

Summary of findings

The following is a summary of the findings and recommendations made in the full report. It substantially represents the content of Chapter 18 of the full report of the *Same-Sex: Same Entitlements* Inquiry.

What are the Inquiry's findings?

The principles of non-discrimination, equality before the law and the best interests of the child are amongst the most fundamental of all human rights principles. Yet there are a raft of federal laws which breach these principles.

58 laws discriminate against same-sex couples and families

The Inquiry finds that:

1. The 58 federal laws in Appendix 1 [to the full report] discriminate against same-sex couples in the area of financial and work-related entitlements.

Those laws breach the International Covenant on Civil and Political Rights.

2. Many of the federal laws in Appendix 1 [to the full report] discriminate against the children of same-sex couples and fail to protect the best interests of the child in the area of financial and work-related entitlements.

Those laws breach the International Covenant on Civil and Political Rights and the Convention on the Rights of the Child.

Discrimination can lead to further human rights breaches

The breach of the right to non-discrimination and the failure to protect the best interests of the child does, in some circumstances, result in further breaches of other human rights principles.

Those additional human rights principles are set out in the *International Covenant on Civil and Political Rights* (ICCPR), the *Convention on the Rights of the Child* (CRC), the *International Covenant on Economic, Social and Cultural Rights* (ICESCR) and the *Discrimination (Employment and Occupation) Convention* (ILO 111).

The findings in each of the topic-specific chapters in the full report explain which laws breach the various provisions in those four human rights treaties.

The following is a list of the human rights principles which are breached by the totality of federal legislation listed in Appendix 1 to the full report:

- the right to *equal protection* and *non-discrimination* under the law (ICCPR, article 26)
- the right to *non-discrimination* in the enjoyment of human rights (ICCPR, article 2(1); CRC, article 2; ICESCR, article 2(2))
- the right to just and favourable conditions of work, *non-discrimination* and equality of opportunity *in the workplace* (ICESCR, article 7; ILO 111, articles 2-3)

- the obligation to ensure that the *best interests of the child is a primary consideration* in all decisions and laws relating to children (CRC, article 3)
- the right of *both parents to be assisted* in fulfilling *common parental responsibilities* (CRC, article 18)
- the right to *protection of, and assistance for, the family* (ICCPR, article 23(1); ICESCR, article 10)
- the right to *privacy and protection from interference with the family* (ICCPR, article 17; CRC, article 16)
- the right to access and benefit from *social security* (CRC, article 26; ICESCR, article 9)
- the *child's right to an identity* and to know and be cared for by his or her parents (CRC, articles 7–8; ICCPR, article 24)
- the *best interests of the child* must be *the paramount consideration* in *adoption* (CRC, article 21)
- the right to the *highest attainable standard of health* (CRC, article 24; ICESCR, article 12)
- the right to *an effective remedy* for a breach of human rights (ICCPR, article 2(3)).

These principles are explained in Chapter 3 on Human Rights Protections and in the relevant topic-specific chapters.

What are the reasons for the Inquiry's findings?

Each of the topic-specific chapters in the full report goes through relevant federal laws to identify whether and when there is discrimination against same-sex couples and their children. In particular, the Inquiry examines whether there are financial and work-related rights and entitlements which are available to opposite-sex couples and families, but denied to same-sex couples and families. The Inquiry has identified many areas where this discrimination occurs.

The primary cause of the discrimination against same-sex couples lies in the definitions those laws use to describe a couple or a family.

Same-sex couples are excluded from definitions describing de facto couples

Chapter 4 on Recognising Relationships describes the variety of definitions used to describe a couple in federal law. Broadly speaking, those definitions can be grouped into the following categories:

- definitions using the words 'opposite sex' to describe a couple
- definitions using the words 'husband or wife' to describe a couple
- definitions using the words 'spouse' or 'de facto spouse' to describe a couple
- definitions using the words 'marriage-like relationship' to describe a couple.

All of those definitions include an opposite-sex couple, whether or not they are married. None of those definitions include a same-sex couple.

There are also some federal laws which do not include a definition of a spouse or couple. Those federal laws have also been interpreted to exclude a same-sex partner or couple.

The consequence of these narrow definitions and interpretations is that a genuine same-sex couple cannot access the financial and work-related rights and entitlements available to an opposite-sex couple. Where those couples have children, those children will be at a disadvantage.

The 'interdependency' category does not give full equality to same-sex couples

The recent introduction of the 'interdependency' relationship category to certain federal laws has meant that same-sex couples can now access certain superannuation, immigration and Australian Defence Force employment entitlements that were previously denied to them.

However, the 'interdependency' category has not brought full equality to same-sex couples, primarily because it treats genuine same-sex couples differently to genuine opposite-sex couples.

The problems with using an 'interdependency' category to remove discrimination against same-sex couples include the following:

- The 'interdependency relationship' label for a same-sex relationship mischaracterises a genuine same-sex couple as different or inferior to a genuine opposite-sex couple.
- The criteria to qualify as a same-sex interdependency relationship can be more onerous than the criteria to qualify as an opposite-sex de facto relationship. This may mean that some same-sex couples cannot access the entitlements available to opposite-sex couples.
- The introduction of a federal interdependency relationship category creates inconsistencies with definitions used in state and territory laws.
- The interdependency relationship category extends beyond people in a couple. For example, it may include elderly friends or siblings living with, and caring for, each other in old age. This means that the interdependency category may have the unintended consequence of expanding the number of people eligible for federal financial and work-related entitlements.

Children of same-sex couples are excluded from some definitions describing parent-child relationships

Chapter 5 on Recognising Children discusses the variety of legislative definitions used to describe the relationship between a child and his or her parents. Broadly speaking, those definitions can be categorised into the following groups:

- laws defining a child to include an adopted, ex-nuptial or step-child
- laws defining a child to include a person for whom an adult has legal responsibility or custody and care
- laws including a child who is wholly or substantially dependent on an adult who stands in the position of a parent.

There are also several laws which do not define the relevant parent-child relationship at all.

The interpretation of these definitions and laws relies heavily on how family law characterises the legal relationship between a same-sex parent and child.

As Chapter 5 in the full report explains, a child born to a gay or lesbian couple could have any one or more of a birth mother, birth father, lesbian co-mother or gay co-father(s).

Generally speaking, a birth mother and birth father will be recognised as legal parents under family law and will therefore have access to financial and work-related entitlements available to help support a child. However, the legal status of a lesbian co-mother or gay co-father(s) of a child is extremely uncertain.

The result of this uncertainty is that a same-sex family will often have more difficulty accessing financial and work-related benefits, which are intended to support children,

than an opposite-sex family. This may mean that the best interests of a child born to a same-sex couple will be compromised.

Same-sex couples and families cannot access the same financial and work-related entitlements as opposite-sex couples and families

The following sections set out the financial and work-related entitlements and benefits which are available to opposite-sex couples and families, but denied to same-sex couples and families.

The list does not cover all the financial and work-related entitlements and benefits discussed in the various topic-specific chapters. However, it does note the main entitlements denied to a same-sex partner; a lesbian co-mother or gay co-father; or a child of a lesbian co-mother or gay co-father.

As discussed earlier in this chapter, every time a same-sex couple or family are denied entitlements available to an opposite-sex couple or family, there will be a breach of the right to non-discrimination under article 26 of the ICCPR. In some circumstances, that discrimination may lead to further breaches under the CRC, ILO 111 and ICESCR.

Discrimination under employment laws

The Inquiry finds that federal workplace laws discriminate against same-sex couples or families in the following ways:

- A same-sex partner is not guaranteed the same *carer's leave* and *compassionate leave* as an opposite-sex partner.
- A lesbian co-mother or gay co-father is not guaranteed the same *carer's leave* and *compassionate leave* as a birth mother or birth father.
- A lesbian co-mother or gay co-father is not guaranteed *parental leave*.
- A same-sex partner of a federal *member of parliament* cannot access all the *travel entitlements* available to an opposite-sex partner.
- A same-sex partner of a *federal judge or magistrate* cannot access all the *travel entitlements* available to an opposite-sex partner.
- A same-sex couple in the *Australian Defence Force* does not have the same access to *low-interest home loans* as an opposite-sex couple.
- Employees in a same-sex couple are not adequately protected from *discrimination in the workplace* on the grounds of sexual orientation.

Chapter 6 on Employment provides more detail about these and other work-related entitlements.

Discrimination under workers' compensation laws

The Inquiry finds that the federal Comcare scheme and the Seacare Authority discriminate against same-sex couples or families in the following ways:

- A same-sex partner is not entitled to *lump sum workers' compensation death benefits* available to an opposite-sex partner.
- A same-sex partner will not automatically be taken into account for the purposes of calculating the *workers' compensation sums* available on an employee's *incapacity*.

Chapter 7 on Workers' Compensation provides more detail about these and other workers' compensation entitlements.

Discrimination under tax laws

The Inquiry finds that federal tax laws discriminate against same-sex couples or families in the following ways:

- A same-sex partner cannot access the *dependent spouse tax offset* available to an opposite-sex partner.
- A same-sex partner cannot access the *tax offset for a partner's parent* available to an opposite-sex partner.
- A same-sex partner, lesbian co-mother or gay co-father cannot access the *housekeeper tax offset* available to an opposite-sex partner, birth mother or birth father.
- A lesbian co-mother or gay co-father cannot access the *child-housekeeper tax offset* available to a birth mother or birth father.
- A lesbian co-mother or gay co-father cannot access the *invalid relative tax offset* available to a birth mother or birth father.
- A taxpayer in a same-sex couple cannot access the higher rate of *overseas forces tax offset* available to an opposite-sex couple.
- A taxpayer in a same-sex couple cannot access the higher rate of *zone tax offset* available to an opposite-sex couple.
- A *US defence force* same-sex couple cannot access *tax exemptions* available to an opposite-sex couple.
- A lesbian co-mother or gay co-father cannot assert a primary entitlement to the *baby bonus*.
- A same-sex partner of a person eligible for the *child care tax rebate* cannot access the rebate in the same way as an opposite-sex partner. And a person eligible for the child care tax rebate cannot transfer the unused value of the rebate to his or her same-sex partner.
- A same-sex couple must spend more than an opposite-sex couple to qualify for the *medical expenses tax offset*.
- A same-sex couple may pay a higher *Medicare levy* and *Medicare levy surcharge* than an opposite-sex couple.
- A same-sex partner cannot access the same *capital gains tax concessions* available to an opposite-sex couple.
- A same-sex couple *transferring property to a child* (or trustee) on family breakdown will be taxed at the top marginal rate, unlike an opposite-sex couple.
- A same-sex partner must pay income tax on *child maintenance payments* received from a former partner, unlike an opposite-sex partner.
- A same-sex partner is not eligible for the same *fringe benefit tax exemptions* available to an opposite-sex partner.

Chapter 8 on Tax provides more detail about these and other tax entitlements.

Discrimination under social security laws

Social security laws treat a same-sex couple as two individuals. Sometimes this brings a benefit to a same-sex couple or family; other times this brings a detriment.

As discussed in Chapter 9 on Social Security, the main point of concern is that social security laws treat a same-sex couple differently to an opposite-sex couple.

However, as discussed in Chapter 3 on Human Rights Protections, generally under human rights law there will only be discrimination if there is a negative impact on the affected person.

Thus, the following is a list of those areas of social security law where there is clearly a negative impact, and therefore discrimination against a same-sex couple:

- A same-sex partner cannot access the *Partner Allowance* available to an opposite-sex partner.
- A same-sex partner cannot access the *bereavement benefits* available to an opposite-sex partner.
- A same-sex partner cannot access the *Widow Allowance* available to an opposite-sex partner.
- A same-sex partner cannot access *concession card benefits* available to an opposite-sex partner.
- A same-sex partner cannot access a *gaoled partner's pension* available to an opposite-sex partner.
- A young same-sex couple is less likely to qualify for the independent rate of *Youth Allowance* than a young opposite-sex couple in the same situation.

Chapter 9 on Social Security provides more detail about these and other social security entitlements.

Discrimination under veterans' entitlements laws

The Inquiry finds that federal veterans' entitlements laws discriminate against same-sex couples or families in the following ways:

- A veteran's surviving same-sex partner cannot access the *War Widow/Widower's Pension* available to an opposite-sex partner.
- A veteran's surviving same-sex partner cannot access the *Income Support Supplement* available to an opposite-sex partner.
- A veteran's surviving same-sex partner cannot access the *Bereavement Payment* available to an opposite-sex partner.
- There is no support available for the *funeral of a deceased veteran's indigent* same-sex partner, but there is for an opposite-sex partner.
- A veteran's surviving same-sex partner cannot access the *Gold Repatriation Card* available to an opposite-sex partner.
- A veteran's surviving same-sex partner cannot access *military compensation* available to an opposite-sex partner.
- A veteran's same-sex partner cannot access the *Partner Service Pension* available to an opposite-sex partner.
- A veteran's same-sex partner cannot access the *Utilities Allowance* under the same circumstances as an opposite-sex partner.
- A veteran's same-sex partner cannot usually access the *Telephone Allowance* available to an opposite-sex partner.

Chapter 10 on Veterans' Entitlements provides more detail about these and other veterans' entitlements.

Discrimination under health care laws

The Inquiry finds that laws relating to the Medicare and Pharmaceutical Benefits Scheme (PBS) Safety Nets discriminate against same-sex couples or families in the following ways:

- A same-sex couple or family must spend more than an opposite-sex couple or family to qualify for the *Medicare Safety Net* and *Medicare Extended Safety Net*.
- A same-sex couple or family must spend more on pharmaceuticals than an opposite-sex couple or family to qualify for the *PBS Safety Net*.

Chapter 11 on Health Care Costs provides more detail about these and other health care entitlements.

Discrimination under family laws

The Inquiry finds that family laws discriminate against same-sex couples or families in the context of relationship breakdown in the following ways:

- A same-sex couple cannot access the more comprehensive federal *property settlement* regime on relationship breakdown. This access is only available to married couples, though it is expected that opposite-sex de facto couples will have access to the federal regime shortly.
- A birth mother and birth father cannot pursue *child support* against a lesbian co-mother or gay co-father.

Chapter 12 on Family Law provides more detail about these and other entitlements relevant to relationship breakdown.

Discrimination under superannuation laws

The Inquiry finds that federal superannuation laws discriminate against same-sex couples or families in the following ways:

- A *federal government employee's* surviving same-sex partner cannot access *direct death benefits* (lump sum or reversionary pension) available to a surviving opposite-sex partner (unless the employee joined the public service after 1 July 2005).
- The surviving child of a lesbian co-mother or gay co-father who was a *federal government employee* will not usually qualify for *direct death benefits* (lump sum or reversionary pension) available to the child of a birth mother or birth father.
- It is harder for a surviving same-sex partner to qualify for *death benefits in private superannuation schemes* (as a person in an 'interdependency relationship') than for a surviving opposite-sex partner (as a 'spouse').
- A surviving same-sex partner cannot usually qualify for a *reversionary pension in a private superannuation scheme*, which is available to an opposite-sex partner.
- It is harder for a surviving same-sex partner to access *death benefits from a retirement savings account* (as a person in an 'interdependency relationship') than for a surviving opposite-sex partner.
- It is harder for a surviving same-sex partner to access *death benefits tax concessions* than for a surviving opposite-sex partner.
- A same-sex partner cannot access the *death benefits anti-detriment payment* available to an opposite-sex partner.
- A same-sex partner cannot engage in *superannuation contributions splitting* and the associated tax advantages available to an opposite-sex partner.
- A same-sex partner cannot access the *superannuation spouse tax offset* available to an opposite-sex partner.

- A surviving same-sex partner of a *federal judge* cannot access the *reversionary pension* available to a surviving opposite-sex partner.
- A surviving same-sex partner of a *Governor-General* cannot access the *allowance* available to a surviving opposite-sex partner.

Chapter 13 on Superannuation provides more detail about these and other superannuation entitlements.

Discrimination under aged care laws

Aged care laws treat a same-sex couple as two individuals. Depending on the asset distribution between the two members of a same-sex couple, a same-sex couple may be better off or worse off when entering residential aged care facilities.

As discussed in Chapter 14 on Aged Care, the main point of concern is that aged care laws treat a same-sex couple differently to an opposite-sex couple, because the laws do not recognise a same-sex couple as a genuine couple.

However, as discussed in Chapter 3 on Human Rights Protections, under human rights law, generally there will only be discrimination if there is a negative impact on the affected individual.

Thus, the following is a list of those areas of aged care law where there is usually a negative impact, and therefore discrimination against a same-sex couple:

- A same-sex partner is more likely to be *liable for accommodation payments*, because the family home is not exempt from the assets test as it is for an opposite-sex couple.
- A same-sex couple will usually pay a *higher accommodation charge* than an opposite-sex couple.
- A same-sex couple will usually pay a *higher accommodation bond* than an opposite-sex couple.

Chapter 14 on Aged Care provides more detail about these and other aged care payments.

Discrimination under immigration laws

The Inquiry finds that federal immigration laws discriminate against same-sex couples in the following ways:

- A same-sex partner of an Australian citizen or permanent resident may have to *pay more for an Interdependency visa* than an opposite-sex partner pays for a Spouse visa.
- A same-sex couple is *only eligible for one visa category* if they wish to migrate to Australia as a couple, compared to the many options available to an opposite-sex couple.

Chapter 15 on Migration provides more detail about the visas available to same-sex couples and the financial implications of restricted visa options.