), sch 1.
The interdependency visa also applies to a person in an interdependent relationship with an 'eligible' New Zealand citizen. See Australian Government, Department of Immigration and Citizenship, *Partner Migration*, <http://www.immi.gov.au/allforms/booklets/1127.pdf>, p 34, viewed 4 April 2007.
- 2 Migration Regulations 1994 (Cth), reg 1.15A.
- 3 *Migration Act 1958* (Cth), s 12.
- 4 Migration Regulations 1994 (Cth), reg 1.09A(2).
- 5 For Spouse visas, see Partner (Residence)(Class BS), Subclass 801 (Spouse) and Partner (Migrant)(Class BC), Subclass 100 (Spouse): Migration Regulations 1994 (Cth), sch 1. For Prospective Marriage visas, see Prospective Marriage (Temporary)(Class TO) visa: Migration Regulations 1994 (Cth), sch 1.
- 6 See Partner (Residence)(Class BS), Subclass 814 (Interdependency), and Partner (Migrant)(Class BC), Subclass 110 (Interdependency): Migration Regulations 1994 (Cth), sch 1.
- 7 Australian Government, Department of Immigration and Citizenship, *Partner Migration*, <http://www.immi.gov.au/allforms/booklets/1127.pdf>, viewed 5 March 2007.
- 8 Australian Government, Department of Immigration and Citizenship, *Partner Visa Charges*, <http://www.immi.gov.au/allforms/990i/partner.htm>, viewed 19 January 2007.
- 9 Australian Government, Department of Immigration and Citizenship, *Partner Visa Charges*, <http://www.immi.gov.au/allforms/990i/partner.htm>, viewed 19 January 2007.
- 10 See for example, Elizabeth Franklin and Vivianne Arnold, Submission 181; Doug Pollard, Melbourne Hearing, 27 September 2006; Name Withheld, Submission 48; Anthony Pannuzzo and Daniel Milano, Submission 72.
- 11 Anthony Pannuzzo and Daniel Milano, Submission 72.
- 12 Canberra Public Forum, 19 October 2006.
- 13 Anti-Discrimination Commission Queensland, Submission 264. 'Subclass 310 visa' is the temporary Interdependency visa applied for when outside Australia: Australian Government, Department of Immigration and Citizenship, *Interdependency Visa: Offshore Temporary and Permanent (Subclasses 310 and 110)*, <http://www.immi.gov.au/migrants/partners/interdependency/110-310/how-the-visa-works.htm>, viewed 21 March 2007.
- 14 Action Reform Change Queensland and Queensland AIDS Council, Submission 270.
- 15 Anti-Discrimination Commission Queensland, Submission 264.
- 16 For example, the following are some of the visas allowing a 'member of the family unit' to accompany a primary visa holder: Business Skills visas (subclasses 132, 845, 846, 890, 891, 892, 893, 160-165); Parent visas (subclasses 118, 173, 884); Skilled Migrant visas (subclasses 134, 105, 106, 138, 139, 136); Cultural/Social visas (subclasses 411, 416, 420, 421, 423, 428); Domestic Worker visas (subclasses 426, 427); Educational visas (415, 418, 419, 442); Emergency visas (subclasses 302, 303); Graduate visas (subclasses 497); Prospective Marriage visa (subclass 300); Student visas (subclasses 570-576, 580): Migration Regulations 1994 (Cth), sch 1.
- 17 For example, the Resolution of Status (Temporary) (Class UH), Subclass 450 (Resolution of Status – Family Member (Temporary)) visa may be available to a 'member of the immediate family': Migration Regulations 1994 (Cth), sch 1.
- 18 Vivianne Arnold and Elizabeth Franklin, Submission 181.
- 19 Migration Regulations 1994 (Cth), reg 1.12.
- 20 Migration Regulations 1994 (Cth), reg 1.12AA.

● Same-Sex: Same Entitlements

- 21 Temporary Business Entry (Class UC) Subclass 457 (Business (Long Stay)), Migration Regulations 1994 (Cth), sch 1. See also Australian Government, Department of Immigration and Citizenship, *Legislation Change – 1 July 2006: Amendments to Subclass 457 – Temporary Business (Long Stay) visa*, http://www.immi.gov.au/legislation/amendments/lc01062006_4.htm, viewed 17 January 2007.
- 22 Australian Government, Department of Immigration and Citizenship, *Temporary Business (Long Stay) – Standard Business Sponsorship (Subclass 457)*, <http://www.immi.gov.au/skilled/skilled-workers/sbs/index.htm>, viewed 8 March 2007.
- 23 Doug Pollard, Submission 1.