



CHAPTER 6:

Employment

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6.1 What is this chapter about?

This chapter focuses on discrimination against same-sex couples and their families in the context of conditions of employment.

Employment is fundamental to the lives of Australian families. For many individuals, work is their major activity outside the home, and ensures their family's financial security.

However, workers in same-sex couples do not always enjoy the same employment conditions as workers in opposite-sex couples. In particular, a worker in a same-sex couple may not be guaranteed the following work rights:

- **leave entitlements** including carer's leave to look after a same-sex partner, compassionate leave to grieve a same-sex partner and parental leave to care for a newborn child
- **travel entitlements** allowing an employee to travel with his or her same-sex partner
- **employment allowances** to help support an employee's same-sex partner and children
- **workers' compensation** for an injured or deceased employee's same-sex partner
- **superannuation entitlements** for an employee's same-sex partner.

This chapter explores how employment laws discriminate against workers in same-sex couples in the first three of these areas. Workers' compensation is discussed in Chapter 7 and superannuation is discussed in Chapter 13.

This chapter also discusses how discrimination against same-sex couples in employment law breaches Australia's human rights obligations. The chapter ends by making recommendations as to how to avoid future discrimination and human rights breaches.

Specifically, this chapter addresses the following questions:

- How are employment conditions established for Australian workers?
- Can same-sex and opposite-sex couples access the same leave entitlements?
- Do federal government employees in same-sex and opposite-sex couples enjoy the same work conditions?
- Are same-sex couples protected from general discrimination in the workplace?
- Does employment legislation breach human rights?
- What must change to ensure equal access to work-related benefits for same-sex couples?

6.2 How are employment conditions established for Australian workers?

The rights enjoyed by a worker in a same-sex couple will depend on where that person works and how their work conditions are established.

Work conditions may be established by any one or more of the following mechanisms:

- an award
- a collective agreement
- an Australian Workplace Agreement (AWA)
- a common law contract
- a basic employment contract.¹

The new federal WorkChoices scheme (introduced by amendment to the *Workplace Relations Act 1996* (Cth)) protects five minimum conditions of employment.² Most Australian workers are covered by WorkChoices.³ But some workers remain within state industrial relations systems and in some areas of the public service there are specifically legislated work conditions.⁴

The five minimum conditions under WorkChoices are set out in the Australian Fair Pay and Conditions Standard (the WorkChoices Standard).⁵ Three of those minimum conditions guarantee leave entitlements:

- four weeks paid annual leave⁶
- ten days paid personal or carer's leave per year⁷
- 52 weeks unpaid parental leave.⁸

Carer's leave can be paid or unpaid leave. It is taken by an employee to provide care or support to a member of his or her 'immediate family' or household because of personal illness or injury, or an unexpected emergency.⁹

Compassionate leave is paid leave. It is taken by an employee:

- to spend time with a member of his or her 'immediate family' or household who has a personal illness or injury that poses a serious threat to life
- after the death of a member of his or her 'immediate family' or household.¹⁰

Parental leave includes maternity leave, paternity leave and adoption leave. It is taken by an employee who has just had a baby or adopted a baby.

The following sections explain where there is discrimination against workers in same-sex families regarding carer's leave, compassionate leave and parental leave.

6.3 Can same-sex and opposite-sex couples access the same leave entitlements?

The WorkChoices Standard does not protect the leave entitlements of an employee in a same-sex relationship in the same way as it protects an employee in an opposite-sex relationship.

However, awards and agreements can provide greater entitlements than those protected by WorkChoices. So the leave rights of some workers in same-sex families may be protected under individual awards and agreements.

For those workers still covered by state industrial laws, in most cases, same-sex and opposite-sex families enjoy the same rights.

The following sections explain why there are these differences in protections for same-sex couples.

6.3.1 WorkChoices does not protect carer's and compassionate leave for same-sex families

Carer's leave and compassionate leave are both protected under the WorkChoices Standard so that an employee can take leave to care or grieve for 'immediate family' or a member of the employee's household.¹¹

(a) 'Immediate family' excludes a same-sex family

The definition of 'immediate family' under the WorkChoices legislation includes a spouse, as well as a child, parent, grandparent, grandchild or sibling of the employee, or of the spouse of the employee.¹²

As discussed below, the definition of 'spouse' and 'child' does not incorporate a same-sex partner or lesbian or gay co-parent. Therefore, the concept of 'immediate family' does not incorporate a same-sex family.

(b) 'Spouse' and 'de facto spouse' exclude a same-sex partner

The definition of 'spouse' includes a 'de facto spouse' (as well as a 'former spouse' and 'former de facto spouse').¹³

The definition of 'de facto spouse' is explicitly restricted to a person of the opposite sex.¹⁴ This means that a same-sex partner cannot be a 'de facto spouse' and therefore will not qualify as a 'spouse'. Since a same-sex partner cannot be a 'spouse', he or she is not a member of an employee's 'immediate family'.

(c) 'Child' excludes the child of a lesbian co-mother or gay co-father

The WorkChoices legislation defines 'child' to include an adopted child, a step-child, an ex-nuptial child and an adult child.¹⁵ The legislation does not define who is a 'parent'.

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).¹⁶

Chapter 5 also explains that definitions of 'child' like that in the WorkChoices legislation will generally *include* the child of a birth mother or birth father but *exclude* the child of a lesbian co-mother or gay co-father(s) (in the absence of adoption).¹⁷

This means that the child of a lesbian co-mother or gay co-father will not be included in the definition of 'immediate family'.

(d) *A same-sex partner may be a member of an employee's household*

A 'member of the employee's household' is not defined anywhere in the WorkChoices legislation.

Submissions from the Australian Chamber of Commerce and Industry and a law academic, Anna Chapman, indicate that for the purposes of determining leave, this phrase covers any person ordinarily living with the employee, including a same-sex partner.¹⁸

Since a same-sex partner is not considered 'immediate family', the WorkChoices Standard will only protect the right to carer's or compassionate leave if the same-sex partners are living together. Opposite-sex couples are not restricted in this way.

The Inner City Legal Centre summarised the problems caused by requiring cohabitation as follows:

... there will be circumstances where the child in need of care is not a member of the household of the co-mother. For example, the co-mother may be separated from the birth mother and the child lives with the birth mother, or the child is an adult and lives in a separate household.¹⁹

ACON talked about the stress of proving cohabitation before being able to take carer's leave:

It should also be noted that having to prove to an employer that you live in the same household as your partner, rather than automatically receiving leave as the person's spouse, causes additional stress and burden at an already stressful time.²⁰

(e) *An employee in a same-sex relationship has limited rights to carer's and compassionate leave*

In summary, the definitions of 'immediate family', 'spouse' and 'child' discriminate against same-sex families in the context of leave entitlements as follows.

An employee in a same-sex couple is only guaranteed leave to care for a partner if he or she is living with that partner. An employee in an opposite-sex couple has an automatic right to take leave to care for his or her partner.

A gay or lesbian employee is not guaranteed leave to care for a former same-sex partner.

An employee in a same-sex couple is not guaranteed leave to look after his or her partner's immediate family. For example, there is no guaranteed leave to care for a same-sex partner's sick mother, unless the mother is living with the couple. For example, the Inquiry heard that:

When my partner's mother passed away, after both of us caring for her in her final days, I was only offered annual leave to arrange her funeral and for the period after her funeral. Her brother unexpectedly passed away three weeks after this, I was only given half a day to attend the funeral, I couldn't even take an annual leave day.²¹

An employee in an opposite-sex relationship has an automatic right to take leave to care for his or her partner's immediate family.

A woman in a lesbian couple will only be entitled to carer's leave or compassionate leave regarding her birth child. The lesbian co-mother will not be entitled to leave.

A man in a gay couple will only be entitled to carer's leave or compassionate leave regarding his birth child. The gay co-father will not be entitled to leave.

Even where a member of a same-sex couple has an entitlement to carer's leave, he or she may not know of his or her entitlements or may be unwilling to insist on the entitlement being respected.

Sue McNamara and Leanne Nearmy described the impact of carer's leave restrictions as follows:

[O]ne of us had to have surgery in 2004, and the other needed to take some time off work to provide post-operative care. This leave could not be taken as family carer leave, as would be the case for an opposite sex partner.²²

Another couple told the Inquiry:

My (same-sex) partner suffers a long term debilitating illness and as I am the sole wage earner in our household/family it is very difficult for me to take time off to care for her. On those occasions when I do need to stay home to care for her, to take her to doctor appointments, or to the hospital, I have to use my annual leave as she is not legally recognized as my partner, therefore I am not entitled to carers leave. Our family is at a financial disadvantage because of this. In addition, using my annual leave in this way means I am left with less days off to spend with my family on happier occasions – like holidays, which leaves me more exhausted than I would like.²³

6.3.2 WorkChoices does not protect parental leave for both same-sex parents

Parental leave includes maternity leave, paternity leave and adoptive leave.

The purpose of parental leave is to provide time to both parents to care for a newborn, or newly-adopted, child.

As discussed in Chapter 5 on Recognising Children, very few gay and lesbian couples can successfully adopt a child. So the question of adoptive leave is unlikely to arise for same-sex couples.²⁴ If a same-sex couple does successfully adopt, there is no discrimination in the application of adoptive leave.

However, ever-increasingly, lesbian and gay couples are having a child through assisted reproductive technology (an ART child).

(a) A lesbian co-mother is not entitled to parental leave

Where a lesbian couple has a child, the birth mother will be entitled to maternity leave. The only leave theoretically available to the lesbian co-mother will be 'paternity' leave.²⁵

However, paternity leave is only available to a 'male employee' who is the 'spouse' of a woman giving birth.²⁶ A female partner of the birth mother is neither male, nor a 'spouse' under the legislation.²⁷

(b) Neither member of a gay couple is entitled to paternity leave

As discussed in Chapter 5, a gay couple may use a surrogate birth mother or enter an arrangement with a female friend to have a child through ART. If this occurs, neither of the men will be the 'spouse' of the woman giving birth so they will not be guaranteed parental leave.

(c) Parental leave guarantees do not allow flexible parenting arrangements for same-sex couples

Several submissions observed that parental leave provisions do not provide sufficiently flexible caring possibilities for the diverse range of same-sex families.²⁸

A gay father of a child, Anthony Brien, notes that current parental leave provisions do not adequately meet the needs of same-sex co-parenting arrangements:

Co-parenting is another method and this introduces all sorts of complications when a child may have a biological mother and father as well as a non-biological mother and father if each of the biological parents are same sex partnered. The child could live part time in each of two households and there are four parents. So how does the law deal with things such as who is entitled to parental leave (can it be shared amongst all 4 parents if they are all interested in having a parenting role in the child's life?).²⁹

The ACTU argues that it is not always the biological father who is the support person for a birth mother:

...that may be the mother's same sex partner but it might be grandma... [The purpose of parental leave should focus on] who is providing the care to infants and the support to a mother at the time of the birth of a child.³⁰

The ACTU also suggests that:

The purpose of parental leave is to ensure adequate care and support for mothers and their new-borns at and following the birth of a child, and to provide time off from work to ensure adequate care of infants and toddlers...

A more inclusive regime could be developed which allocates leave to a primary and secondary caregiver, which would give families more flexibility, regardless of the nature of the relationship between the child and the care-givers.³¹

(d) Denying parental leave to same-sex parents can have a serious impact on the family

As mentioned above, neither the lesbian co-mother nor the gay co-father(s) of a child will be guaranteed access to parental leave upon the birth of a child.³²

This may result in a lesbian co-mother or gay co-father(s) either resigning or giving up the opportunity of providing primary care for a young child.³³

One lesbian parent, Janet Jukes, told the Inquiry about her decision to resign:

Nine months after Hannah was born I resigned from my work to care for her full time while Marion returned to work. If we were in a heterosexual relationship I would have been entitled to take unpaid parental leave up to her first birthday under my award. In my case it was up to the discretion of my employer if they would allow unpaid leave.³⁴

6.3.3 WorkChoices non-discrimination provisions do not help same-sex families enjoy leave entitlements

As discussed above, the WorkChoices legislation discriminates against employees in same-sex relationships regarding leave entitlements.

A number of submissions to the Inquiry pointed out that this discrimination is inconsistent with the stated objectives of the WorkChoices legislation.³⁵

Those objectives include the following anti-discrimination measures:

- assisting employees to balance their work and family responsibilities effectively through the development of mutually beneficial work practices with employers³⁶
- respecting and valuing the diversity of the workforce by helping to prevent and eliminate discrimination on the basis of race, colour, sex, *sexual preference*, age, physical or mental disability, marital status, family responsibilities, pregnancy, religion, political opinion, national extraction or social origin.³⁷

The WorkChoices legislation also contains specific anti-discrimination measures which seek to eliminate discrimination in employment on the grounds of sexual orientation.³⁸

However, it seems that these provisions provide little practical protection for same-sex couples regarding workplace conditions.

6.3.4 Some state workplace laws protect leave entitlements for same-sex couples and parents

Some employees who are not covered by WorkChoices are covered by state workplace laws.

(a) *States where same-sex families do enjoy protection in leave entitlements*

Under Queensland,³⁹ South Australian,⁴⁰ and Western Australian⁴¹ workplace laws, same-sex partners receive the same leave entitlements as opposite-sex partners, including parental leave and carer's leave.

The Tasmanian *Industrial Relations Act 1984* is unclear about whether a same-sex partner or parent can access carer's leave.⁴² But same-sex parents are entitled to parental leave.⁴³

(b) *States where same-sex families do not enjoy protection in leave entitlements*

NSW industrial relations legislation does not provide for carer's leave. However, those same-sex couples covered by a NSW Award can access carer's leave.⁴⁴

Paternity leave is only available to the male partner of a woman who has given birth under NSW law.⁴⁵ The Gay and Lesbian Rights Lobby (NSW) explains that this discrimination:

...significantly limits the ability of co-parents who are covered under the Act as employees from taking on the role as primary care-giver. Lesbian co-parents are made to choose between leaving their employment to take on the primary care-giver role, or give up the opportunity all-together.⁴⁶

In the ACT, the NT and Victoria, federal industrial relations laws still apply.⁴⁷ Thus, the discrimination under WorkChoices legislation will affect employees in same-sex relationships in these states.

In addition, the ACT Attorney-General observed that under the *Parental Leave (Private Sector Employees) Act 1992* (ACT) parental leave is not available to a lesbian co-mother of an ART child.⁴⁸

However, the Equal Opportunity Commission of Victoria informed the Inquiry that access to leave is covered by the *Equal Opportunity Act 1995* (Vic).⁴⁹ This legislation and other state anti-discrimination provisions still seem to protect against discrimination contained within WorkChoices legislation.⁵⁰

6.3.5 Workplace agreements can protect leave entitlements for same-sex families

Workplace agreements include both collective agreements and individual agreements (AWAs). These agreements must contain the employment entitlements protected by the WorkChoices Standard. However, they can include conditions better than those contained in the WorkChoices Standard.

(a) *Examples of collective agreements protecting leave entitlements for same-sex families*

There are good examples of collective workplace agreements which treat same-sex and opposite-sex couples and parents in exactly the same way with regard to leave provisions. Some of the examples provided to the Inquiry include:

- Amnesty International Agreement⁵¹
- Canon Industries Agreement⁵²
- Harvest Fresh Cuts Pty Ltd Certified Agreement 2001. This agreement explicitly defines 'spouse' as including a spouse of the same sex.⁵³
- University of Western Australia Agreement. This agreement explicitly says that 'partner' means same-sex partner and refers to 'parental' leave rather than 'maternity' leave.⁵⁴

(b) *Not all collective agreements protect leave entitlements for same-sex families*

Although some workplace agreements contain good leave provisions, there is no legislative obligation for agreements to contain provisions treating same-sex and opposite-sex couples in the same way.

As a result, collective agreements vary as to whether they give equal access to leave for same-sex couples:

Through many collective agreements the ASU [Australian Services Union] has been able to establish rights for same-sex couples under provisions such as carer's leave and parental leave. But these provisions are the exception to the rule.⁵⁵

One person in a same-sex relationship told the Inquiry about the insecurity caused by the absence of legislative guarantees:

In the workplace, we are currently not discriminated against, but that is because our respective certified agreements recognise same-sex couples in the taking of carer's and bereavement leave etc. When either one or both of us moves to a different workplace, we are not guaranteed those benefits. This puts constraints on our career and work choices.⁵⁶

(c) *Individual workplace agreements may protect same-sex couples*

The new WorkChoices system encourages the making of individual agreements between employers and employees. The government's WorkChoices website asserts that:

Bargaining at the workplace level is particularly suited to tailoring working arrangements in ways that assist employees to balance work and family responsibilities.⁵⁷

The Australian Chamber of Commerce and Industry (ACCI) argues that although the WorkChoices Standard does not protect employees in a same-sex relationship regarding entitlements to parental leave:

...it must be remembered that an employer and an employee can agree to more generous terms than that provided for in the Standard. Therefore, it is possible for same-sex entitlements to be contained in agreements.⁵⁸

One lesbian woman explained that her employer was willing to offer full access to parental leave irrespective of whether she was the birth mother:

My employer is willing to offer me 1 week (2 days paid, 3 days paid via leave accrued) parenting leave on the arrival of our child and 51 weeks un-paid maternity leave if I am the primary carer for our child regardless of biological relationship.⁵⁹

Another lesbian co-mother explained that she was able to negotiate short parental leave but not long parental leave:

In addition as I am organising time off from 2 part-time positions to be with Sarah and our babies, I have become aware of problems with the agreement in one workplace which only allows Parental Leave for a male spouse as defined by the terms of the agreement. Apart from the fact that it is only one week, I have been able to access this leave because I have an excellent manager who is willing to give it to me. The lack of access to longer paid leave and lack of acknowledgment of my role as Sarah's partner in parenting of the babies adds another financial burden to our new family.⁶⁰

ACCI also argues sexuality is a private and individual matter, which is better suited to an individual bargaining process, rather than a collective bargaining process:

The role of statutory individual bargaining agreements (AWAs) is important on a contentious issue such as the recognition of same sex relationships. Given that these are often very private and individual matters, and given that collective agreements can only be made by a majority vote of employees, then in many workplaces a majority may not support recognition of same sex relationships for employment purposes.⁶¹

(d) *Individual workplace agreements may place too much negotiating pressure on same-sex couples*

The Australian Services Union argues that individual agreement-making for a person in a same-sex relationship is an onerous task.⁶² This may be because of a reluctance to disclose sexuality in an environment where there is no legislated right to equal treatment, and where there may be some discriminatory attitudes.

One person told the Inquiry about her concerns about being sufficiently confident to negotiate for equal parental leave:

[The employment contract at my workplace] gives us an entitlement to ‘non-birth parent leave’ as opposed to ‘paternity leave’. There is no unnecessary gender-specific language, like father, husband or wife... these entitlements are important and we’re grateful for them... I was also grateful for the people who came before me to negotiate that agreement. What happens when we have to negotiate individual agreements? Do we feel confident and safe to negotiate ‘non-birth parent leave’ and similar on our own?⁶³

6.3.6 Some same-sex couples do not access leave because they do not want to ‘come out’ in the workplace

Even where state laws, awards or collective agreements allow for carer’s or parental leave, some ‘[p]eople are scared to apply for carer’s leave because they have to out themselves to their employers and to their workmates.’⁶⁴

Elis Hughes explains this fear by comparing the atmosphere in her workplace with the work environment in her partner’s workplace:

I am lucky to work in a progressive workplace which offers both maternity leave and non birth parent leave. When the time comes for us to have our child, I will be able to take leave at that time. My partner, on the other hand, works for a small business owned by a family with conservative values. She expects not to be granted parental leave and is in fact nervous about the impact of coming out to her employers under these circumstances. While anti-discrimination laws prevent her from being sacked directly for her sexuality, it is now easy for her employer to find another reason to sack her if they don’t agree with her values or if they don’t wish to grant her parental leave. If our relationship was recognised formally by the government then we would have more protection in these circumstances.⁶⁵

But even more important than the entitlements is the tone or the culture that they set for my workplace. They make our family visible and equal. This meant that I knew before I even sat at my desk on my first day at work that it was going to be ok to be open and proud about my family at work. I put Kristen’s photo on my desk and my boss smiled and said, ‘Is that your family?’ I didn’t have to make that coming out decision.⁶⁶

The fear of discrimination in the workplace can have a variety of consequences, including:

- not requesting leave at all
- taking annual leave instead of carer’s leave
- taking sick leave instead of carer’s leave.

The Australian Services Union described the problem as follows:

A large number of same-sex couples who don’t want to declare their sexuality may well feign illness rather than say that they’re caring for someone, which is in fact quite common amongst other workers. Mothers with young children will often feign personal illness rather than say it’s their children for fear of discrimination on the grounds of their parenting responsibilities.⁶⁷

Employees wishing to take annual leave or join the Christmas roster, or indeed deal with school holidays in an environment where due to the number of employees, rosters, or allotment of holiday ballots take place, are often reluctant to step forward and identify that they have parental obligations and need to participate in school holiday scheduling.⁶⁸

The Australian Services Union also told the Inquiry that an unwillingness to disclose sexuality affects access to compassionate leave:

Bereavement leave also delivers the same challenges for disclosure in the workplace without any form of instrumental protection. Attempting to attain bereavement for the loss of your partner's parent becomes extremely difficult if not impossible for you, [i]f you have not disclosed your status in the workplace, [or] if your status is not embraced and accepted in the workplace. Then you are less likely to ask for such a right in a regime of the quick dismissal.⁶⁹

6.3.7 Legislative protection gives confidence to employees in same-sex couples

Several submissions argued that legislative protection of the rights of same-sex couples is fundamental to an employee's willingness to disclose his or her relationship and claim his or her entitlements to adequate leave from employment:

If there was a legislative benchmark or right given and that was reinforced with the strength of a collectively bargained agreement then an employee should feel no fear in coming forward and be able to engage in balancing their work and family life.⁷⁰

There is some concern that even though the entitlement to take leave exists [as a member of a household], 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.⁷¹

Recognition of rights for same-sex couples is limited in our experience. It is limited for two reasons: one that individuals are too afraid to raise any such issues that are affecting them directly and second, that if and when their issues are raised there is not the law, regulation, policy or understanding to support their claims.⁷²

6.4 Do federal government employees in same-sex and opposite-sex couples enjoy the same work conditions?

Many federal employees work under collective or individual agreements. Some of those agreements will give equal access to employment conditions for opposite-sex and same-sex couples, others will not.

However, there is federal legislation determining specific work conditions for particular groups of federal employees.

This section discusses:

- a range of federal government agency **collective workplace agreements**
- **travel entitlements** for members of the federal Parliament, public office holders, judicial and statutory office holders
- employment benefits for members of the **Australian Defence Force (ADF)**.

6.4.1 Some federal government workplace agreements do not discriminate against same-sex employees

The employment conditions of most federal government employees are determined by comprehensive certified agreements rather than by legislation.⁷³ These agreements can include couple and family-related employment benefits and entitlements, including travel allowances, housing allowances, loans, health insurance and education.

(a) *Examples of federal government collective agreements protecting the rights of employees in same-sex couples*

Various federal government departments informed the Inquiry that their collective agreements do not discriminate against employees in same-sex relationships, including:

- AusAID Collective Agreement 2006–2009⁷⁴
- Department of Health and Ageing, People Leadership and Performance Improvement 2004–2007.⁷⁵

The Community and Public Sector Union (CPSU) also gave the Inquiry examples of federal agreements that include same-sex partners in entitlements, including the Centrelink Certified Agreement and the Northern Land Council Certified Agreement.⁷⁶

(b) *Concerns about using collective agreements to protect equality for same-sex couples*

The Inquiry heard concerns about the impact of the federal agreement-making processes on same-sex couples in the federal public service.

The CPSU notes that the Department of Employment and Workplace Relations (DEWR) produces Policy Parameters and Associated Guidelines for agreement-making. These guidelines prohibit the use of discriminatory terms, including ‘sexual preference’ in agreements. The CPSU recommend that a new parameter be developed to provide:

...a clear and unequivocal statement that public sector employers, regardless of the employment instrument, must not allow for any form of financial or employment-related discrimination on the basis of race, colour, gender, sexual preference, age, disability, marital status, family responsibilities, pregnancy, religion, political opinion, national extraction, membership or non membership of a trade union or social origin.⁷⁷

Furthermore, the CPSU expressed concern that the expression of work conditions is starting to move from collective agreements to government department policy documents. This may have a detrimental impact on same-sex couples:

In conducting this sample audit, it became apparent that a number of public sector agencies have transferred entitlements out of collective / certified agreements and into agency policy documents. For example the Department of Foreign Affairs and Trade (DFAT) have transferred all relocation expense entitlements in the DFAT Human Resource Manual (HRM), and the definition of family member for personal / carer’s leave is also within the HRM... As reported above, this transfer out of the agreement does not allow for public access or scrutiny of these entitlements and could lead to changes in employee entitlements which could establish discriminatory provisions.⁷⁸

6.4.2 Same-sex partners of members of the federal Parliament can only access some travel entitlements

The travel entitlements of members of the federal Parliament are determined by a combination of the conditions set out in *Remuneration Tribunal Determination 2006/18: Members of Parliament – Entitlements* (Determination 2006/18)⁷⁹ and the *Parliamentary Entitlements Act 1990* (Cth) (Parliamentary Entitlements Act).

Determination 2006/18 generally treats same-sex and opposite-sex partners in the same way. But the Parliamentary Entitlements Act does not.

(a) *Same-sex partners can access most travel entitlements under Determination 2006/18*

Same-sex partners are eligible for most (but not all) of the travel entitlements set out in Determination 2006/18. This is because the provisions for travel entitlements allow a 'spouse' or 'nominee' to accompany the member of the federal Parliament.

(i) *A same-sex partner cannot be a 'spouse'*

Determination 2006/18 defines 'spouse' so that it only includes the opposite-sex married or de facto partner of the member of the federal Parliament.⁸⁰

(ii) *A same-sex partner can be a 'nominee'*

A 'nominee' is defined as 'a person nominated by the senator or member and approved at the discretion of the Special Minister of State.'⁸¹ This definition could include a same-sex partner, but the same-sex partner must be approved by the Special Minister (unlike an opposite-sex de facto partner).

(iii) *A 'nominee' is entitled to a range of travel entitlements*

A 'spouse' or 'nominee' is entitled to:

- travel equivalent to the value of nine business class return trips to Canberra from the principal place of residence⁸²
- travel equivalent to the value of three business class return interstate trips per year⁸³
- travel in order to attend an official government, parliamentary or vice-regal function as an invitee⁸⁴
- car transport for specific purposes⁸⁵
- members entitled to costs of overseas travel for study will be covered for the costs of an accompanying spouse.⁸⁶ This entitlement may be available to a nominee at the discretion of the Special Minister of State.⁸⁷

(iv) *Some travel entitlements are only available to a 'spouse'*

There are some travel entitlements under Determination 2006/18 which are not available to a 'nominee', but are available to a 'spouse'. These entitlements will not be available to a

same-sex partner. For example, senators and members who are entitled to reimbursement for the cost of a hire car and charter aircraft may be accompanied by a 'spouse', but not a 'nominee'.⁸⁸

(v) The 'nominee' category may not be appropriate recognition of a same-sex partner

Former Senator Brian Greig drew the Inquiry's attention to discrimination he experienced when his partner became a member of his staff.

His partner's travel entitlements were withdrawn as a staff member could not also be a 'nominee'. This rule did not apply to opposite-sex partners who were also staff members.

The Remuneration Tribunal found in Senator Greig's favour and travel entitlements were restored. Senator Greig argues that the 'nominee' category is an inappropriate mechanism for recognising a same-sex partner. He argues that all members and senators should be able to register a 'partner'.⁸⁹

(b) Same-sex partners cannot access travel entitlements in some other Remuneration Tribunal determinations

There are some travel entitlements for partners which are set out in specific determinations made by the Remuneration Tribunal. At least one of those determinations does not extend the benefits to same-sex partners. That determination provides that a Minister or office holder accompanied by a spouse can access an additional \$10 per night travelling allowance.⁹⁰

(c) Same-sex partners cannot access travel entitlements under the Parliamentary Entitlements Act

The Parliamentary Entitlements Act sets out additional entitlements available to members of federal Parliament and their partners. However, a partner will only have access to those entitlements if he or she qualifies as a 'spouse' under the legislation and the definition of 'spouse' does not allow for a same-sex partner.

(i) A same-sex partner cannot be a 'spouse'

The Parliamentary Entitlements Act defines a 'spouse' as including 'a person who is living with the member as the spouse of the member on a genuine domestic basis although not legally married to the member'.⁹¹

As discussed in Chapter 4 on Recognising Relationships, the use of the word 'spouse' within this definition will exclude a same-sex partner.⁹²

(ii) A same-sex partner cannot access travel benefits available to a 'spouse'

A same-sex partner will be excluded from the following range of travel entitlements available to a 'spouse':

- for overseas travel, a member may downgrade the class of travel and use the difference in cost to offset the fare of an accompanying spouse⁹³
- the cost of travel for a spouse accompanying a Senior Officer travelling on official business either overseas or within Australia⁹⁴

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- the cost of travel for a spouse accompanying a member travelling overseas if the Prime Minister approves⁹⁵
- the cost of travel for a spouse accompanying an Opposition Office Holder or Presiding Officer travelling in Australia⁹⁶
- the cost of charter transport for a spouse accompanying the leader of a minority party.⁹⁷

(d) Same-sex partners do not qualify for a Life Gold Pass

The *Members of Parliament (Life Gold Pass) Act 2002* (Cth) provides a specified number of free domestic air trips per year for:

- a sitting or former member of the federal Parliament
- his or her spouses
- his or her widow or widower.⁹⁸

The legislation defines 'spouse' as 'the person's legally married husband or legally married wife'.⁹⁹ The legislation defines a 'widow' and 'widower' to be a surviving 'spouse'.¹⁰⁰ Thus, this legislation excludes a partner in an opposite-sex de facto couple as well as a same-sex couple.

6.4.3 Same-sex partners of judicial and statutory office holders can only access some travel entitlements

The *Judicial and Statutory Officers (Remuneration and Allowances) Act 1984* (Cth) gives judicial or statutory office holders the right to claim additional travel allowance when accompanied by a spouse.¹⁰¹ There is no definition of spouse in the legislation. As explained in Chapter 4 on Recognising Relationships, it is extremely unlikely that a same-sex partner will qualify as a spouse in the absence of a definition. Thus, a judicial or statutory office holder cannot claim a spouse travel allowance when accompanied by a same-sex partner.

However, there are also travel entitlements provided by Determination 2004/03 of the Remuneration Tribunal. That Determination provides travel entitlements regarding a 'partner'. The definition of 'partner' includes same-sex and opposite-sex couples alike.

Thus, judicial and statutory office holders in same-sex couples will receive the following entitlements under the Determination:

- An office holder may travel with his or her partner for purposes relating to official business at Commonwealth expense (within Australia or overseas).¹⁰²
- Where the Commonwealth meets the travel costs of the office holder's partner the difference between the cost of a single and double room is also paid.¹⁰³

6.4.4 Same-sex partners of public office holders can access all travel entitlements

The travel entitlements for the partner of a public officer holder (including a range of senior jobs in Commonwealth agencies) and principal executive officers are set out in determinations of the Remuneration Tribunal.¹⁰⁴

The most recent determination gives travel entitlements to the ‘spouse’ and ‘partner’ of an office holder.¹⁰⁵ A ‘partner’ is defined as ‘any person who lives with the office holder on a genuine domestic basis as the partner of the office holder’.¹⁰⁶ This definition will include a same-sex and opposite-sex partner on the same basis.

Consequently, same-sex partners of public office holders receive equivalent travel entitlements to those available to opposite-sex partners.

6.4.5 Same-sex partners of Department of Foreign Affairs and Trade employees can access all travel entitlements

An Administrative Circular issued by the Department of Foreign Affairs states that a de facto partner can accompany an officer on an overseas posting at official expense. The circular is quite explicit about including same-sex couples:

[A] de facto relationship may be deemed to exist where two people regardless of their gender, not being legally married, have a mutual commitment to living together on a genuine domestic basis, to the exclusion of all others.¹⁰⁷

A child normally living with the couple will also be entitled to accompany them if less than 18 years old.¹⁰⁸

6.4.6 Same-sex couples in the Australian Defence Force can access most work entitlements

The Secretary and the Chief of the Australian Defence Forces (ADF) can issue instructions covering the various conditions of service for ADF employees, subject to and in accordance with any directions of the Minister.¹⁰⁹

(a) ‘Spouse’ excludes a same-sex partner

The definition of dependant in the ADF Pay and Conditions Manual includes a ‘spouse’, defined as ‘a person who is married to the member in accordance with the *Marriage Act 1961*’.¹¹⁰ This definition excludes both opposite-sex de facto couples and same-sex couples, both of whom are recognised under the definition of ‘interdependent partner’.

(b) ‘Interdependent partner’ includes a same-sex partner

In 2005, the ADF amended its instructions to include an ‘interdependent partner’ as a person in a recognised relationship with an ADF employee.¹¹¹ The definition of ‘interdependent partner’ includes:

a person who, regardless of gender, is living in a common household with the member in a bona fide, domestic, interdependent partnership, although not legally married to the member...¹¹²

Thus, same-sex and opposite-sex partners are both categorised as an ‘interdependent partner’.¹¹³

The ADF instructions set out strict criteria for recognising an interdependent partnership, including:

- the member and his or her partner must have lived together for at least 90 consecutive days and maintained a common household¹¹⁴
- the couple must complete an application form and a statutory declaration¹¹⁵
- the couple must annex four items of documentary evidence, drawn from a compulsory list.¹¹⁶

Professor Jenni Millbank observes that these requirements contrast with all other federal laws which recognise de facto relationships without any formal step of registering the relationship with authorities.¹¹⁷

The Department of Defence informed the Inquiry that the interdependency category provides greater flexibility and gives more scope for an inclusive approach to relationships than the definitions of 'spouse' or 'de facto partner' used in other federal laws.¹¹⁸ However, it is possible for the ADF to retain discretion, whilst treating opposite-sex de facto and same-sex couples in the same manner as married couples.

(c) *An 'interdependent partner' is entitled to a range of benefits*

The ADF Pay and Conditions Manual covers a range of employment benefits for an ADF employee and his or her interdependent partner, including:

- relocation allowances¹¹⁹
- travel costs associated with relocation¹²⁰
- temporary accommodation allowances¹²¹
- entitlement to a service residence¹²²
- leave entitlements including compassionate, parental and carer's leave¹²³
- education and training benefits.¹²⁴

Same-sex and opposite-sex de facto couples have equal access to these entitlements because of the definition of 'interdependent partner' in the ADF instructions.

The ADF Pay and Conditions Manual also provides that both members of a couple can take parental leave at the birth of a child irrespective of the gender of the parents.¹²⁵ Thus, the lesbian co-mother and gay co-father of a child would be entitled to leave if in a relationship with the birth parent.

(d) *Some benefits are not available to same-sex partners*

Under the *Defence Force (Home Loans Assistance) Act 1990* (Cth), ADF employees are entitled to low-interest home loans if they own an interest in a house that:

- is more than a half-interest; or
- when added to the interest of a 'spouse' or 'child', is more than a half-interest.¹²⁶

The definition of ‘spouse’ does not include a same-sex partner.¹²⁷ So an ADF member who buys a house as a joint tenant with a same-sex partner is not eligible for the loan. To qualify for the entitlement, the ADF member would have to:

- buy the house in his or her own name; or
- buy more than half the house as a tenant-in-common with his or her same-sex partner.

An ADF member in an opposite-sex couple can buy a house jointly with a partner and still qualify for the subsidised loan.

The definition of ‘child’ includes ‘a child, step-child or legally adopted child of the person.’¹²⁸ As discussed in Chapter 5 on Recognising Children, definitions of ‘child’ such as this will generally *include* the child of a birth mother or birth father but *exclude* the child of a lesbian co-mother or gay co-father.

Some provisions in the Act also rely on a definition of ‘family member’, which excludes a same-sex partner and his or her child.¹²⁹ This may have a negative impact on how the loan scheme applies in relation to same-sex families.¹³⁰

Further, if the ADF member dies, the subsidised loan remains available to his or her surviving spouse.¹³¹ This benefit is not available to a surviving same-sex partner because the same-sex partner of an ADF member is not included in the definition of ‘widow’ or ‘widower’.¹³²

The ADF informed the Inquiry that the legislation governing this entitlement is currently under review.¹³³

6.5 Are same-sex couples protected from general discrimination in the workplace?

Many people in same-sex couples described to the Inquiry their experiences of discrimination in the workplace.¹³⁴ The Inquiry’s Terms of Reference do not extend to investigating individual cases of workplace discrimination. However, it is clear that a discriminatory workplace environment (be it actual or perceived) can have a strong impact on whether a person in a same-sex relationship is willing to assert or negotiate his or her workplace entitlements.

6.5.1 Examples of discrimination in the workplace

The Coalition of Activist Lesbians described the following example of harassment in a NSW government department:

A lesbian working in a NSW government department described to me having obscene emails sent to her, including sexualised cartoons of lesbians, pornography and at one point a sex toy was left on her desk. When she spoke with her supervisor she received more harassment and left her place of employment.¹³⁵

Graeme Moffatt told a story about a colleague who was held back from promotion because he was gay:

Another instance that really shook me and showed me how little things had changed in many ways occurred to a senior colleague of mine during my employment with one major bank. My colleague, [name withheld], as an indication of the regard he was held in for his professional abilities... was the relationship manager to the bank's largest single customer group. He was taken aside and advised that rumours had circulated in regards to his sexuality. He was further advised that if any basis was found for the rumours, it would affect his possibility for promotion. In light of this, he decided to leave and was hired by an international bank. Many people would ask why he did not take legal action or lodge a complaint, but I would imagine that the financial services industry is much like any other close knit community - any hint of non conformity is quickly spread by people seeking to advance themselves at the expense of others trying to achieve their goals through legitimate hard work.¹³⁶

Several people described their concern about 'coming out' in the workplace because of the possibility of discrimination:

Some workplaces ask for your 'next of kin contact' and then ask 'relationship to you'. I am forced to either 1. come out or 2. put my partner as next of kin and lie about our relationship or 3. not put my partner as next of kin. I placed my partner's Aunty as a next of kin contact so she can contact my partner in an emergency. This means I do not have to come out and risk my employment. However, I would prefer if they simply did not ask about your relationship to your next of kin.¹³⁷

Ultimately, the pressure of hiding my relationship became unbearable, and I resigned from the school. This had a huge financial impact on me. I lost wages and benefits, and for a while I was in a very precarious financial position until I found a position where I could be open about who I am.¹³⁸

A lesbian woman who was employed as a teacher in a private school told the Inquiry of the long term damage discrimination has had on her career:

Some of the other teachers were aware that I am a lesbian. One of my superiors advised me that if any of the pupils found out I am a lesbian, I would be sacked. I knew that the school had the power to do so, and it made me feel very uncomfortable and insecure. I had to be very careful about everything I said, making sure I never used the word 'we' when describing any activity or event in my life. I was forced to be constantly on my guard, in case I inadvertently implied that I had a partner or that I was in a same-sex relationship.

This experience of discrimination continues to affect me today. Although I relate very well with young people, I have not worked with children since that time. This has restricted my employment options and stopped me from pursuing work in areas that I love. This discrimination also affects the community, because young people miss out on the positive qualities and input that I have to offer. Young people also get inaccurate and destructive messages when it is implied that all people are heterosexual, or when those who are not are silenced, as I was.¹³⁹

6.5.2 Inadequate protection against discrimination in federal law

Several submissions to the Inquiry express concern about the quality of legal protection against discrimination of people in same-sex couples.

The Equal Opportunity Commission of Victoria notes that most states and territories provide some degree of protection from discrimination on the grounds of sexuality.¹⁴⁰ However, protection at the federal level is limited:

...at the Federal level there are almost no effective avenues of redress for people who experience such discrimination. The *Human Rights and Equal Opportunity Commission Act 1986* provides an extremely limited avenue for redress for discrimination on the ground of 'sexual preference', but only in relation to Commonwealth bodies and agencies and in employment. Complainants wishing to pursue redress through this avenue may access HREOC's complaint-handling service only, as HREOC has no power to make enforceable determinations in respect of complaints under the Act and complainants have no access to a formal determination of an entitlement to remedy by a Court. Where complaints cannot be resolved by conciliation, the only option available is for HREOC to report its findings and recommendations to the Commonwealth Attorney-General who is required to table the report in the Federal Parliament.¹⁴¹

The Australian Chamber of Commerce and Industry argues that employers are subject to a complex array of overlapping anti-discrimination laws, including federal and state anti-discrimination laws. They argue that employers face difficulty in:

...trying to comply with all of the following, sometimes incompatible and overlapping laws: Commonwealth minimum employment entitlements (under legislation such as WR Act, or awards), Commonwealth anti-discrimination legislation (such as the SDA Act or HREOC Act), State/Territory anti-discrimination laws, State and Territory industrial awards and State/Territory minimum employment entitlements.¹⁴²

The Inquiry also heard arguments both for and against retention of the exemptions in relation to employment discrimination for religious organisations.¹⁴³

Some submissions to the Inquiry made general comments about the absence of federal anti-discrimination laws protecting against discrimination on the basis of sexual orientation.¹⁴⁴ Such legislation would protect gay and lesbian employees against the discrimination described above. It would also require amendment of employment-related laws to remove discrimination and may assist gay and lesbian employees to assert their rights in the workplace.

6.6 Does employment legislation breach human rights?

This chapter identifies a number of workplace laws which fail to protect the rights of workers in same-sex couples in the same way as they protect the rights of workers in opposite-sex couples. It also identifies areas where the best interests of the child of a same-sex couple are not protected in the same way as the child of an opposite-sex couple.

The Inquiry's main finding is that the definitions in federal employment legislation regarding couples and children cause a breach of the right to equal protection of the law without discrimination (*International Covenant on Civil and Political Rights*, article 26).

This discrimination leads to further breaches of Australia's obligations under:

- *International Covenant on Civil and Political Rights* (ICCPR) – articles 2(1), 2(3) (right to a remedy), 23(1) (protection of families).
- *Discrimination (Employment and Occupation) Convention 1958* (ILO 111) – articles 2, 3(b)-(c) (equal opportunity in the workplace).
- *Convention on the Rights of the Child* (CRC) – articles 2, 3(1) (best interests of the child), 18 (common responsibilities of, and assistance to, parents).

- *International Covenant on Economic Social and Cultural Rights* (ICESCR) – articles 2(2), 7 (just and favourable work conditions), 10 (protection of the family).

These principles are discussed in more detail in Chapter 3 on Human Rights Protections.

6.6.1 Employment legislation breaches the right to non-discrimination

The Inquiry finds that the following legislation breaches the rights to non-discrimination set out in the ICCPR (article 26), ILO 111 (articles 2 and 3) and ICESCR (articles 7, 2(2)):

- *Workplace Relations Act 1996* (Cth) – same-sex couples are not guaranteed the same personal and parental leave as opposite-sex couples.
- *Parliamentary Entitlements Act 1990* (Cth) – members of the federal Parliament in same-sex couples are not guaranteed the same travel entitlements as opposite-sex couples.
- *Members of Parliament (Life Gold Pass) Act 2002* (Cth) – travel entitlements are only granted to the married spouse of sitting and former members of federal Parliament and same-sex couples cannot marry.
- *Defence Force (Home Loans Assistance) Act 1990* (Cth) – same-sex couples cannot access low-interest home loans available to opposite-sex couples.

6.6.2 Discrimination in parental leave entitlements breaches the rights of children and families

The *Workplace Relations Act 1996* (Cth) does not guarantee parental leave to the lesbian or gay co-parents of a newborn child. This means that the child may only have the benefit of one carer in the weeks and months after birth.

This discrimination against the lesbian co-mother and gay co-father in the area of parental leave results in breaches of the CRC for the following reasons:

- The child of a same-sex couple cannot enjoy the same level of parental care as the child of an opposite-sex couple – this amounts to *discrimination* against the child on the basis of the status of his or her parents (CRC, article 2(2))
- The child's *best interests* are not a primary consideration – if the child's best interests were considered, both parents would be entitled to leave (CRC, articles 3(1), 2(1))
- The parental leave provisions do not *recognise and support the common responsibilities* of *both* same-sex parents to fulfil child-rearing responsibilities (CRC, articles 18, 2(1)).

Discrimination in parental leave entitlements also breaches those articles of the ICCPR and ICESCR which require Australia to provide non-discriminatory protection and assistance to the family (ICCPR, articles 23(1), 2(1); ICESCR, articles 10, 2(2)).

6.7 What must change to ensure equal access to work-related benefits for same-sex couples?

This chapter describes a range of workplace legislation which discriminates against same-sex couples.

The Inquiry recommends amending the legislation to avoid future breaches of the human rights of people in same-sex couples.

The following sections summarise where the problems lie and how to fix them.

6.7.1 Narrow definitions are the main cause of discrimination

Most same-sex couples and parents in Australia are not guaranteed the same carer's and compassionate leave as opposite-sex couples because of narrow definitions of 'spouse' and 'child' in the WorkChoices legislation.

Neither a lesbian co-mother nor a gay co-father of a child is guaranteed parental leave under WorkChoices because of the definition of 'paternity leave'.

Federal members of Parliament, statutory office holders and judges in same-sex couples only sometimes get the same travel entitlements as their opposite-sex counterparts. Again, the root cause of the problem is a definition of 'spouse' which includes opposite-sex de facto partners but not same-sex partners.

ADF personnel in same-sex couples mostly enjoy the same work benefits because the ADF introduced the concept of 'interdependent partners' which applies to both opposite-sex and same-sex couples. However, there are still some entitlements which are only available to a 'spouse' and that definition excludes a same-sex partner.

6.7.2 The solution is to amend the definitions and recognise both same-sex parents of a child

Since the main problem 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 'spouse' in the WorkChoices legislation)
- redefine the terms in the legislation to include same-sex couples (for example, redefine 'spouse' to include a 'de facto partner')
- insert new definitions of 'de facto relationship' and 'de facto partner' which include same-sex couples.

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

Amongst other things, Chapter 5 recommends that the federal government implement parenting presumptions in favour of a lesbian co-mother of a child conceived through assisted reproductive technology (ART child). This would mean that an ART child born to a lesbian couple would automatically be the 'child' of both members of the couple (in the same way as an ART child is automatically the 'child' of both members of an opposite-sex couple).

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, then different amendments would be required.

6.7.3 A list of federal legislation to be amended

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

Defence Act 1903 (Cth)

'child' (no need to insert definition if the child of a lesbian co-mother or gay co-father may be recognised through reformed parenting presumptions or adoption laws)

'de facto partner' (insert new definition)

'de facto relationship' (insert new definition)

'dependant' (insert definition to include a 'de facto partner' and 'child')

'member of a family' (s 58A – no need to amend if new definition of 'dependant')

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

'child' (s 3 – no need to amend if the child of a lesbian co-mother or gay co-father may be recognised through reformed parenting presumptions, adoption laws or a new definition of 'step-child')

'de facto partner' (insert new definition)

'de facto relationship' (insert new definition)

'family member' (s 6 – no need to amend if 'spouse' is amended and a lesbian co-mother or gay co-father and their children may be recognised through reformed parenting presumptions, adoption laws or a new definition of 'step-child').

'spouse' (s 3 – amend to include a 'de facto partner')

'step-child' (insert new definition)

'widow' (s 3 – amend to remove gender specific language, otherwise no need to amend if 'spouse' is amended)

'widower' (s 3 – amend to remove gender specific language, otherwise no need to amend if 'spouse' is amended)

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

‘de facto partner’ (insert new definition)

‘de facto relationship’ (insert new definition)

‘spouse’ (insert new definition including a ‘de facto partner’)

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

‘de facto partner’ (insert new definition)

‘de facto relationship’ (insert new definition)

‘spouse’ (s 4 – amend to include a ‘de facto partner’)

‘widow’ (s 4 – amend to remove gender specific language, otherwise no need to amend if ‘spouse’ is amended)

‘widower’ (s 4 – amend to remove gender specific language, otherwise no need to amend if ‘spouse’ is amended)

Parliamentary Entitlements Act 1990 (Cth)

‘de facto partner’ (insert new definition)

‘de facto relationship’ (insert new definition)

‘spouse’ (s 3 – amend to include a ‘de facto partner’)

Workplace Relations Act 1996 (Cth)

‘child’ (s 240 – no need to amend if the child of a lesbian co-mother or gay co-father are recognised through reformed parenting presumptions, adoption laws or a new definition of ‘step-child’)

‘de facto relationship’ (insert new definition)

‘de facto spouse’ (ss 240, 263 – replace with new definition of ‘de facto partner’)

‘immediate family’ (s 240 – no need to amend if ‘spouse’ is amended and a lesbian co-mother or gay co-father and their children may be recognised through reformed parenting presumptions, adoption laws or a new definition of ‘step-child’)

‘paternity leave’ (s 282(1) – amend to remove gender specific language, otherwise no need to amend if ‘spouse’ is amended)

‘spouse’ (ss 240, 263 – amend to replace all references to ‘de facto spouse’ with ‘de facto partner’)

‘step-child’ (insert new definition)

6.7.4 Other instruments to be amended

Determination 2006/14: Members of Parliament – Travelling Allowance

- 'de facto partner' (insert new definition)
- 'de facto relationship' (insert new definition)
- 'spouse' (insert new definition including a 'de facto partner')

Determination 2006/18: Members of Parliament – Entitlements

- 'de facto partner' (insert new definition)
- 'de facto relationship' (insert new definition)
- 'spouse' (insert new definition including a 'de facto partner')

Australian Government Department of Defence, ADF Pay and Conditions Manual

- 'de facto partner' (insert new definition)
- 'de facto relationship' (insert new definition)
- 'spouse' (ch 1, pt 3, div 2, cl 1.3.77 – amend to include a 'de facto partner')

6.7.5 A list of state legislation to be amended

The Inquiry recommends amendment of the following legislation:

- *Parental Leave (Private Sector Employees) Act 1992* (ACT)
- *Industrial Relations Act 1996* (NSW).

6.7.6 Anti-discrimination legislation would help protect against general workplace discrimination

The Inquiry recommends the introduction of federal legislation to protect against discrimination in employment on the grounds of sexual orientation.

Federal anti-discrimination legislation would not only provide a legal remedy for discrimination in the workplace, it would send a strong message to the community as a whole that gay and lesbian employees are entitled to the same rights as any other employee.

Federal anti-discrimination legislation should also result in a range of consequential legislative changes – for instance equal treatment in leave entitlements under WorkChoices.

Anti-discrimination legislation may also give gay and lesbian employees greater confidence to 'come out' to their employer and assert their rights to leave to care for their same-sex partner. In this regard, such legislation may also provide confidence to gay and lesbian employees negotiating workplace agreements.

Endnotes

- 1 Community and Public Sector Union (CPSU), PSU Group, Submission 135.
- 2 *Workplace Relations Amendment (Work Choices) Act 2005* (Cth), commenced operation on 27 March 2006 (schs 1, 2, 4 (Items 3-24) and 5 of the Bill commenced 27 March 2006; the remainder had already commenced on Royal Assent on 14 December 2005).
- 3 See Australian Government, WorkChoices, *WorkChoices and who is covered, Fact Sheet 1*, <https://www.workchoices.gov.au/ourplan/publications/html/WorkChoicesandwhoiscovered.htm>, viewed 15 January 2007.
- 4 Community and Public Sector Union (CPSU), PSU Group, Submission 135. See for example *Public Service Act 1999* (Cth) and other Acts of Parliament such as those governing maternity and long service leave.
- 5 The scope of the Standard is set out in *Workplace Relations Act 1996* (Cth), s 171(2). The WorkChoices Standard also includes the minimum wage set by the Australian Fair Pay Commission and a maximum of 38 ordinary hours of work per week.
- 6 *Workplace Relations Act 1996* (Cth), s 232. Shift workers are entitled to an additional week.
- 7 *Workplace Relations Act 1996* (Cth), ss 245-249. This includes sick leave and carer's leave, with provision for an additional two days of unpaid carer's leave (ss 250-252) and two days of paid compassionate leave per occasion (ss 257-259).
- 8 *Workplace Relations Act 1996* (Cth), ss 266, 283.
- 9 *Workplace Relations Act 1996* (Cth), s 244(b).
- 10 *Workplace Relations Act 1996* (Cth), s 257(1).
- 11 *Workplace Relations Act 1996* (Cth), ss 250, 257. The *Workplace Relations Act 1996* (Cth), does not define 'member of the employee's household'.
- 12 *Workplace Relations Act 1996* (Cth), s 240.
- 13 *Workplace Relations Act 1996* (Cth), ss 240, 263. For discussion about the definition of 'spouse' see Australian Council of Trade Unions (ACTU), Submission 39.
- 14 *Workplace Relations Act 1996* (Cth), ss 240, 263: 'de facto spouse, of an employee, 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'.
- 15 *Workplace Relations Act 1996* (Cth), s 240.
- 16 For an explanation of these terms see the Glossary of Terms.
- 17 See Chapter 5 on Recognising Children.
- 18 See Australian Chamber of Commerce and Industry, Submission 301(I); Anna Chapman, Submission 229. See also A Chapman, 'Challenging the Constitution of the (White and Straight) Family in Work and Family Scholarship', *Law in Context*, vol 23, no 1, 2005, pp65-87. See further *Family Leave Test Case – November 1994* (1994) 57 IR 121; *Family Leave Test Case, Supplementary Decision* (1995) AILR 3-060.
- 19 Inner City Legal Centre, Opening Statement, Sydney Hearing, 26 July 2006.
- 20 ACON, Submission 281.
- 21 Graeme Moffatt, Submission 122. See also Law Institute of Victoria, Submission 331.
- 22 Sue McNamara and Leanne Nearmy, Submission 298.
- 23 Name Withheld, Submission 116.
- 24 The relevant provisions on adoptive leave are in the *Workplace Relations Act 1996* (Cth), ss 298-315.
- 25 The relevant provisions on paternity leave are in the *Workplace Relations Act 1996* (Cth), ss 282-285.
- 26 *Workplace Relations Act 1996* (Cth), s 282(1). 'Spouse includes the following: (a) a former spouse; (b) a de facto spouse; (c) a former de facto spouse': s 263.
- 27 See Gay and Lesbian Rights Lobby (NSW), Submission 333; Law Institute of Victoria, Submission 331; Anna Chapman, Submission 229.

- 28 See ACON, Submission 281.
- 29 Anthony Brien, Submission 64.
- 30 Australian Council of Trade Unions, Melbourne Hearing, 27 September 2006.
- 31 Australian Council of Trade Unions, Submission 39.
- 32 See also Gay and Lesbian Rights Lobby (NSW), Submission 333.
- 33 Gay and Lesbian Rights Lobby (NSW), Submission 333.
- 34 Janet Jukes, Submission 276.
- 35 See Australian Council of Trade Unions, Submission 39; Anna Chapman, Submission 229.
- 36 *Workplace Relations Act 1996* (Cth), s 3(l).
- 37 *Workplace Relations Act 1996* (Cth), s 3(m). See Australian Chamber of Commerce and Industry, Submission 301(I); Australian Council of Trade Unions, Submission 39.
- 38 *Workplace Relations Act 1996* (Cth), ss 104-106, 151(3), 222, 568(2)(e). See Anna Chapman, Submission 229.
- 39 Under the *Industrial Relations Act 1999* (Qld), parental leave entitlements are available on ‘the birth of a child of an employee’s spouse’: s 18(3). ‘Spouse’ is defined by the *Acts Interpretation Act 1954* (Qld) to include a de facto partner: s 36. The definition of ‘de facto partner’ is ‘either 1 of 2 persons who are living together as a couple on a genuine domestic basis...’: s 32DA(1). The ‘gender of the persons is not relevant’: s 32DA(5).
- 40 The *Statutes Amendment (Domestic Partners) Act 2006* (SA). This Act had not commenced as at 10 April 2007. It will amend the *Fair Work Act 1994* (SA). See *Fair Work Act 1994* (SA), sch 5, Item 2.
- 41 The *Acts Amendment (Equality of Status) Act 2003* (WA) amended the *Minimum Conditions of Employment Act 1993* (WA). See *Minimum Conditions of Employment Act 1993* (WA), s 20A.
- 42 *Industrial Relations Act 1984* (Tas), s 47AF. However, it seems that amendments to the State Service Regulations 2001 (Tas) may have clarified this issue for Tasmanian public sector employees. Dr Samantha Hardy, Dr Sarah Middleton, Dr Lisa Butler, Submission 125. See State Service Regulations 2001 (Tas), reg 25(1). ‘Spouse’ is now defined as including the person with whom a person is, or was at the time of his or her death, in a significant relationship, within the meaning of the *Relationships Act 2003* (Tas): reg 3(1).
- 43 *Industrial Relations Act 1984* (Tas), sch 2, Item 2: a ‘partner’ as defined in the *Relationships Act 2003* (Tas) is entitled to parental leave.
- 44 Australian Chamber of Commerce and Industry, Submission 301(I). See for example, *State Personal/Carer’s Leave Case – August 1996* (1996) 68 IR 308; *Aged Care General Services (State) Award 2006* (NSW), section 18, http://www.industrialrelations.nsw.gov.au/awards/pathways/results.jsp?award_code=964&show=Content&content_id=1622124, viewed 9 March 2007. See also NSW Department of Commerce, Office of Industrial Relations, *Carer’s and bereavement leave*, <http://www.industrialrelations.nsw.gov.au/resources/carersleave.pdf>, viewed 9 March 2007.
- 45 *Industrial Relations Act 1996* (NSW), s 55(3). See ACON, Submission 281; Gay and Lesbian Rights Lobby (NSW), Submission 333; Anti-Discrimination Board of NSW, Sydney Hearing, 26 July 2006.
- 46 Gay and Lesbian Rights Lobby (NSW), Submission 333. See also ACON, Submission 281.
- 47 In the ACT and the NT, individual industrial relations systems have not been enacted. In Victoria, general industrial relations powers were referred to the Commonwealth in 1996: *Commonwealth Powers (Industrial Relations) Act 1996* (Vic) and *Workplace Relations and other Legislation Amendment Bill (No.2) 1996* (Cth).
- 48 Simon Corbell MLA (Attorney-General for the ACT), Opening Statement, Canberra Hearing, 20 November 2006. The *Parental Leave (Private Sector Employees) Act 1992* (ACT) applies to employees who are either not covered by an industrial award, or whose industrial award does not include entitlement to parental leave and does not preclude such an entitlement: *Parental Leave (Private Sector Employees) Act 1992* (ACT), s 4. Section 5 refers to the Parental Leave Case (Australian Industrial Relations Commission *Decision 773/1990*, 26 July 1990), attachment A.

- 49 Equal Opportunity Commission of Victoria, Daylesford Forum, 28 September 2006. See *Equal Opportunity Act 1995* (Vic). An employer must not discriminate against an employee by denying or limiting access by the employee to opportunities for promotion, transfer or training or to any other benefits connected with employment: s 14. Discrimination is prohibited on the basis of such attributes as ‘marital status’ and ‘sexual orientation’: s 6. ‘Marital status’ includes ‘domestic partner’ which is defined as a person living with another as a couple on a genuine domestic basis, irrespective of gender: s 4.
- 50 Section 16(1) of the *Workplace Relations Act 1996* (Cth) outlines the state and territory legislation that is excluded by the Act, primarily state or territory industrial laws or laws that apply to employment generally and deal with leave. However, s 16(2)(a) specifies that state and territory laws that deal with ‘the prevention of discrimination’ or ‘the promotion of EEO’ are not excluded.
- 51 Australian Services Union, documents provided at Sydney Hearing, 26 July 2006.
- 52 Australian Services Union, documents provided at Sydney Hearing, 26 July 2006.
- 53 Australian Chamber of Commerce and Industry, Submission 301(I).
- 54 University of Western Australia, Perth Hearing, 9 August 2006.
- 55 Australian Services Union, Submission 296.
- 56 Name Withheld, Submission 297.
- 57 Australian Government, WorkChoices, *WorkChoices and Australian Families*, <https://www.workchoices.gov.au/ourplan/publications/html/WorkChoicesandAustralianfamilies.htm>, viewed 5 March 2007.
- 58 Australian Chamber of Commerce and Industry, Submission 301(I).
- 59 Rebecca Wealands, Submission 132.
- 60 Felicity Martin and Sarah Lowe, Submission 145.
- 61 Australian Chamber of Commerce and Industry, Submission 301(I).
- 62 Australian Services Union, Submission 296.
- 63 Eilis Hughes, Melbourne Hearing, 27 September 2006.
- 64 ACON, Sydney Hearing, 26 July 2006. See also, Australian Services Union, Opening Statement, Sydney Hearing, 26 July 2006.
- 65 Eilis Hughes, Submission 37. Also quoted in Victorian Gay and Lesbian Rights Lobby, Submission 256.
- 66 Eilis Hughes, Melbourne Hearing, 27 September 2006.
- 67 Australian Council of Trade Unions, Melbourne Hearing, 27 September 2006.
- 68 Australian Services Union, Opening Statement, Sydney Hearing, 26 July 2006.
- 69 Australian Services Union, Opening Statement, Sydney Hearing, 26 July 2006. See also Australian Council of Trade Unions, Melbourne Hearing, 27 September 2006.
- 70 Australian Services Union, Opening Statement, Sydney Hearing, 26 July 2006.
- 71 Law Institute of Victoria, Submission 331.
- 72 Australian Services Union, Submission 296.
- 73 Community and Public Sector Union (CPSU), PSU Group, Submission 135. ‘Certified agreements made before the commencement of WorkChoices will continue to operate until they are replaced by a collective agreement or an AWA made after WorkChoices commences’: WorkChoices, *WorkChoices and federal awards and agreements, Fact Sheet 2*, <https://www.workchoices.gov.au/ourplan/publications/html/WorkChoicesandfederalawardsandagreements.htm>, viewed 13 March 2007.
- 74 T Mills, Assistant Director-General, Human Resources Branch, Australian Agency for International Development, Correspondence to the Human Rights and Equal Opportunity Commission, 24 November 2006.
- 75 Australian Government, Department of Health and Ageing, *People Leadership and Performance Improvement 2004-2007*, in D Kalisch, Deputy Secretary, Department of Health and Ageing, Correspondence to the President, Human Rights and Equal Opportunity Commission, 6 November 2006.

- 76 Community and Public Sector Union (CPSU), PSU Group, Submission 135.
- 77 Community and Public Sector Union (CPSU), PSU Group, Submission 135.
- 78 Community and Public Sector Union (CPSU), PSU Group, Submission 135.
- 79 Additional entitlements under the Act may be determined by the Remuneration Tribunal or by regulation: *Parliamentary Entitlements Act 1990* (Cth), s 5(1)(a). Where the regulations are inconsistent with a determination by the Remuneration Tribunal under subsections 5(1)(a) or 9(1), the regulations prevail and the determination is void to the extent of the inconsistency: *Parliamentary Entitlements Act 1990* (Cth), s 10(1).
- 80 Remuneration Tribunal, *Determination 2006/18*, cl 2.8.
- 81 Remuneration Tribunal, *Determination 2006/18*, cl 2.8.
- 82 Remuneration Tribunal, *Determination 2006/18*, cls 2.9, 2.12(a).
- 83 Remuneration Tribunal, *Determination 2006/18*, cl 2.15.
- 84 Remuneration Tribunal, *Determination 2006/18*, cl 2.20(a).
- 85 Remuneration Tribunal, *Determination 2006/18*, cls 3.14-3.15.
- 86 Remuneration Tribunal, *Determination 2006/18*, cl 9.1(d).
- 87 Remuneration Tribunal, *Determination 2006/18*, cl 9.13. This clause was amended by Remuneration Tribunal, *Determination 2006/20*, cl 3.2. See J Conde, President, Remuneration Tribunal, Correspondence to the President, Human Rights and Equal Opportunity Commission, 11 December 2006.
- 88 Remuneration Tribunal, *Determination 2006/18*, cl 6.5.
- 89 Brian Greig, Submission 110. See Remuneration Tribunal, *Determination 2006/18*, cl 2.8: the definition of ‘nominee’ does not exclude a Senator’s or Member’s staff members. Clause 2.8 of *Determination 2003/14* was amended by *Determination 2005/09* to remove the condition that a ‘nominee’ be a person ‘other than a member of the staff of the senator or member’: see Remuneration Tribunal, *Determination 2005/09*, cl 2.8.
- 90 Remuneration Tribunal, *Determination 2006/14*, cl 2.8.
- 91 *Parliamentary Entitlements Act 1990* (Cth), s 3.
- 92 The use of the phrase ‘as the spouse’ would still exclude same-sex couples if the interpretation given by the Federal Court in *Commonwealth of Australia v Human Rights and Equal Opportunity Commission and Anor* [1998] 138 FCA (27 February 1998) continues to be followed. See further I Watt, Secretary, Department of Finance and Administration, Correspondence to the President, Human Rights and Equal Opportunity Commission, 24 November 2006.
- 93 *Parliamentary Entitlements Act 1990* (Cth), sch 1, pt 1, s 9(2).
- 94 *Parliamentary Entitlements Act 1990* (Cth), sch 1, pt 2, s 3(1)-(2). A senior officer is a Minister, an Opposition Office Holder or a Presiding Officer (President of the Senate or the Speaker of the House of Representatives): *Parliamentary Entitlements Act 1990* (Cth), s 3.
- 95 Parliamentary Entitlement Regulations 1997 (Cth), regs 3B-3C.
- 96 Parliamentary Entitlement Regulations 1997 (Cth), sch 1, pt 2, para 1(1)(e).
- 97 Parliamentary Entitlement Regulations 1997 (Cth), sch 1, pt 2, para 1(1)(f).
- 98 See *Members of Parliament (Life Gold Pass) Act 2002* (Cth), ss 10(1), 11(2), 12. See also *Determination 2006/18*, cl 2.20(b).
- 99 *Members of Parliament (Life Gold Pass) Act 2002* (Cth), s 4.
- 100 *Members of Parliament (Life Gold Pass) Act 2002* (Cth), s 4.
- 101 *Judicial and Statutory Officers (Remuneration and Allowances) Act 1984* (Cth), ss 4-7. These office holders include judges of the High Court, the Federal Court, the Family Court, the Supreme Court of the ACT, the Chairman of the Commonwealth Grants Commission and the President of the Inter-State Commission.
- 102 Remuneration Tribunal, *Determination 2004/03*, cl 1.10.
- 103 Remuneration Tribunal, *Determination 2004/03*, cl 3.2.

- 104 *Remuneration Tribunal Act 1973* (Cth), ss 5(2A), 7(3)-(4). Public office holders include a range of senior jobs in Commonwealth bodies: see Remuneration Tribunal, *Full-time Offices*, <http://www.remtribunal.gov.au/fullTimeOffices/default.asp?menu=Sec1&switch=on>, viewed 9 March 2007. Principal executive officers include a range of chief executives and managing directors of federal agencies.
- 105 Remuneration Tribunal, *Determination 2004/03*.
- 106 Remuneration Tribunal, *Determination 2004/03*, cl 1.5.7. The same definition of 'partner' appears in determinations covering the travel allowance of other senior office holders such as the Solicitor-General and Director of Public Prosecutions: see Remuneration Tribunal, *Determination 2000/15*, cl C3.
- 107 Department of Foreign Affairs and Trade, *Administrative Circular P0265*, 22 May 2000, in S Merrifield, Assistant Secretary, Staffing Branch, Department of Foreign Affairs and Trade, Correspondence to V Lesnie, Director, Human Rights Unit, Human Rights and Equal Opportunity Commission, 1 November 2006.
- 108 Department of Foreign Affairs and Trade, *Administrative Circular P0046*, 28 February 1997, in S Merrifield, Assistant Secretary, Staffing Branch, Department of Foreign Affairs and Trade, Correspondence to V Lesnie, Director, Human Rights Unit, Human Rights and Equal Opportunity Commission, 1 November 2006.
- 109 *Defence Act 1903* (Cth), ss 9A, 58B. There is no definition of 'spouse' or 'de facto spouse' in the Act. The definition relevant to the entitlements available to the family of ADF members is that of 'member of the family', which includes: '(a) in relation to a member - a member of the household of the member and a dependant of the member; or (b) in relation to a cadet - a member of the household of the cadet and a dependant of the cadet': s 58A.
- 110 Australian Government Department of Defence, *ADF Pay and Conditions Manual*, Chapter 1, Part 3, Division 2, cl 1.3.77.
- 111 Australian Government Department of Defence, *Defence Instructions (General) Personnel 53-1* amended the *Defence Instruction (General) Manual* and the *ADF Pay and Conditions Manual*.
- 112 Australian Government Department of Defence, *Defence Instructions (General) Personnel 53-1*, Item 4(b).
- 113 Australian Government Department of Defence, *ADF Pay and Conditions Manual*, Chapter 1, Part 3, Division 2, cls 1.3.74-1.3.79.
- 114 Australian Government Department of Defence, *Defence Instructions (General) Personnel 53-1*, Item 7. Although the Approving Authority may waive this requirement if there is a temporary separation because of service emergencies or unforeseen circumstances: Australian Government Department of Defence, *Defence Instructions (General) Personnel 53-1*, Item 8.
- 115 Australian Government Department of Defence, *Defence Instructions (General) Personnel 53-1*, Item 9.
- 116 Australian Government Department of Defence, *Defence Instructions (General) Personnel 53-1*, Item 9.
- 117 J Millbank, 'Areas of Federal Law that Exclude Same-Sex Couples and their Children', Inquiry Research Paper, September 2006, available at [www.http://www.humanrights.gov.au/samesex/index.html](http://www.humanrights.gov.au/samesex/index.html), p15.
- 118 RC Smith, Secretary, Department of Defence, Correspondence to the President, Human Rights and Equal Opportunity Commission, 3 November 2006.
- 119 Australian Government Department of Defence, *ADF Pay and Conditions Manual*, Chapter 6, Part 1.
- 120 Australian Government Department of Defence, *ADF Pay and Conditions Manual*, Chapter 6, Parts 4, 7.
- 121 Australian Government Department of Defence, *ADF Pay and Conditions Manual*, Chapter 7, Part 4.
- 122 Australian Government Department of Defence, *ADF Pay and Conditions Manual*, Chapter 7, Part 5.
- 123 Australian Government Department of Defence, *ADF Pay and Conditions Manual*, Chapter 5.
- 124 See generally Australian Government Department of Defence, *ADF Pay and Conditions Manual*, Chapter 8. See also J Millbank, 'Areas of Federal Law that Exclude Same-Sex Couples and their Children', Inquiry Research Paper, September 2006, available at [www.http://www.humanrights.gov.au/samesex/index.html](http://www.humanrights.gov.au/samesex/index.html), pp15-16.

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- 125 Australian Government Department of Defence, *ADF Pay and Conditions Manual*, Chapter 5, Part 5, cl 5.5.3.
- 126 *Defence Force (Home Loans Assistance) Act 1990* (Cth), s 5.
- 127 *Defence Force (Home Loans Assistance) Act 1990* (Cth), s 3.
- 128 *Defence Force (Home Loans Assistance) Act 1990* (Cth), s 3.
- 129 *Defence Force (Home Loans Assistance) Act 1990* (Cth), s 6 defines members of a person's family as their spouse, the child of the person or their spouse, or the dependent parent of the person or their spouse.
- 130 See, for example, *Defence Force (Home Loans Assistance) Act 1990* (Cth), ss 20, 32.
- 131 *Defence Force (Home Loans Assistance) Act 1990* (Cth), s 30.
- 132 *Defence Force (Home Loans Assistance) Act 1990* (Cth), s 3.
- 133 RC Smith, Secretary, Department of Defence, Correspondence to the President, Human Rights and Equal Opportunity Commission, 3 November 2006.
- 134 See for example, Name Withheld, Submission 49; University of Western Australia, Submission 185; Women's Health Victoria, Submission 318; Anthony Brien, Submission 64.
- 135 Coalition of Activist Lesbians, Submission 171.
- 136 Graeme Moffatt, Submission 122.
- 137 Name Withheld, Submission 49.
- 138 Name Withheld, Submission 267.
- 139 Name Withheld, Submission 267.
- 140 Equal Opportunity Commission of Victoria, Submission 327.
- 141 Equal Opportunity Commission of Victoria, Submission 327. See also Anna Chapman, Submission 229.
- 142 Australian Chamber of Commerce and Industry, Submission 301(I).
- 143 See Association of Independent Schools of South Australia, Submission 261; Lesbian and Gay Solidarity (Melbourne), Submission 89a.
- 144 Public Interest Advocacy Centre, Submission 328; ACON, Submission 281.