

Summary of recommendations

The following is a summary of the recommendations made in the full report of the *Same-Sex: Same Entitlements* Inquiry.

What are the Inquiry's recommendations?

The Inquiry has only two recommendations. They both aim to protect non-discrimination, equality under the law and the best interests of the child.

Those recommendations are:

- 1. The federal government should amend the discriminatory laws identified by this Inquiry to ensure that same-sex and opposite-sex couples enjoy the same financial and work-related entitlements.*
- 2. The federal government should amend the discriminatory laws identified by this Inquiry to ensure that the best interests of children in same-sex and opposite-sex families are equally protected in the area of financial and work-related entitlements.*

How can the federal government fulfil those recommendations?

A number of submissions to the Inquiry observed that there is no federal legislation which broadly protects against discrimination on the grounds of sexual orientation. This means that people who suffer discrimination on the grounds of their sexuality have no remedies under Australian law.

The Inquiry agrees that the enactment of 'sexuality discrimination' legislation along the lines of the *Sex Discrimination Act 1984* (Cth), *Disability Discrimination Act 1992* (Cth), *Racial Discrimination Act 1975* (Cth) and the *Age Discrimination Act 2004* (Cth) would help protect the rights of gay and lesbian individuals, couples and families in Australia.

The Inquiry makes a specific recommendation in Chapter 6 on Employment for the introduction of federal legislation to protect against discrimination in employment on the grounds of sexual orientation.

However, such legislation is not a prerequisite to removing discrimination in the 58 laws listed in Appendix 1 to the full report.

The recommendations of this Inquiry focus on a more direct route to ensuring equality for same-sex couples and families in the area of financial and work-related entitlements. This includes enacting omnibus legislation amending all legislative definitions currently excluding same-sex couples and families.

Enact omnibus legislation amending all discriminatory laws

Appendix 1 to the full report identifies 58 federal laws which currently exclude same-sex couples from financial and work-related entitlements. The federal parliament should introduce 'omnibus' legislation to simultaneously eliminate discrimination against same-sex couples in all those federal laws.

The Inquiry's preferred approach to amendments is that the omnibus legislation:

- retain the current terminology used in federal legislation
- redefine the terminology in the legislation to include same-sex couples
- insert a new definition of 'de facto relationship' and 'de facto partner' following the model definition set out below.

If this approach is adopted, amendments will generally be restricted to the 'definitions' or 'interpretation' sections of the relevant legislation. Appendix 1 provides some guidance on how this approach may be applied in the context of the specific legislation.

Insert a new definition of 'de facto relationship' and 'de facto partner' in federal law

In developing the following definition of 'de facto relationship' the Inquiry has examined:

- the various definitions and criteria describing same-sex and opposite-sex couples in state and territory laws
- the various definitions and criteria describing 'interdependency' relationships in federal laws
- the criteria for a 'marriage-like relationship' used in social security law.

The Inquiry has used the term 'de facto' because it is the most common of the terms used in state and territory laws. However, the Inquiry has no strong preference for the term 'de facto relationship' above terms such as 'domestic relationship' or 'significant relationship', as long as the term covers same-sex and opposite-sex couples alike.

For reasons expressed earlier in this chapter, the Inquiry does not believe that the introduction of an 'interdependency' category is an appropriate approach to removing discrimination against same-sex couples.

The following definition of 'de facto relationship' has sought to ensure the following features:

- *Inclusiveness.* The focus of the definition is on the genuineness of the relationship rather than the gender of the partners.
- *Flexibility.* The definition considers a range of factors relevant to a relationship, but no one factor is determinative. Further, the definition starts with the assumption that the couple must live together, but allows for the possibility that they may be temporarily separated.
- *Consistency.* The proposed federal definition is generally consistent with definitions in state and territory jurisdictions. The goal is to reduce the uncertainty currently facing same-sex couples seeking to access entitlements in different jurisdictions.
- *Evidentiary guidelines.* The definition seeks to indicate the type of evidence that may assist a couple to prove the genuineness of the relationship, including statutory declarations and other formal recognition schemes if available.

With those factors in mind, the Inquiry recommends that the following definition of 'de facto relationship' be inserted into federal laws conferring financial and work-related entitlements:

(1) 'De facto relationship' means the relationship between two people living together as a couple on a genuine domestic basis.

(2) In determining whether two people are in a de facto relationship, all the circumstances of the relationship must be taken into account, including any of the following:

- (a) *the length of their relationship*
- (b) *how long and under what circumstances they have lived together*
- (c) *whether there is a sexual relationship between them*
- (d) *their degree of financial dependence or interdependence, and any arrangements for financial support, between or by them*
- (e) *the ownership, use and acquisition of their property, including any property that they own individually*
- (f) *their degree of mutual commitment to a shared life*
- (g) *whether they mutually care for and support children*
- (h) *the performance of household duties*
- (i) *the reputation, and public aspects, of the relationship between them*
- (j) *the existence of a statutory declaration signed by both persons stating that they regard themselves to be in a de facto relationship with the other person.*

(3) *No one factor, or any combination of factors, under (2) is necessary to establish a de facto relationship.*

(4) *A de facto relationship may be between two people, irrespective of gender.*

(5) *Two people may still be in a de facto relationship if they are living apart from each other on a temporary basis.*

If the various states and territories adopt a relationship registration scheme (like that which exists in Tasmania), subsection (6) could be added to the definition of 'de facto relationship' along the following lines:

(6) If a relationship is registered under a state or territory law allowing for the registration of relationships, registration is proof of the relationship from that date.

If the various states and territories adopt a civil union scheme, subsection (7) could be added along the following lines:

(7) If two people enter into a civil union under a state or territory law, evidence of that civil union is proof of the relationship from that date.

If relationship registration or civil unions become relevant to the definition of 'de facto relationship', subsection (3) should change to read:

(3) No one factor, or any combination of factors, under (2), (6) or (7) is necessary to establish a de facto relationship.

The Inquiry further recommends the following definition of 'de facto partner':

'de facto partner' means one of two people in a de facto relationship.

Enact laws recognising the relationship between a child and both same-sex parents

The amendments necessary to ensure equal protection of the children of same-sex families and opposite-sex families go beyond the federal financial laws themselves. This is because the definitions in those laws rely on the way family law recognises the legal status of a lesbian co-mother or gay co-father. Family laws have not caught up with the reality that lesbian and gay couples are now raising children from birth.

The Inquiry recommends that the following steps be taken to better ensure protection of the best interests of children raised in all families, irrespective of the gender of their parents:

1. *Federal laws without a definition of 'child' should include a definition which recognises the children of a birth mother, birth father, lesbian co-mother or gay co-father.*
2. *Federal laws should ensure that a lesbian co-mother of a child conceived through assisted reproductive technology (an ART child) can access the same financial and work-related entitlements available to a birth mother and birth father (a legal parent).*

This could be achieved by amending:

- the *Family Law Act 1975* (Cth) (Family Law Act) to include a parenting presumption in favour of the lesbian co-mother of an ART child and ensuring that the definition of 'child' in any relevant legislation recognises the parenting presumptions in the Family Law Act; or
- the *Acts Interpretation Act 1901* (Cth) (Acts Interpretation Act) such that any references to a person's 'child' in federal legislation includes the ART child of a lesbian co-mother.

It could also be achieved if:

- all states enacted parenting presumptions in favour of a lesbian co-mother of an ART child (following the models in WA, ACT and NT); and
- federal law clearly recognised those presumptions and the birth certificates flowing from those presumptions.

While parenting presumptions are appropriate for the ART child of a lesbian couple, broader adoption laws are the better solution for a gay couple having an ART child (as set out in the following Recommendations 4–5).

3. *Federal financial and work-related laws should include a definition of 'step-child' which recognises a child under the care of a 'de facto partner' of a birth mother or birth father.*

The previous section suggests an appropriate definition of 'de facto partner'.

Amending laws in this way would generally recognise the child of a lesbian co-mother or gay co-father as a step-child. It would also include a child under the care of a subsequent de facto partner in an opposite-sex and same-sex couple. (Currently a step-child can only be a child under the care of a subsequent partner who marries the birth parent).

4. *'Step-parent adoption' laws should more readily consider adoption by a lesbian co-mother or gay co-father.*

This will require amendments to remove the prohibition on same-sex step-parent adoption in all state and territory laws other than in WA, the ACT and Tasmania. It may also require reconsideration of the general presumption against step-parent adoption, in the event of gay and lesbian co-parenting arrangements. The Victorian Law Reform Commission is due to publish a report on this issue during 2007.

5. *Gay and lesbian couples should have equal rights to apply for adoption of an unrelated child.*

This will require amendments to adoption laws in all states and territories other than in WA and the ACT. Further, the federal government should not introduce

legislation limiting the possibility of overseas adoptions by gay and lesbian couples.

6. *Where access to financial or work-related benefits is intended to extend beyond the legal parents, federal laws should explicitly recognise the eligibility of a person who has a parenting order from the Family Court of Australia.*

This could be achieved by amending:

- the relevant federal legislation to define a person who is 'legally responsible', has 'custody and care', is in the 'position of a parent' (and other similar terms) to *include* a person who has been granted a parenting order from the Family Court of Australia; or
 - the Acts Interpretation Act such that any reference to a person who is 'legally responsible', has 'custody and care', is in the 'position of a parent' (or other similar terms) *includes* a person who has been granted a parenting order from the Family Court of Australia.
7. *There should be a public information and education campaign to ensure that gay and lesbian families are aware of their rights and entitlements under federal financial and work-related laws.*

In particular, same-sex parents should be:

- informed about the role of parenting orders in asserting legal rights; and
- assisted through the process of obtaining such an order.

Appendix 1 to the full report provides some direction as to how these seven recommendations may be applied in the context of specific legislation.