



CHAPTER 13:

Superannuation

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13.1 What is this chapter about?

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

Superannuation is one of the main ways of saving for retirement. It is designed to provide financial security for individuals and their families in retirement; or when a person dies unexpectedly.

Superannuation is often a person's largest asset apart from the family home. Most people expect that their superannuation entitlements will be inherited by a partner, children or other dependants. But for people in same-sex couples and families, this is not always the case.

The same-sex partner of a member of a private superannuation fund may receive superannuation death benefits if he or she can establish an 'interdependency relationship' with, or financial dependence on, the deceased member of the fund. However, the 'interdependency' and financial dependence categories impose more onerous qualifying criteria than for an opposite-sex de facto couple in the same position.

The same-sex partner of a federal government public servant will not get any direct access to superannuation death benefits, unless his or her partner joined the public service after 1 July 2005. This is because a same-sex partner does not qualify as a 'spouse' under the relevant legislation.

Further, a same-sex partner may not get the same tax benefits for superannuation contributions and earnings as an opposite-sex partner (in either private or federal government funds).¹ Some tax concessions flow onto 'dependants' who inherit superannuation death benefits and this may include a same-sex partner in some circumstances. However, other tax concessions are only available to a 'spouse'. The definition of 'spouse' under the relevant tax legislation and federal government superannuation schemes excludes a same-sex partner.

Finally, the child of a same-sex couple may not be entitled to the same superannuation benefits and tax concessions as a child of an opposite-sex couple. This is because of the definition of 'child' in the relevant legislation.

This chapter explains how private, federal and state superannuation schemes distribute benefits to same-sex couples and families. The chapter commences with a discussion of superannuation death benefits as this was the issue most frequently raised in submissions to the Inquiry. It also addresses a range of other superannuation entitlements and tax concessions which put same-sex couples at a significant financial disadvantage before and after retirement.

The chapter finds that the discrimination against same-sex couples in superannuation laws amounts to a breach of human rights. It then goes on to recommend amendments to the laws in order to avoid future discrimination.

Specifically the chapter addresses the following questions:

- Can the surviving same-sex partner of a federal public servant access superannuation death benefits?

- Can the surviving same-sex partner of a member of a state public sector superannuation scheme access member death benefits?
- Can the surviving same-sex partner of a private superannuation scheme member access superannuation death benefits?
- Can a surviving same-sex partner access death benefit tax concessions?
- Can a same-sex couple take advantage of superannuation contributions splitting?
- Can a same-sex couple access the superannuation spouse tax offset?
- Can the surviving same-sex partner of a judge access a judicial pension?
- Can the surviving same-sex partner of a Governor-General access an allowance?
- Do superannuation laws breach human rights?
- How should the law be changed to avoid future human rights breaches?

13.2 Can the surviving same-sex partner of a federal public servant access superannuation death benefits?

One of the main purposes of superannuation schemes is to encourage savings during life which will support a person's family after he or she dies. Superannuation law ensures this support by providing for the payment of death benefits directly to the deceased's dependants.²

However, the same-sex partner of a federal government public servant is not entitled to death benefits, unless the deceased joined the public service after 1 July 2005. This is because they do not qualify as a 'spouse' or a person in a 'marital relationship' under any of the various statutes which govern the relevant federal government superannuation schemes. In comparison, an opposite-sex de facto partner will qualify under all relevant legislation.

Further, because of the definition of 'child', a person born to a same-sex couple will generally only qualify for death benefits if the child's birth mother or birth father dies. The child will usually not qualify for death benefits on the death of his or her lesbian co-mother or gay co-father.

13.2.1 All but one federal superannuation scheme discriminates against same-sex families

The following Commonwealth government superannuation schemes exclude the surviving partners of a same-sex couple from receiving death benefits. They may also exclude the child of a lesbian co-mother and gay co-father:

- Commonwealth Superannuation Scheme (CSS)
- Public Sector Superannuation Scheme (PSS)
- Defence Forces Retirement and Death Benefits Scheme (DFRDB)
- Military Superannuation and Benefits Scheme (MSBS)

- Parliamentary Contributory Superannuation Scheme (PCSS)
- Judges' Pension Scheme

Table 1 at the end of this chapter summarises the legislation governing each federal superannuation scheme, the definitions which exclude a surviving same-sex partner or child, and the benefits for which same-sex couples are ineligible because of those definitions.

The only federal superannuation scheme which does not discriminate against a surviving same-sex partner is the Public Sector Superannuation Accumulation Plan (PSSap).³ This federal scheme covers employees hired on or after 1 July 2005. The PSSap Trust Deed has adopted the 'interdependency relationship' category, which is discussed in the context of private superannuation schemes in the following sections.⁴

13.2.2 'Spouse' and 'marital relationship' exclude a same-sex couple

The cause of the discrimination against a surviving same-sex partner lies in the various legislative provisions which define a 'spouse' or a person in a 'marital relationship'.

By way of example, these terms are examined in the context of the definitions in the *Superannuation Act 1976* (Cth) (Superannuation Act 1976) which governs the Commonwealth Superannuation Scheme (CSS).

Under that legislation, a person will be entitled to death benefits if the person is a 'spouse who survives a deceased person'. This means that the person must have had a 'marital relationship' with the deceased.⁵

A person will have had a 'marital relationship' if:

...the person ordinarily lived with that other person as that other person's husband or wife on a permanent and *bona fide* domestic basis at that time.⁶

In 1994, Mr Gregory Brown applied for the spouse benefit when his same-sex partner died. When he was denied the benefit he appealed to the Administrative Appeals Tribunal. In considering whether this definition could include a surviving same-sex partner, the Tribunal held that:

There is no doubt that the applicant and [his same-sex partner] had a close marriage-like relationship and that they conformed to the requirements of sections 8A *in all respects except for their gender*.⁷ (emphasis added)

Thus the definitions of 'spouse' and 'marital relationship' under the various federal superannuation schemes require the couple to be of the opposite-sex.

13.2.3 Only a 'spouse' can access a reversionary pension

Many federal government superannuation schemes offer death benefits to the surviving 'spouse' or 'child' either as a reversionary pension or a lump sum payment. A reversionary pension is usually worth much more to the survivors than a lump sum.

However, if there is no qualifying spouse or child, a lump sum payment can be made to an estate.

A same-sex partner can only ever inherit a death benefit through the estate of his or her partner. So a same-sex partner will only ever qualify for an amount equal to the lump sum. And a superannuation lump sum payment made to a non-dependant through an estate is taxed more heavily than a lump sum payment made directly to a dependant (see further section 13.5 below).

Gary Fan and Wayne Lodge clearly realised this predicament:

...we are both members of the PSS (a Comsuper administered defined benefit fund), which expressly denies recognition of each other as significant dependents for the purposes of pensions, death benefits etc. by defining a spouse as a member of the opposite sex. Should one of us die, then we would only be able to inherit the death benefit via our wills/estate, with a much higher taxation treatment of that benefit.⁸

13.2.4 Negative financial consequences for federal public servants

Good Process provide an example demonstrating that a lump sum paid to an estate is less valuable to a dependant than a reversionary pension:

If there are no other eligible beneficiaries, a lump sum can be paid to the estate and distributed to the same-sex partner. However, the lump sum is worth far less than a ComSuper pension.

For example, a \$500,000 lump sum could buy a commercial pension of \$23,697 (male 55 year old). However, investing a lump sum would mean taking on an investment risk and would involve management of the investment and payment of all associated investment fees.

In contrast, as a surviving 'eligible spouse' of a ComSuper PSS member, a notional \$500,000 lump sum would entitle the person to a guaranteed pension of \$30,454 *fully indexed for their entire life* (67% of the original member's pension if they stayed in the scheme until age 60). No fees are charged by ComSuper to manage the pension.⁹

The Association of Superannuation Funds of Australia outline the impact of discrimination in the CSS both when a member dies in service and when the member dies in the pension phase.

[If a]... member dies in service, their spouse... would receive an indexed pension and the option of a lump-sum or a non-indexed pension. The same-sex partner ... of a member who dies in service does not receive a pension in the event of the death of their partner. If there is no eligible beneficiary a lump sum will be paid to the estate of the deceased person... The lump sum paid from an estate may be taxed unless the recipient can prove financial dependency under the [*Income Tax Assessment Act 1936* (Cth)]. The lump sum may not be sufficient to purchase [the equivalent of a pension] with annual payments, security and fees comparable to the CSS.

A 55 year old CSS member (with a spouse aged 55), dies in service after 20 years service. The member has a member financed benefit of \$100,000 and a Superannuation Guarantee component of \$20,000 and was on a salary of \$70,000 at date of death. The member's spouse may have the option of an indexed pension of \$23,450 and a lump sum of \$100,000 or a pension of \$32,830 (\$23,450 indexed and \$9,830 non-indexed). If the member instead had a same-sex partner there would have been no benefit entitlement but a lump sum of \$120,000 would be payable to the member's estate. This lump sum would purchase a lifetime indexed pension/annuity of approximately \$5690 from a commercial provider.¹⁰

In other words, the surviving partner of a same-sex couple might receive approximately \$27,000 per year less than the member of an opposite-sex couple.

Where the... member dies [after retirement while receiving a pension], their spouse would receive a reversionary pension equivalent to 67% of the deceased member's pension. If there is no spouse or eligible child reversionary beneficiary, there is no benefit payable to any other person or to the estate.

On retirement, a CSS pensioner member aged 65, with 30 years service and on a final salary of \$70,000 took their whole entitlement to a lifetime pension as a part indexed and part non-indexed pension. The annual pension is \$49,000 (\$35,000 indexed pension plus \$14,000 non-indexed pension). On their death, their spouse would receive a lifetime pension of \$32,830 (part indexed and part non-indexed pension), or 67% of the entitlement the pensioner was receiving at their death. If the pensioner has a same-sex partner, that partner would receive no entitlement and no residual benefit would be payable to the pensioner's estate.¹¹

So the surviving partner of a same-sex couple would receive nothing, while the surviving partner of an opposite-sex couple would receive \$32 830 per year.

13.2.5 Negative personal impact on federal public servants

A considerable number of submissions to the Inquiry expressed concern about the discriminatory treatment of same-sex couples by federal government superannuation funds. For example, the Gay and Lesbian Rights Lobby (NSW) told the Inquiry that:

Despite a commitment from the Government, public sector funds have not incorporated the category of 'interdependency', meaning that public sector and military employees who are in a same-sex relationship cannot nominate their same-sex partner of their beneficiary for any super death benefits. Instead they must distribute their benefit to their partner through their estate, which attracts a higher rate of tax.¹²

People still working for the federal government expressed concern that they could not name their partner as a beneficiary, that the only way their partner could receive their superannuation benefit was as a lump sum payment through their estate. For example:

[I] soon discovered that I was unable to join another superannuation scheme, and after contacting the PSS, it was confirmed that I could not put my same-sex partner down as a beneficiary. I was left with no choice but to contribute to the PSS and put my mother as my beneficiary. I write to you to highlight the real consequences that the Commonwealth's active discrimination of people in same-sex relationships have had in my life. I felt sick when I realised that once again the loving and supportive relationship I had with my same-sex partner, was not supported by the legal and social systems under which I conduct my daily life. It is extremely unnerving to not feel the protection of the state, and subsequently the approval of society.¹³

Retired fund members were also acutely aware of their predicament. For example Barbara Guthrie and Maureen Kingshott said:

In recent years, we have each commuted our Commonwealth PSS superannuation to a pension. We are thus directly affected by the Commonwealth's failure to extend the 2004 amendment broadening the definition of 'dependant' to its own superannuants in same-sex relationships. We understand that this means that when one of us dies, the other will not be entitled to receive a reversionary pension.¹⁴

Another federal government retiree said:

I retired six years ago after [many] years in the Commonwealth Public Service. The Commonwealth Superannuation Scheme provides for a death benefit to be paid to a spouse if he/she has had a 'marital relationship' at the time of the superannuant's death. I understand that the benefit would be a pension based on 67% of my 'potential invalidity entitlement'. Unfortunately for my male partner, a marital relationship is restricted to two people of the opposite sex. If my partner was female and we were married or had lived together in a permanent and bona fide relationship for at least 3 years, he'd qualify. The criteria that is used to determine that a marital relationship exists covers the length of the relationship, financial dependence, children, and joint property ownership. We would have no trouble meeting these criteria if the definition of spouse was extended to a same-sex partner. Apart from children, our lives are very similar to our heterosexual neighbours. The main difference is that we have no children. We have had a loving, committed, supportive relationship for [a substantial period of time]. It's simply unfair and discriminatory that we don't have equality with my straight retired colleagues.¹⁵

Other submissions expressed a similar degree of frustration at the manner in which federal government superannuation funds discriminated against them:

As a federal public servant, I [name withheld] am required [to] pay superannuation into either PSS or CSS (I am with PSS), but I am unable to nominate my partner as beneficiary as these schemes do not recognise same sex relationships. I have willed my superannuation to my partner [name withheld] in the event of my death, but whether that occurs will only be seen should I die. Why do Comsuper schemes not allow same sex couples to nominate their partners as beneficiaries? If I had personal superannuation (I am entitled to, but don't see the point in splitting super across multiple funds – particularly when the Comsuper schemes have a guarantee of no negative returns) I could nominate [my partner], but not so in the scheme I am forced by law to be part of. The law says I must pay into the scheme and also says – “your same sex partner will not be getting any of it”. How unfair is that?¹⁶

Given the age of my partner and myself, the possibility of one of us dying in the next ten years is not insignificant. If that happens, the surviving partner will not receive any death benefit payments from the deceased partner's superannuation. I could accept that if other members of those schemes faced the same dilemma, but of course they do not. Former military or public service members who have a partner of the opposite sex automatically receive death benefit entitlements... Granting me and my partner superannuation death benefits will not bring about the collapse of my neighbours' marriages, nor lower their income, nor make their roses wilt. There is no logical reason to maintain this discrimination; it is being maintained out of ideological spite... We are all citizens and there should not be one superannuation law for my brother and a different superannuation law for me.¹⁷

13.2.6 Federal government budget concerns

Several submissions to the Inquiry reported correspondence with the Minister for Finance regarding discriminatory federal government superannuation funds.¹⁸

However, correspondence provided to the Inquiry by the Superannuated Commonwealth Officers Association, indicates that budgetary implications need to be examined before any decision is made:

The issue of extending eligibility for death benefits in [the CSS and the PSS] to persons in an interdependency relationship with a scheme member is being examined. However, because of the design of these schemes a number of technical matters and also Budgetary considerations need to be fully examined before any decision could be made.¹⁹

Another submission to the Inquiry reported similar correspondence with the Minister for Finance:

I also have a letter from Senator Minchin addressed to the both of us which basically states that even taking the “interdependent relationship” avenue for giving [name withheld] [my partner] access to my PSS death benefit, the federal government was of the opinion that the cost of allowing this (ie.. allowing same sex couples equality under Comsuper rules) was far too great.²⁰

13.3 Can the surviving same-sex partner of a state public sector superannuation scheme member access death benefits?

It appears to the Inquiry that same-sex couples can now generally access the same benefits as opposite-sex couples under state and territory public sector superannuation legislation. This is because of general reforms recognising same-sex couples under state and territory law (see further Chapter 4 on Recognising Relationships).

However, research indicates that there may still be some discriminatory definitions in the legislation listed below. The Inquiry has not had sufficient resources to investigate whether there has been subsequent law or policy removing any remaining discriminatory impact of this legislation. Further, the Inquiry has not had the resources to investigate whether the children of same-sex couples may be impacted by this legislation.

The Inquiry therefore urges all state and territory authorities to review this legislation, and any other superannuation legislation, to ensure the elimination of any discrimination which may still exist.

New South Wales

- *Coal and Oil Shale Mine Workers (Superannuation) Act 1941* (NSW)
- *Local Government and Other Authorities (Superannuation) Act 1927* (NSW)
- *New South Wales Retirement Benefits Act 1972* (NSW)
- *Public Authorities Superannuation Act 1985* (NSW)
- *Transport Employees Retirement Benefits Act 1967* (NSW)

Victoria

- *Coal Mines (Pensions) Act 1958* (Vic)

Western Australia

- *Superannuation and Family Benefits Act 1938* (WA)

In addition, the Equal Opportunity Commission of Victoria (EOCV) pointed out to the Inquiry that even though discrimination has been removed for a same-sex partner who died after the reforms:

...the new, non-discriminatory provisions only apply to members who 'become entitled' to superannuation benefits or pensions (that is, when their super entitlements vest) after the amendments came into operation. Therefore members who "became entitled to their benefits" prior to the Relationships Acts amendments (either by retiring and in receipt of a pension or death [benefit]) could not have their benefits or entitlements subsequently vest with their same-sex partners. This means that discrimination still occurs where, for example, a same-sex couple member who retired prior to the amendments commencing, was receiving a pension from his or her scheme and dies after the amendments commenced would be prohibited from having a reversionary pension or other benefit pass to their surviving same-sex domestic partner.²¹

The EOCV argues that:

Provisions enabling reversionary pensions or death benefits to vest with domestic partners should apply by reference to the date of death of a superannuant or pensioner and not the date a super member became entitled to their benefits. Furthermore, a scheme should be established to enable provision for bereaved same-sex partners in necessitous circumstances where the past discriminatory laws denied them the super benefits that would otherwise have accrued or reverted to them had they been in a heterosexual relationship.²²

Similar provisions exist in superannuation legislation in other states and territories.²³

13.4 Can the surviving same-sex partner of a private superannuation scheme member access superannuation death benefits?

The *Superannuation Industry (Supervision) Act 1993* (Cth) (Superannuation Industry Act) governs who can receive a death benefit in private superannuation schemes.

The Superannuation Industry Act highlights that one of the main purposes of superannuation is to provide death benefits directly to the 'dependant' of a deceased superannuation member.²⁴ The federal government seeks to encourage contributions to superannuation schemes by providing significant tax concessions for death benefits paid to a dependant directly or via the estate of the deceased fund member.

Since 1 July 2004, the Superannuation Industry Act has provided that a same-sex partner may qualify as a 'dependant' if the couple meets the criteria for an 'interdependency relationship' or if he or she can establish financial dependency on the deceased. A member of an opposite-sex couple will qualify as a 'dependant' if he or she meets the criteria of a 'spouse'.

A child born to an opposite-sex couple will also qualify as a 'dependant'. But a child born to a same-sex couple will only qualify as the 'dependant' of the birth mother or birth father (not the lesbian co-mother or gay co-father) unless he or she can establish financial dependency on the deceased.

The same-sex partner or child of a deceased superannuation member who is not a dependant of the deceased could also receive death benefits through the estate of the deceased (if no other person qualified as a 'dependant'). However, any such payment would only be made at the discretion of the trustee. Further, only a lump sum payment can be paid to the estate and this is generally worth less than a reversionary pension that can be paid to a 'dependant'. Further, a death benefit paid to an estate will only attract the tax concessions available to benefits paid directly to a 'dependant' under superannuation legislation if the recipient is

also considered a 'dependant' under the relevant taxation legislation.²⁵ Thus it is financially important for same-sex families to qualify as a 'dependant' in the same way as opposite-sex families.

13.4.1 A same-sex partner may be a 'dependant' for the purposes of death benefits in private funds

The definition of 'dependant' in the Superannuation Industry Act includes:

- a 'spouse' of the deceased person²⁶
- a 'child' of the deceased person²⁷
- a person in an 'interdependency relationship' with the deceased person²⁸
- a dependant in the ordinary sense of the word, generally referring to a person who was partly or wholly financially dependent on the deceased.²⁹

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

Under the Superannuation Industry Act, a 'spouse' includes a person who:

although not legally married to the person, lives with the person on a genuine domestic basis as the husband or wife of the person.³⁰

As noted above, the Administrative Appeals Tribunal has held that a reference to 'husband or wife' requires the couple to be of the opposite-sex.³¹

Furthermore, the Superannuation Complaints Tribunal believes that any attempt to amend a superannuation trust deed to include same-sex partners within the definition of 'spouse', would potentially breach the Superannuation Industry Act.³²

(b) *A same-sex partner may be in an 'interdependency relationship'*

In July 2004 both the Superannuation Industry Act and the *Income Tax Assessment Act 1936* (Cth) (Income Tax Assessment Act 1936) were amended to introduce the category of 'interdependency relationship' within the definition of 'dependant'. This opened the door for same-sex partners to qualify as a 'dependant' if they could not establish financial dependency.

However, it is important to note that although these amendments *permit* a superannuation trustee to include same-sex couples by adopting the category of 'interdependency relationship', the law does *not require* them to do so.³³ Same-sex couples may therefore still be at a disadvantage in some superannuation trust deeds.

Further, the amendments in the Superannuation Industry Act apply to private superannuation funds only. The interdependency relationship category does not apply to most federal government superannuation schemes, as discussed above.

Finally, as discussed below, a same-sex partner may have a harder time qualifying as a person in an 'interdependency relationship' than an opposite-sex partner has in qualifying as a 'spouse'.

Nevertheless, same-sex couples may qualify for death benefits under the following definition of 'interdependency relationship':

2 persons (whether or not related by family) have an *interdependency relationship* if:

- (a) they have a close personal relationship; and
- (b) they live together; and
- (c) one or each of them provides the other with financial support; and
- (d) one or each of them provides the other with domestic support and personal care.³⁴

This definition is used both in the Superannuation Industry Act and relevant tax law (discussed in section 13.5 below).

(c) A same-sex partner may be 'financially dependent'

According to the Superannuation Complaints Tribunal, the definition of 'dependant' in both the Superannuation Industry Act and the Income Tax Assessment Act 1936 extends to those who are 'financially dependent', in the ordinary meaning of 'dependant'.³⁵

This category of financial dependency may continue to be important for surviving same-sex partners where a fund has not adopted the interdependency provisions. Further, in some cases it may be easier to prove financial dependency than an 'interdependency relationship'.

The Association of Superannuation Funds of Australia (ASFA) outlines what it believes is required for a person to be 'financially dependent':

- unless the trust deed provides otherwise, partial financial dependency is sufficient
- unless the trust deed provides otherwise, financial interdependency is sufficient
- a person does not have to prove they were in financial need to establish dependency
- the mere provision of gifts and loans does not establish financial dependency
- if a relationship has broken down, but there is still some degree of financial dependency, a claimant may not qualify as a spouse, but would possibly qualify as a financial dependant.³⁶

The Australian Taxation Office may apply a stricter approach to financial dependency. In some cases, significant or full financial dependency is required: 'where a person is wholly or substantially maintained financially by another person'.³⁷

(d) A 'child' generally includes a birth child only

'Child' is defined in the Superannuation Industry Act and the Income Tax Assessment Act 1936 to include an adopted child, step-child or ex-nuptial child.³⁸

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).³⁹

Chapter 5 also explains that definitions of ‘child’, like those in the Superannuation Industry Act and the Income Tax Assessment Act 1936, 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 (in the absence of adoption).⁴⁰

The children of a lesbian co-mother or gay co-father may be able to claim a death benefit as a ‘dependant’ if they are financially dependent on the deceased co-mother or co-father.⁴¹ However, the child of a birth mother or birth father will automatically qualify whereas the child of a lesbian co-mother or gay co-father will have to prove financial dependence.

13.4.2 It is harder to prove an ‘interdependency relationship’ than a de facto ‘spouse’ relationship

The main way a same-sex partner will qualify as a dependant for superannuation purposes is through proving the existence of an ‘interdependency relationship’.

Several submissions to the Inquiry suggest that both the criteria and the process for proving an ‘interdependency relationship’ are unduly onerous. They highlight that it is more difficult to prove an ‘interdependency relationship’ than to prove an opposite-sex married or de facto relationship for the purpose of qualifying as a ‘spouse’.⁴²

(a) *General criteria to prove an opposite-sex partner is a ‘spouse’*

In the case of a married person, a copy of the marriage certificate is sufficient proof that a person is a ‘spouse’ and therefore a ‘dependant’.⁴³

A trustee of a superannuation fund needs to be satisfied that a member of an opposite-sex de facto couple is in a ‘genuine domestic relationship’. The following criteria are considered relevant in making this assessment:

- (a) the duration of the relationship;
- (b) the nature and extent of the common residence;
- (c) whether or not a sexual relationship existed;
- (d) the degree of financial interdependence, and any arrangements for support, between or by the parties;
- (e) the ownership, acquisition and use of property;
- (f) the procreation of children;
- (g) the performance of household duties;
- (h) the degree of mutual commitment and support;
- (i) reputation and ‘public’ aspects of the relationship.⁴⁴

These criteria are not listed in the Superannuation Industry Act but were developed through case law. No one of the above criteria is determinative of the existence of the relationship. The Superannuation Complaints Tribunal adopts the common law interpretation of these criteria which generally requires that the couple must live together.⁴⁵

(b) Prescriptive criteria to prove that a same-sex partner is in an 'interdependency relationship'

The criteria for establishing an 'interdependency relationship' is much more prescriptive than the general criteria for proving a genuine domestic relationship for opposite-sex couples.

A same-sex couple must prove all of the criteria set out in the definition of 'interdependency relationship' in the Superannuation Industry Act. This means that a surviving member of a couple must establish:

- a close personal relationship *and*
- they live together *and*
- financial support *and*
- domestic support *and*
- personal care.⁴⁶

In addition, superannuation trustees must consider the following factors set out in the Superannuation Industry (Supervision) Regulations 1994 (Cth) (Superannuation Regulations) before conferring a death benefit on a person in an 'interdependency relationship':

- (a) all of the circumstances of the relationship between the persons, including (where relevant):
- (i) the duration of the relationship; and
 - (ii) whether or not a sexual relationship exists; and
 - (iii) the ownership, use and acquisition of property; and
 - (iv) the degree of mutual commitment to a shared life; and
 - (v) the care and support of children; and
 - (vi) the reputation and public aspects of the relationship; and
 - (vii) the degree of emotional support; and
 - (viii) the extent to which the relationship is one of mere convenience; and
 - (ix) any evidence suggesting that the parties intend the relationship to be permanent;
- (b) the existence of a statutory declaration signed by one of the persons to the effect that the person is, or (in the case of a statutory declaration made after the end of the relationship) was, in an interdependency relationship with the other person.⁴⁷

(c) Additional criteria to prove an 'interdependency relationship'

The Superannuation Regulations contain factors which do not otherwise appear in the statutes or case law regarding opposite-sex de facto relationships.

These additional criteria include:

- the degree of emotional support
- whether the relationship is one of mere convenience
- whether the relationship is intended to be permanent.⁴⁸

Again, meeting these additional criteria may make establishing an interdependent relationship more difficult than establishing an opposite-sex de facto relationship.

(d) *'Interdependency relationship' emphasises a carer role*

The hardest element of the legislative definition of 'interdependency relationship' for same-sex couples to prove seems to be 'domestic support and personal care'.⁴⁹

However, the Superannuation Regulations mitigate the impact of these criteria by stating that two people will still be in an 'interdependency relationship' if they have a close personal relationship, live together, financially support each other and:

one or each of them provides the other with support and care of a type and quality normally provided in a close personal relationship, rather than by a mere friend or flatmate.⁵⁰

This still requires one member of a same-sex couple to provide significant and constant care for the other. Examples of relevant care include:

- significant care provided for the other person when he or she is unwell
- significant care provided for the other person when he or she is suffering emotionally.⁵¹

Thus the interdependency criteria appear to emphasise a 'carer' relationship at times of serious illness or trauma rather than a couple-like relationship.⁵² This puts same-sex couples on a different footing to opposite-sex couples.

(e) *Proving an 'interdependency relationship' creates great uncertainty for same-sex couples*

Miranda Stewart argues that the high level of scrutiny and the degree of proof required to persuade a trustee to exercise discretion in favour of a same-sex partner:

results in greater uncertainty and injustice for the surviving same-sex partner, especially where the deceased's family is hostile and makes a competing claim for death benefits.⁵³

Several submissions to the Inquiry expressed concern about the unfairness of having to prove an interdependency relationship. For example:

- According to [the Superannuation Industry Act] if I was to die, any death insurance that I hold through my superannuation would only be paid to my same-sex spouse tax free (up to the pension RBL) if she could prove interdependency. When I asked ASFA (Association of Super Funds of Australia) and the ATO (Aust Tax Office) how does one prove interdependency, they were unable to answer my query, except for stating that my partner would (probably) need to show banking records and photos as proof. Why is this necessary? Do heterosexual couples need to show banking records and personal effects to prove they are in a relationship? I can't imagine the horror that has been or will be faced by many Australian gay or lesbian people, when faced by death and subsequent grief of a loved partner to have to then prove their relationship status. What an inhumane request, especially seeing as though opposite-sex couples do not have to suffer the same experience.⁵⁴

● Same-Sex: Same Entitlements

- Same-sex partners ... will ... still have to prove to the trustee's satisfaction that they were in an interdependency relationship with the deceased in order for their entitlements to be binding on the trustee. This is in stark contrast to opposite-sex spouses, who are automatically recognised as dependents and who do not have to endure the intrusive process of having to provide private information in order to establish a claim to the death benefits. Further, until the interdependency relationship is proven, a same-sex partner's entitlement to the death benefit remains in a doubt and is at greater risk of challenge by relatives of the deceased.⁵⁵
- I have listed my partner down as the recipient of my Super, yet under legislation currently this can be easily challenged. This would not be the case for heterosexual couples. If my partner died I would have to prove an interdependent relationship, which has been interpreted very differently by different courts. There is no clean statement to clear the confusion up.⁵⁶

The uncertainty caused by proving an 'interdependency relationship' also affects financial planning. For example, the Inquiry heard:

The 2004 changes to the [the Superannuation Industry Act] broadened the definition of ['dependant'] to include 'interdependency relationships'. While this change is welcome, the definition still does not offer *equal* rights to couples in same-sex relationships as it remains for the partner left behind, on the death of one member of the couple, to prove that they were indeed in an 'interdependent relationship'. If a married couple have full and unquestioned rights to the benefits of their partner's superannuation, same-sex couples should also have these rights. I have named my partner as sole beneficiary of my superannuation benefits upon my death. However, in order to receive this benefit, not only will she have to prove that we were life partners, she will also be at the mercy of the chair of the board of the superannuation company, who still holds the right to refuse benefit payment. It should not be the responsibility of a stranger to determine who receives my benefits upon my death and it is for this reason that I do not salary sacrifice into my superannuation to provide myself and my family with greater retirement or death benefits – I have no guarantee that they will actually receive my superannuation entitlements.⁵⁷

Margie Collins described the inequities that she and her partner face with superannuation:

Should we now choose to invest in the hope to gain some retirement wealth, we can't be sure our super would be available to each other should one of us die. If it is available, it would only be following legal action.⁵⁸

(f) *'Interdependency relationships' do not adequately characterise same-sex relationships*

The creation of a separate category for same-sex couples suggests, in itself, that there is something different about the quality of a same-sex relationship. And, as indicated above, the interdependency category emphasises a carer role over a couple role.

Some submissions to the Inquiry talk about the indignity of being placed in an 'other' category to that of 'spouse':

Does the Tax Act call de facto heterosexual couples as interdependent? No they are titled and respected as spouses. Does it describe a married couple as interdependent? No they are titled and respected as spouses. Surely a same-sex partner should be recognised under [the Superannuation Industry Act] as a spouse in the same way as heterosexual couples are.⁵⁹

Some people told the Inquiry that the interdependency category inadequately represents the nature of their relationships. For example:

In a general philosophical sense, it causes discomfort, embarrassment or even anger among lesbian and gay people, that their relationship should be defined in that way. It's a lessening, a diminishment and a failure to acknowledge the depth and sincerity of same-sex relationships by using that kind of language.⁶⁰

13.4.3 A same-sex partner can only nominate a 'dependant' as superannuation beneficiary

Some superannuation funds allow members to nominate a person as a 'nominated beneficiary' in case of the member's death. In many superannuation funds, this nomination is not binding but provides an indication to the trustee of the member's wishes. Since same-sex partners do not automatically receive death benefits, some same-sex couples try to nominate their partner as a beneficiary.

In some superannuation funds, a binding nomination can be made subject to various conditions. However, the trustees of a fund are still bound by the provisions of the Superannuation Industry Act regarding the payment of death benefits to dependants. This means that in any case, a death benefit nomination will only bind the trustee if the nominated person is either the member's 'dependant' or legal personal representative (executor of the estate).⁶¹

So, while a nomination indicates the wishes of the deceased member, it does not necessarily bind the trustee regarding the distribution of the death benefit.

13.4.4 A same-sex partner cannot usually receive a reversionary pension

Some superannuation funds pay a reversionary pension to the surviving dependants of a deceased member. This pension is generally a portion of the superannuation pension that would have been paid, or was being paid to the deceased.

However, surviving same-sex partners are generally not eligible for a reversionary pension. This is because most trust deeds only pay a reversionary pension to a married or opposite-sex *de facto* spouse.⁶²

Miranda Stewart explains how reversionary pensions work as follows:

A member of a superannuation fund may be in receipt of benefits, after retirement or disability, as a pension (or income stream) from the fund rather than as a lump sum. A superannuation pension may be 'reversionary' such that it will revert automatically to another nominated person on death of the pensioner. Most trust deeds only allow for reversion of a pension to a *de jure* or *de facto* spouse, which does not include a partner in a same-sex relationship; as a result, trustees have refused to pay reversionary pensions to surviving members of same-sex relationships. As the 'interdependency relationship' reform has not actually amended the meaning of 'spouse', an amendment of trust deeds to include a same-sex partner in this category may breach the [Superannuation Industry Act]. Under the recent proposals to reform superannuation, reversionary pensions would be limited by statute to spouses and would therefore not be allowed for a surviving member in a same-sex couple.⁶³

The Inquiry heard that ineligibility for reversionary pensions affects the long term financial planning of same-sex couples:

Under current legislation, a person can nominate a spouse to continue to receive their pension in the event of their death. When the pension is set up, a person is able to select a term based on either their or their spouse's life expectancy. This assists with managing assets where an age difference exists between a member of a couple. It also slows the eating away of capital and is useful if a longer life expectancy is expected or a selected term is preferred (i.e. to reduce the risk of the survivor outliving their capital).⁶⁴

13.4.5 A surviving same-sex partner may access death benefits from a retirement savings account

A retirement savings account (RSA) is a special account offered by banks, building societies, credit unions, life insurance companies and financial institutions. It is used for retirement savings and is similar to a superannuation fund.⁶⁵

RSA benefits are available to the 'dependants' or personal legal representative of the account holder.⁶⁶ A 'dependant' is defined in identical terms to the Superannuation Industry Act and therefore includes a person in an 'interdependency relationship'.⁶⁷

Consequently, a same-sex partner will be entitled to RSA benefits if an interdependency relationship can be proven or if he or she can establish financial dependence.

13.5 Can a surviving same-sex partner access death benefit tax concessions?

As mentioned earlier, a same-sex partner who does not qualify for direct payment of death benefits as a 'dependant' under the Superannuation Industry Act, or a 'spouse' under the federal government schemes, may still inherit a partner's superannuation benefit through the estate.

In general, death benefits are tax-free when paid to dependants of the deceased. The rate of tax that a surviving partner pays on a death benefit thus depends on whether that partner is considered a 'dependant' under the relevant tax law. A person other than a 'dependant' will pay significantly more tax on a superannuation death benefit received through an estate than a person who meets the tax law definition of 'dependant'.

13.5.1 A same-sex partner may be a 'dependant' for tax concession purposes

The definition of 'dependant' in the tax law is essentially the same as the definition under the Superannuation Industry Act.⁶⁸ So, the main difference is that in the tax law, a child is generally only a dependant if he or she is less than 18 years of age (however, a child over the age of 18 may qualify as a dependant if she or he can provide financial dependency).

It has been held that a same-sex partner is not a 'spouse' under the Income Tax Assessment Act 1997.⁶⁹

Thus, if a surviving same-sex partner qualifies for a direct death benefit as a 'dependant' under the Superannuation Industry Act, he or she will qualify as a 'dependant' under the tax law.

The children of a lesbian co-mother or gay co-father may qualify as a 'dependant' under the tax law if they are financially dependent on the deceased co-mother or co-father. However, the child of a birth mother or birth father will automatically be entitled whereas the child of a lesbian co-mother or gay co-father will have to prove financial dependence.

13.5.2 A 'dependant' is eligible for tax concessions on lump sum superannuation death benefits

The rate at which a superannuation death benefit is taxed depends on whether the benefit is paid to a 'dependant' as defined in the relevant taxation legislation.⁷⁰

If a surviving same-sex partner does not qualify as a 'dependant' he or she will pay a higher rate of tax on a superannuation death benefit received through his or her partner's estate.

A lump sum payment is tax-free when paid to a dependant. If paid to a non-dependant, any element that has already been taxed is subject to 15% tax, while any element that has not been taxed is subject to 30% tax.⁷¹

From 1 July 2007 a non-dependant can only receive a lump sum payment. In contrast, for dependants, depending on the terms of the superannuation fund deed, a superannuation death benefit can be taken as an income stream. Income streams received by non-dependants, which commenced before 1 July 2007, are taxed at the same rate as those received by dependants.⁷²

This means that a non-dependant will pay more tax on a lump sum superannuation death benefit than a dependant.

13.5.3 A same-sex partner cannot access the death benefits anti-detriment payment

The 15% superannuation contributions tax was introduced in 1988. The anti-detriment payment is essentially a reimbursement of the contributions tax that has been paid by those people who were receiving death benefits prior to the introduction of the tax in 1988.⁷³

In other words, the anti-detriment payment ensures that death benefits received prior to and after the introduction of the contributions tax in 1988 are taxed in the same way.⁷⁴

However, in the case of anti-detriment payments, a 'dependant' is defined to include a 'spouse' and 'child' but not an 'interdependency relationship'.⁷⁵ So a same-sex partner will not be eligible for this payment.

13.6 Can a same-sex couple take advantage of superannuation contributions splitting?

Contributions splitting allows a couple to direct superannuation contributions to the superannuation fund of a partner who has a lower superannuation benefit.⁷⁶ This will minimise the amount of tax each member of the couple have to pay on superannuation benefits exceeding the relevant thresholds (the Reasonable Benefit Limit (RBL) threshold and the Eligible Termination Payment (ETP) threshold).⁷⁷

13.6.1 A same-sex partner cannot engage in contributions splitting

Since 1 January 2006, the Superannuation Industry Regulations have provided that an individual can split his or her superannuation contributions with a 'spouse'.⁷⁸

While 'spouse' is not defined in the Superannuation Industry Regulations, the definition of 'spouse' in the Superannuation Industry Act and tax legislation clearly excludes a same-sex partner. Therefore it is the Inquiry's view that a same-sex partner will not qualify as a 'spouse' for the purposes of superannuation contributions splitting.⁷⁹

13.6.2 Negative impact on same-sex couples

The Association of Superannuation Funds of Australia (ASFA) notes that access to contributions splitting can be a considerable financial advantage for couples with large superannuation benefits.⁸⁰ The ALSO Foundation also highlights that contributions splitting greatly helps a couple where one partner is not working.⁸¹

Several people in same-sex couples told the Inquiry of the impact of their ineligibility for these provisions. For example:

In our case, my partner has significantly less superannuation savings than I do and we would like to equalise the amounts saved in superannuation. The ability to do this by splitting superannuation contributions would be of great benefit to our retirement savings. The potential tax saving is over \$20,000 at retirement. We are unable to take advantage of this initiative as it is not available to same sex couples.⁸²

Action Reform Change Queensland and the Queensland AIDS Council describe one couple's experience of discrimination in the area of contributions splitting:

Karen and Siobhan (not their real names) have lived together for 8 years. As Karen works full-time, and Siobhan works on a casual, part-time basis, Karen would like to be able to make contributions into Siobhan's superannuation fund. As Karen says:

What are our rights? Superannuation is quite confusing but for same sex couples it is much worse. This is discriminatory. Super splitting is not an option for same sex couples. This is a good idea if one person in the couple is working more regularly than the other, but this option is not available in same sex couples.⁸³

13.7 Can a same-sex couple access the superannuation spouse tax offset?

A person is eligible for a tax offset if he or she makes an after-tax superannuation contribution on behalf of his or her low-income earning 'spouse'.⁸⁴ The tax offset is 18% for contributions made up to \$3000 per annum (which amounts to a tax offset of up to \$540 per annum).⁸⁵

In addition, any after-tax contribution to the superannuation fund of a 'spouse' or 'child' will be exempt from the 15% superannuation contributions tax.⁸⁶

13.7.1 A same-sex partner cannot access the superannuation spouse tax offset

For the purposes of the spouse tax offset, a 'spouse' is defined as a person who 'lives with the person on a genuine domestic basis as the person's husband or wife' even though they are not legally married.⁸⁷

As discussed previously, the terms 'husband' and 'wife' exclude a same-sex partner from this definition.

13.7.2 Negative impact on same-sex families

A person who makes a superannuation contribution on behalf of a same-sex partner or child other than a birth child will be excluded both from the offset and the contribution tax exemption.

A person will not be entitled to either the spouse tax offset or the tax exemption available to a person who makes after-tax contributions to his or her same-sex partner or non-birth child.

The Inquiry heard of the impact of this discrimination:

There have been some financial years where one of us has qualified as a low income earner under the Tax Office's definition. Yet as we do not qualify as "spouses" under the Taxation Office definition, the other is unable to claim the \$540 rebate for contributing to the lower income earner's superannuation fund. We are therefore financially worse off than we would be if the definition of spouse included same-sex spouse. This impacts not only our pocket today but it removes an incentive to top up superannuation, it impacts upon what is available to us at retirement.⁸⁸

13.8 Can the surviving same-sex partner of a judge access a judicial pension?

Judicial pensions are a form of superannuation entitlement.

13.8.1 The surviving same-sex partner of a federal judge cannot access a reversionary pension

When a federal judge or magistrate dies, his or her 'spouse' is entitled to a reversionary pension equivalent to 62.5% of the pension entitlement paid while the judge was alive.⁸⁹ A pension may also be available to an 'eligible child'.⁹⁰

However, the same-sex partner of a judge does not qualify as a 'spouse who survives a deceased judge' and is therefore not entitled to this reversionary pension.⁹¹

The child of a deceased judge who was the lesbian co-mother or gay co-father may qualify as an 'eligible child' if the Attorney-General forms the view that he or she was wholly or substantially dependent, but otherwise will be excluded.⁹²

The Judicial Conference of Australia told the Inquiry that they believed that 'Australian judicial officers, like other working Australians, should be able to share the fruits of their labours with their partners of either sex'.⁹³ They also argue that:

...it is important to recognise that the pension entitlements or retirement benefits provided to judicial officers play an important role in protecting judicial independence. Entitlements and benefits should be uniform among all judicial officers, State and Federal, and should reflect the principle that family members will be protected after the death of a judicial officer.⁹⁴

The Judicial Conference of Australia also draws attention to potential discrimination in the Federal Magistrates Amendment (Disability and Death Benefits) Bill 2006, which is still before the federal Parliament. The Bill seeks to amend the *Federal Magistrates Act 1999* (Cth) to provide disability cover and death benefits to an 'eligible spouse' or 'eligible child' of a federal magistrate.⁹⁵ However, those definitions do not include the same-sex partner of a magistrate. Nor do they include a child of a lesbian co-mother or gay co-father.⁹⁶

13.8.2 The surviving same-sex partner of a state judge can access a reversionary pension except in Victoria

Except in Victoria, it seems that the same-sex partner of a judge in all state and territory jurisdictions is entitled to the same retirement benefits as an opposite-sex partner.

According to the Equal Opportunity Commission of Victoria, a same-sex partner will be ineligible for a reversionary pension under any of the following legislation. This legislation does not define 'spouse':

- *Attorney-General and Solicitor-General Act 1972* (Vic)⁹⁷
- *Constitution Act 1975* (Vic)⁹⁸
- *County Court Act 1958* (Vic)⁹⁹
- *Magistrates' Court Act 1989* (Vic)¹⁰⁰
- *Public Prosecutions Act 1994* (Vic)¹⁰¹
- *Supreme Court Act 1986* (Vic).¹⁰²

The Equal Opportunity Commission of Victoria describes recent efforts to amend this legislation:

In April 2005 the Victorian Government introduced into Parliament the Courts Legislation (Judicial Pensions) Bill. It sought to modernise the State's constitutionally protected pension schemes to ensure that they operate in accordance with Commonwealth family law and Victorian equal opportunity law. The second reading speech to this Bill acknowledged that the constitutionally protected pension schemes were established in the middle of the 19th century and reversionary pensions were only made available to married partners. This Bill sought to replace references to spouse with domestic partner to ensure that reversionary pension schemes were also available to mixed-sex and same-sex unmarried partners. The proposed amendments would have brought reversionary pension entitlements up to date with commensurate relationship recognition reform under the Relationships Acts.¹⁰³

The situation in the ACT is complex due to the interaction between federal and ACT law. The Judicial Conference of Australia explains:

In the ACT, a judge has the same entitlements as a Federal judge under s.4(1) of the *Judges Pensions Act 1968* (Cth). However, the ACT has effectively overcome the discriminatory operation of the *Judges Pensions Act* by adopting a definition of "marital relationship" in s.37U(3)(h) of the *Supreme Court Act 1933* (ACT) which includes a relationship between two people of the same sex. Section 37U(3)(a) applies the *Judges Pensions Act* as if it was a law of the ACT. Assuming that the ACT has achieved its objective, the odd result is that the *Judges Pensions Act* has a more generous operation as a law of the ACT than it does as a law of the Commonwealth. This raises interesting questions as to the position of judges who hold dual commissions as both Commonwealth and ACT judges.¹⁰⁴

13.9 Can the surviving same-sex partner of a Governor-General access an allowance?

As with judges, a former Governor-General receives an allowance which passes to their 'spouse' on death.¹⁰⁵ However, the relevant definition excludes a same-sex partner.¹⁰⁶ Therefore a same-sex partner of the Governor-General will not be entitled to the allowance.

13.10 Do superannuation laws breach human rights?

This chapter shows that same-sex couples do not have access to the range of superannuation benefits and tax concessions available to opposite-sex couples. In particular, the same-sex partner of a federal public servant does not have access to direct death benefits.

A same-sex partner may be able to access some benefits in private superannuation schemes if he or she can establish financial dependence on his or her partner or meet the 'interdependency relationship' criteria. However, both these categories impose more onerous qualifying criteria than for an opposite-sex de facto partner in the same position.

Therefore, the main finding of this chapter is that superannuation and tax laws which exclude same-sex couples from superannuation entitlements and associated tax concessions available to an opposite-sex couple, breach the right to equal protection of the law under article 26 of the *International Covenant of Civil and Political Rights* (ICCPR).

Under the *International Covenant of Economic Social and Cultural Rights* (ICESCR), any steps Australia takes to guarantee the right to social security (including superannuation

entitlements) must occur without discrimination (articles 9, 2(2)). The discriminatory treatment of same-sex couples in superannuation breaches this right.

In some federal employee superannuation schemes the child of a lesbian co-mother or gay co-father may not be entitled to the direct death benefits available to the child of a birth mother or birth father. This may amount to a breach of article 18(1) of the *Convention on the Rights of the Child* (CRC) which requires recognition of the common responsibilities of both parents of a child.

In other superannuation schemes, the child of a lesbian or gay co-parent may be able to access direct death benefits if they can prove financial dependence. Since these schemes do not deny a child access to direct death benefits outright, the Inquiry makes no finding of breach insofar as the laws apply to the children of same-sex couples.

Nevertheless, to the extent that a same-sex family may be financially worse-off because of discrimination in accessing superannuation entitlements and tax concessions, the best interests of the child may be compromised.

Finally, to the extent that proving the 'interdependency category' requires greater intrusion into the private family life of a same-sex couple than for an opposite-sex couple, there may be a breach of articles 17 and 2(1) of the ICCPR.

13.11 How should the law be changed to avoid future human rights breaches?

It is clear that same-sex couples and families are denied access to a range of superannuation entitlements and associated tax concessions which are available to opposite-sex de facto couples and parents.

The introduction of the interdependency category has given same-sex couples access to certain death benefits which were previously denied to them. However, it is more complex for a same-sex couple to satisfy the 'interdependency' criteria than it is for an opposite-sex de facto couple to satisfy the 'spouse' criteria. And the creation of a different category for same-sex couples suggests that they are a lesser, or at least different quality of couple to an opposite-sex couple. The Inquiry does not accept this distinction.

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

The following sections summarise the cause of the problems and how to fix them.

13.11.1 Narrow definitions are the main cause of discrimination

Same-sex couples are worse off than opposite-sex couples because the definitions in superannuation and associated taxation legislation fail to treat same-sex couples and families in the same way as opposite-sex couples and families.

In particular, the narrow definition of 'spouse' in various pieces of superannuation and associated taxation legislation limits the entitlements available to same-sex couples and families.

The definition of ‘child’ in certain pieces of superannuation legislation is also problematic because it may exclude the child of a lesbian co-mother or gay co-father.

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

While the interdependency definition opens the door to gay and lesbian couples, it still does not treat same-sex and opposite-sex couples in the same way. And it is not the appropriate mechanism for bringing equality to same-sex couples.

A better way to bring equality is to treat a same-sex partner as a ‘spouse’ in the same-way as an opposite-sex partner.

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 Superannuation Act 1976)
- redefine the terms in the legislation to include same-sex couples (for example, redefine ‘spouse’ in the Superannuation Act 1976 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 both the *children of same-sex couples* and the parents of those children.

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). This would mean that an ART child born to a lesbian couple would automatically be the ‘child’ of both members of the lesbian couple (in the same way as an ART child is automatically the ‘child’ of both members of an opposite-sex couple).

Chapter 5 also suggests that it should be easier for a lesbian co-mother and gay co-father to adopt a child for the same reasons.

Chapter 5 further recommends the insertion of a new definition of ‘step-child’ which would include a child under the care of a ‘de facto partner’ of the birth parent. This would make it easier for the child of a lesbian co-mother or gay co-father to qualify under those definitions of ‘child’ which include a ‘step-child’.

It may not be necessary to amend the definition of ‘child’ if these three things occur, because a lesbian co-mother and gay co-father will fall under the definition as is.

Finally, Chapter 5 suggests that federal legislation should clearly recognise the status of a person who has a parenting order from the Family Court of Australia. This would mean that the children of a gay co-father or lesbian co-mother with a parenting order could more confidently assert their right to superannuation entitlements.

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 approaches set out in Chapter 4 on Recognising Relationships, then different amendments would be required.

13.11.3 A list of federal legislation to be amended

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

Defence Force Retirement and Death Benefits Act 1973 (Cth)

‘child’ (s 3(1) – 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 relationship’ (insert new definition)

‘eligible child’ (s 3(1) – 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’)

‘marital relationship’ (s 6A – amend to include a ‘de facto relationship’)

‘spouse’ (s 6B(2) – no need to amend if ‘marital relationship’ is amended)

‘step-child’ (insert new definition)

Federal Magistrates Amendment (Disability and Death Benefits) Bill 2006 seeking to amend the *Federal Magistrates Act 1999 (Cth)*

‘de facto partner’ (insert new definition)

‘de facto relationship’ (insert new definition)

‘eligible child’ (sch 1, cl 13 inserting sch 1, cl 9F into the Act - no need to amend if the child of a lesbian co-mother or gay co-father may be recognised through reformed parenting presumptions or adoption laws)

‘eligible spouse’ (sch 1, cl 13 inserting sch 1, cl 9E into the Act – no need to amend if ‘marital relationship’ is amended)

‘marital relationship’ (sch 1, cl 13 inserting sch 1, cl 9E(5) into the Act – amend to include a ‘de facto partner’)

Governor-General Act 1974 (Cth)

‘de facto relationship’ (insert new definition)

‘marital relationship’ (s 2B – amend to include ‘de facto relationship’)

‘spouse of a deceased person’ (s 2C – no need to amend if ‘marital relationship’ is amended)

Income Tax Assessment Act 1936 (Cth)

‘child’ (s 6(1) – 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’ in the Income Tax Assessment Act 1997)

‘relative’ (s 6(1) – no need to amend if ‘spouse’ is amended and a lesbian co-mother or gay co-father may be recognised as a parent through reformed parenting presumptions or adoption laws in the Income Tax Assessment Act 1997)

‘spouse’ (s 6(1) – no need to amend if ‘spouse’ is amended in the Income Tax Assessment Act 1997)

Income Tax Assessment Act 1997 (Cth)

‘child’ (s 995-1 – 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’)

‘death benefits dependant’ (s 302-195 – no need to amend if ‘spouse’ is amended and ‘child’ may recognise the child of a lesbian co-mother or gay co-father 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)

‘interdependency relationship’ (s 302-200 – no need to amend if ‘spouse’ is amended)

‘relative’ (s 995-1 – no need to amend if ‘spouse’ is amended and a lesbian co-mother or gay co-father may be recognised as a parent through reformed parenting presumptions or adoption laws)

‘spouse’ (s 995-1 – amend to include a ‘de facto partner’)

‘step-child’ (insert new definition)

Income Tax Regulations 1936 (Cth)

‘interdependency relationship’ (reg 8A(1) – no need to amend if ‘spouse’ is amended in the Income Tax Assessment Act 1997)

Judges’ Pensions Act 1968 (Cth)

‘de facto relationship’ (insert new definition)

‘eligible child’ (s 4AA – amend to clarify the role of a parenting order; otherwise no need to amend if the child of a lesbian co-mother or gay co-father may also be recognised through reformed parenting presumptions or adoption laws)

‘marital relationship’ (s 4AB(1) – amend to include ‘de facto relationship’)

‘spouse who survives a deceased judge’ (s 4AC(2) – no need to amend if ‘marital relationship’ is amended)

Military Superannuation and Benefits Trust Deed (made under s 5(1) of the Military Superannuation and Benefits Act 1991 (Cth))

‘child’ (sch 1, r 1 – no need to amend if ‘spouse’ is amended and 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 relationship’ (insert new definition)

‘eligible child’ (sch 1, r 1 – 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’)

‘marital relationship’ (sch 1, r 1A – amend to include ‘de facto relationship’)

‘spouse’ (sch 1, r 9 – no need to amend if ‘marital relationship’ is amended)

‘spouse’ (sch 1, r 12 – delete)

‘step-child’ (insert new definition)

Parliamentary Contributory Superannuation Act 1948 (Cth)

‘child’ (s 19AA(5) – no need to amend if the child of a lesbian co-mother or gay co-father may be recognised through reformed parenting presumptions or adoption laws)

‘de facto relationship’ (insert new definition)

‘eligible child’ (s 19AA(5) – no need to amend if the child of a lesbian co-mother or gay co-father may be recognised through reformed parenting presumptions or adoption laws)

‘marital relationship’ (s 4B – amend to include ‘de facto relationship’)

‘spouse’ (s 4C(2) – no need to amend if ‘marital relationship’ is amended)

Retirement Savings Accounts Act 1997 (Cth)

‘child’ (s 20(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)

‘dependant’ (s 20(1) – no need to amend if ‘spouse’ is amended and ‘child’ may recognise the child of a lesbian co-mother or gay co-father through reformed parenting presumptions, adoption laws or a new definition of ‘step-child’)

‘interdependency relationship’ (s 20A – no need to amend if ‘spouse’ is amended)

‘spouse’ (s 20(2) – amend to include a ‘de facto partner’)

‘step-child’ (insert new definition)

Superannuation Act 1976 (Cth)

‘child’ (s 3(1) – 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 relationship’ (insert new definition)

‘eligible child’ (s 3(1) – no need to amend if the child of a lesbian co-mother or gay co-father may also be recognised through reformed parenting presumptions, adoption laws or a new definition of ‘step-child’)

‘marital relationship’ (s 8A – amend to include ‘de facto relationship’)

‘partially dependent child’ (s 3(1) – no need to amend if the child of a lesbian co-mother or gay co-father may also be recognised through reformed parenting presumptions, adoption laws or a new definition of ‘step-child’)

‘spouse’ (s 8B(2) – no need to amend if ‘marital relationship’ is amended)

‘step-child’ (insert new definition)

Superannuation Act 1990 (Cth)

‘child’ (sch 1, r 1.1.1 – no need to amend if ‘spouse’ is amended and 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)

‘eligible child’ (sch 1, r 1.1.1 – no need to amend if the child of a lesbian co-mother or gay co-father may also be recognised through reformed parenting presumptions, adoption laws or a new definition of ‘step-child’)

‘partially dependent child’ (sch 1, r 1.1.1 – no need to amend if the child of a lesbian co-mother or gay co-father may also be recognised through reformed parenting presumptions, adoption laws or a new definition of ‘step-child’)

‘spouse’ (sch 1, r 1.1.1 – amend to include a ‘de facto partner’)

‘step-child’ (insert new definition)

Superannuation Industry (Supervision) Act 1993 (Cth)

‘child’ (s 10(1) – 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)

‘dependant’ (s 10 – no need to amend if ‘spouse’ is amended and 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’)

‘interdependency relationship’ (s 10A – no need to amend if ‘spouse’ is amended)

‘spouse’ (s 10(1) – amend to include a ‘de facto partner’)

‘step-child’ (insert new definition)

Superannuation Industry (Supervision) Regulations 1994 (Cth)

‘interdependency relationship’ (reg 1.04AAAA – no need to amend if ‘spouse’ is amended in the Superannuation Industry Act)

Superannuation (Public Sector Superannuation Accumulation Plan) Trust Deed (made under s 10 of the *Superannuation Act 2005* (Cth))

‘dependant’ (Div 2, r 1.2.1 – no need to amend if ‘spouse’ is amended in the Superannuation Industry Act)

13.11.4 A list of state legislation to be amended

The Inquiry recommends review of the following legislation and amendment if discrimination remains with respect to same-sex couples or their children:

New South Wales

- *Coal and Oil Shale Mine Workers (Superannuation) Act 1941* (NSW)
- *Local Government and Other Authorities (Superannuation) Act 1927* (NSW)
- *New South Wales Retirement Benefits Act 1972* (NSW)
- *Public Authorities Superannuation Act 1985* (NSW)
- *Transport Employees Retirement Benefits Act 1967* (NSW)

Victoria

- *Attorney-General and Solicitor-General Act 1972* (Vic)
- *Coal Mines (Pensions) Act 1958* (Vic)
- *Constitution Act 1975* (Vic)
- *County Court Act 1958* (Vic)
- *Magistrates Court Act 1989* (Vic)
- *Public Prosecutions Act 1994* (Vic)
- *Supreme Court Act 1986* (Vic)

Western Australia

- *Superannuation and Family Benefits Act 1938* (WA)

Table 1: Federal government superannuation schemes

SCHEME	BENEFITS	DEFINITIONS
<p>Commonwealth Superannuation Scheme (CSS)</p> <p>Members include federal government and ACT government employees. The scheme closed to new members from 1 July 1990.</p> <p>CSS is governed by the <i>Superannuation Act 1976 (Cth)</i>.</p>	<p>A range of death benefits are payable to spouses and children: ss 81-88, 89-92, 93-96AB, 97-109A.</p> <p>Some of these benefits are higher when there are partially dependent children: ss 96B-96BB, 109A.</p> <p>In the event that there is no surviving spouse or child, a benefit is payable to the person's legal personal representative. If no legal personal representative can be found, benefits can be paid to any individual or individuals that the Board determines: s 110SQ.</p>	<p>Spouse: 'a person is a spouse who survives a deceased person if the person had a marital relationship with the deceased person at the time of the death of the deceased person': s 8B(2).</p> <p>Marital relationship: 'a person had a marital relationship with another person at a particular time if the person ordinarily lived with that other person as that other person's husband or wife on a permanent and <i>bona fide</i> domestic basis at that time': s 8A(1).</p> <p>Child: 'a child (including an adopted child, an ex-nuptial child, a foster child, a step child or a ward) of the person or of a spouse of the person': s 3(1).</p> <p>Eligible child: a child under 16 years; or over 16 but under 25 and receiving full-time education and is not ordinarily in employment or engaged in work on his or her own account; and immediately before the deceased person's death, ordinarily lived with the deceased person (except where the person is a child of a spouse but not of the deceased person) or was wholly or substantially dependent upon the deceased person, in the opinion of the Board: s 3(1).</p> <p>Partially dependent child: a child under 16 years; or over 16 but under 25 and receiving full-time education and not ordinarily in employment or engaged in work on his or her own accord; and in respect of whom, immediately before the deceased person's death, the deceased person was making regular maintenance payments: s 3(1).</p> <p>Legal personal representative: the executor of the will, the trustee of the estate of a person under a legal disability or a person who holds an enduring power of attorney granted by a person: s 10(1) of the <i>Superannuation Industry (Supervision) Act 1993 (Cth)</i>.</p>

SCHEME	BENEFITS	DEFINITIONS
<p>Public Sector Superannuation Scheme (PSS)</p> <p>This scheme took over from the CSS. It closed to new members from 1 July 2005.</p> <p>PSS is governed by the Trust Deed scheduled under the <i>Superannuation Act 1990 (Cth)</i>.</p>	<p>A reversionary pension is available to a spouse or an eligible child or a partially dependent child: sch 1, rr 5.1.1, 5.2.1.</p> <p>Preserved benefits of a deceased member are payable to a spouse or an eligible child or a partially dependent child: sch 1, r 6.1.9-6.1.10. Benefits may be paid in the form of a pension rather than a lump sum: sch 1, rr 6.1.12-6.1.13.</p> <p>If there is no surviving spouse or eligible child or partially dependent child, the member must notify the Board that he or she has a dependent person who would not be able to receive benefits as a spouse, eligible child or partially dependent child. The member must tell the Board he or she has included this person in their will. The Board has discretion to pay such benefit as it considers appropriate to the person named: sch 1, r 6.1.11.</p>	<p>Spouse: (a) a person who was legally married to the deceased person at the time of the person's death and who, at that time, was ordinarily living with the person on a permanent and bona fide domestic basis; and (c) a person who was not legally married to the deceased person at the time of the person's death but who, for a continuous period of not less than 3 years immediately before the person's death, had ordinarily lived with the person as the person's husband or wife, as the case may be, on a permanent and bona fide domestic basis': sch 1, r 1.1.1.</p> <p>Child: 'a child (including an adopted child, an ex-nuptial child or a stepchild, or any other person whom the Board determines is to be treated as a child of the first-mentioned person) of the person or of a spouse of the person': sch 1, r 1.1.1.</p> <p>Eligible child: Substantially the same definition as under the <i>Superannuation Act 1976 (Cth)</i>: sch 1, r 1.1.1.</p> <p>Partially dependent child: Substantially the same definition as under the <i>Superannuation Act 1976 (Cth)</i>: sch 1, r 1.1.1.</p>
<p>Defence Force Retirement and Death Benefits Scheme (DFRDB)</p> <p>Provides retirement funds, as well as death and disability benefits, to members of the defence forces. This scheme closed to new members on 1 October 1991.</p>	<p>The surviving spouse of a deceased member is entitled to a pension: ss 38-39. In some circumstances, a spouse is eligible for such pensions as lump sum payments: s 41A.</p> <p>There are also specific pensions payable to surviving children: ss 42-43.</p>	<p>Spouse: a person is a spouse 'if the person had a marital relationship with the deceased person at the time of the death of the deceased person': s 6B(2).</p> <p>Marital relationship: Substantially the same definition as under the <i>Superannuation Act 1976 (Cth)</i>: s 6A(1).</p>

SCHEME	BENEFITS	DEFINITIONS
<p>Defence Force Retirement and Death Benefits Scheme (DFRDB) <i>continued</i></p> <p>The DFRDB is governed by the <i>Defence Force Retirement and Death Benefits Act 1973</i> (Cth).</p>	<p>On the death of a member, a surviving spouse or eligible child may elect that the member joins the Military Superannuation and Benefits Scheme (MSBS): s 133.</p>	<p>Child: a person who is an ex-nuptial child of the member, or, is, immediately before the member's death, a step-child, an adopted child, a foster child or a ward, of the member; and a person who is a child or ex-nuptial child of a spouse who survives the member and was wholly or substantially dependent upon the member at the time of the member's death': s 3(1).</p> <p>Eligible child: a person under 16 years; or a person over 16 but under 25 years and receiving full-time education and not ordinarily in employment or engaged in work on his own account: s 3(1).</p>
<p>Military Superannuation and Benefits Scheme (MSBS)</p> <p>Provides retirement funds and death and disability benefits to members of the defence forces. This fund took over from the DFRDB in 1991.</p> <p>The MSBS is governed by the Military Superannuation and Benefits Trust Deed made under s 5(1) of <i>Military Superannuation and Benefits Act 1991</i> (Cth).</p>	<p>The Trust Deed provides for benefits to be paid to a spouse and children on the death of a member: sch 1, rr 38-48.</p> <p>The Board has wide discretion to pay benefits to those who would not be entitled under the rules in unusual or exceptional circumstances: sch 1, r 66.</p>	<p>Spouse: Substantially the same definition as under the <i>Defence Force Retirement and Death Benefits Act 1973</i> (Cth): Trust Deed, sch 1, r 9(a).</p> <p>'a person is not, for the purposes of these Rules, a spouse in relation to another person if he or she is of the same sex as that other person': Trust Deed, sch 1, r 12.</p> <p>Marital relationship: Substantially the same definition as under the <i>Superannuation Act 1976</i> (Cth): Trust Deed, sch 1, r 1A.</p> <p>Child: Substantially the same definition as under the <i>Defence Force Retirement and Death Benefits Act 1973</i> (Cth): Trust Deed, sch 1, r 1.</p> <p>Eligible child: Substantially the same definition as under the <i>Defence Force Retirement and Death Benefits Act 1973</i> (Cth): Trust Deed, sch 1, r 1.</p>

SCHEME	BENEFITS	DEFINITIONS
<p>Parliamentary Contributory Superannuation Scheme (PCSS)</p> <p>Provides superannuation entitlements to members of federal parliament who entered the scheme prior to 9 October 2004.</p> <p>The PCSS is governed by the <i>Parliamentary Contributory Superannuation Act 1948 (Cth)</i>.</p> <p>The <i>Parliamentary Superannuation Act 2004 (Cth)</i> gave parliamentarians a choice of superannuation fund.</p>	<p>A proportion of a deceased member's parliamentary allowance (if the member dies while still in parliament) or retirement allowance (if they had retired) is payable to a surviving spouse: s 19. An additional benefit is payable to the surviving spouse of a Prime Minister or former Prime Minister: s 19A.</p> <p>There are also benefits in respect of orphaned children and dependent children of the deceased person: ss 19AA (c)-(d).</p> <p>Both surviving spouses and children may convert some or part of the pension to a lump sum payment: ss 19AAA, 19ABA.</p>	<p>Spouse: Substantially the same definition as under the <i>Superannuation Act 1976 (Cth)</i>: s 4C(2)(a).</p> <p>Marital relationship: Substantially the same definition as under the <i>Superannuation Act 1976 (Cth)</i>: s 4B(1).</p> <p>Child: a child (including an adopted or an ex-nuptial child) of the person: s 19AA(5).</p> <p>Eligible child: a child who is under 16; or a child who is over 16 but under 25 and receiving full-time education: s 19AA(5).</p>

Note: The Public Sector Superannuation Accumulation Plan (PSSap) Scheme is discussed in section 13.2.1.

Endnotes

- 1 In early 2007, the federal government enacted major reforms to the superannuation tax and regulatory regime to simplify it. The new superannuation tax regime is effective from 1 July 2007: see *Tax Laws Amendment (Simplified Superannuation) Act 2007* (Cth). This report refers to both the existing tax provisions contained in the *Income Tax Assessment Act 1936* (Cth) and the new (replacement) provisions in the *Income Tax Assessment Act 1997* (Cth), where relevant.
- 2 A death benefit is usually a significant proportion of the superannuation entitlements of the member. The amount of the death benefit will depend on the member's contributions to the fund; earnings on those contributions; an additional element of life insurance: see M Stewart, 'Are You Two Interdependent? Family, Property and Same-Sex Couples in Australia's Superannuation Regime', *Sydney Law Review*, vol 28, no 3, 2006, p441.
- 3 See *Superannuation Act 2005* (Cth), s 10, which provides for a trust deed to establish the PSSAP Fund. All relevant definitions and entitlements are contained within the Deed: Superannuation (PSSAP) Trust Deed, F2005L01901.
- 4 Superannuation (PSSAP) Trust Deed, r 1.2.1: 'dependant has the same meaning as in the *Superannuation Industry (Supervision) Act 1993* (Cth)'.
 5 *Superannuation Act 1976* (Cth), s 8B(2).
 6 *Superannuation Act 1976* (Cth), s 8A(1).
 7 *Gregory Brown v Commissioner for Superannuation* (1995) 21 AAR 378, para 63.
 8 Gary Fan and Wayne Lodge, Submission 123.
 9 Good Process, Submission 284.
 10 Association of Superannuation Funds of Australia, Submission 128.
 11 Association of Superannuation Funds of Australia, Submission 128.
 12 Gay and Lesbian Rights Lobby (NSW), Submission 333. See also Julie Murphy, Submission 254; Paul Cooke, Submission 293; Brian Greig, Submission 110.
 13 Penelope Morton, Submission 5. See also Brian McKinlay, Submission 130.
 14 Barbara Guthrie and Maureen Kingshott, Submission 205.
 15 Name Withheld, Submission 21.
 16 Name Withheld, Submission 246.
 17 Tony Whelan, Submission 20.
 18 Community and Public Sector Union, PSU Group, Submission 135; Name Withheld, Submission 257; Superannuated Commonwealth Officers' Association Inc., Submission 320.
 19 N Minchin (Minister for Finance and Administration; Deputy Leader of the Government in the Senate), Correspondence with Federal Secretary, Superannuated Commonwealth Officers' Association, 8 December 2005. See Superannuated Commonwealth Officers' Association Inc., Submission 320.
 20 Name Withheld, Submission 246. See also Name Withheld, Submission 257.
 21 Equal Opportunity Commission of Victoria, Submission 327.
 22 Equal Opportunity Commission of Victoria, Submission 327.
 23 See for example *Law Reform (Gender, Sexuality and De Facto Relationships) Act 2003* (NT), ss 45, 61, 75, 79; *Statutes Amendment (Domestic Partners) Act 2006* (SA), ss 177, 209 (this Act had not commenced as at 10 April 2007).
 24 *Superannuation Industry (Supervision) Act 1993* (Cth), s 62(1)(a)(iv)-(v). See also Superannuation Complaints Tribunal, *Key considerations that apply to death benefit complaints*, 2006, para 59. The Association of Superannuation Funds of Australia Limited, *Death Benefits*, Best Practice Paper No. 29, September 2006, section 5.3.1.
 25 *Income Tax Assessment Act 1936* (Cth), s 27A(1); *Income Tax Assessment Act 1997* (Cth), s 302-10. The 1936 Act provisions continue to apply until 30 June 2007; the 1997 Act provisions become effective on 1 July 2007. The latter section has clarified existing practice regarding taxation of a death benefit received by a deceased estate.

- 26 *Superannuation Industry (Supervision) Act 1993* (Cth), s 10(1): ‘spouse in relation to a person, includes another person who, although not legally married to the person, lives with the person on a genuine domestic basis as the husband or wife of the person.’
- 27 *Superannuation Industry (Supervision) Act 1993* (Cth), s 10(1): ‘child in relation to a person, includes an adopted child, a step-child or an ex-nuptial child of the person.’
- 28 *Superannuation Industry (Supervision) Act 1993* (Cth), s 10(1). ‘2 persons (whether or not related by family) have an *interdependency relationship* if: (a) they have a close personal relationship; and (b) they live together; and (c) one or each of them provides the other with financial support; and (d) one or each of them provides the other with domestic support and personal care’: s 10A(1).
- 29 Superannuation Complaints Tribunal, *Key considerations that apply to death benefit complaints*, 2006, paras 90-93.
- 30 *Superannuation Industry (Supervision) Act 1993* (Cth), s 10(1). See also *Income Tax Assessment Act 1936* (Cth), s 6(1); *Income Tax Assessment Act 1997* (Cth), s 995-1.
- 31 See *Gregory Brown v Commissioner for Superannuation* (1995) 21 AAR 378.
- 32 Superannuation Complaints Tribunal, *Legal Issues in Death Benefits*, Forum Discussion Paper, January 2002, p45.
- 33 Association of Superannuation Funds of Australia, Submission 128. The inclusion of the category was enabling only, not prescriptive. ASEFA argues that it is likely that funds will not have included this provision where the fund pays pensions to the spouses of deceased members or where a reversionary pension is payable on the death of a person who was already receiving a pension from the fund.
- 34 *Superannuation Industry (Supervision) Act 1993* (Cth), s 10A(1); *Income Tax Assessment Act 1997* (Cth), s 302-200; *Income Tax Assessment Act 1936* (Cth), s 27AAB. The 1936 Act provisions continue to apply until 30 June 2007; the 1997 Act provisions become effective on 1 July 2007.
- 35 Superannuation Complaints Tribunal, *Key considerations that apply to death benefit complaints*, 2006, paras 90-93. Persons who were financially dependent on a deceased member at the time of the death are another category of dependants to whom a death benefit can be paid. Partial financial dependency may be sufficient, and a person does not have to be in financial need to establish that they were financially dependent on the deceased member at the time of death. However, the degree of financial dependency, which may be determined by reference to the degree of financial need, may be important when the trustee exercises its discretion to determine the percentage distribution of the death benefit amongst various dependants.
- 36 Association of Superannuation Funds of Australia, *Death Benefits*, Best Practice Paper No. 29, September 2006, section 5.3.3.
- 37 Australian Taxation Office, *Interpretive Decision 2002/731*. However, certain decisions of the Superannuation Complaints Tribunal have paid death benefits to a same-sex partner, even where only partial financial dependence was established: M Stewart, ‘Are You Two Interdependent? Family, Property and Same-Sex Couples in Australia’s Superannuation Regime’, *Sydney Law Review*, vol 28, no 3, 2006, p448.
- 38 *Superannuation Industry (Supervision) Act 1993* (Cth), s 10(1). See also *Income Tax Assessment Act 1997* (Cth) s 995-1; *Income Tax Assessment Act 1936* (Cth), s 6(1).
- 39 For an explanation of these terms see the Glossary of Terms.
- 40 See further Chapter 5 on Recognising Children.
- 41 Association of Superannuation Funds of Australia notes that the Explanatory Statement (Explanatory Statement, Select Legislative Instrument 2005 No. 261) puts the view that it would be unlikely for children to be in an interdependency relationship with their parents: Association of Superannuation Funds of Australia, *Death Benefits*, Best Practice Paper No. 29, September 2006, section 1.2.2, pp11-12.
- 42 See Victorian Gay and Lesbian Rights Lobby, Submission 256; Walter Lee, Submission 250a.

- 43 Association of Superannuation Funds of Australia, *Death Benefits*, Best Practice Paper No. 29, September 2006, section 4.6, p26. Information should also be provided about whether the couple had separated or divorced. See also Superannuation Complaints Tribunal, *Key considerations that apply to death benefit complaints*, 2006, para 65: 'If there was an undissolved legal marriage at the time of the death of the member to another person, that other person is a legal spouse. A legal spouse qualifies as a dependant of the deceased.' If a spouse is estranged they may not be paid a death benefit.
- 44 *D v McA* (1986) 11 Fam LR 214 at 227 per Powell J, quoted in Superannuation Complaints Tribunal, *Key considerations that apply to death benefit complaints*, 2006, para 68. Powell J reiterated these criteria in *Roy v Sturgeon* (1986) 11 NSWLR 454 at 458-459.
- 45 However, a temporary separation may not mean that a de facto relationship has come to an end: *George v Hibberson* [1987] DFC 95-054, quoted in Superannuation Complaints Tribunal, *Key considerations that apply to death benefit complaints*, 2006, para 69. Also quoted with approval in *Howland v Ellis* (2001) Fam LR 656 and more recently in *Hornsby v Military Superannuation & Benefits Board of Trustees No 1* (2003) FCA 54 at para [25].
- 46 *Superannuation Industry (Supervision) Act 1993* (Cth), s 10A(1); *Income Tax Assessment Act 1997* (Cth), s 302-200; *Income Tax Assessment Act 1936* (Cth), s 27AAB. The 1936 Act provisions continue to apply until 30 June 2007; the 1997 Act provisions become effective on 1 July 2007. See further Miranda Stewart, Submission 266.
- 47 Superannuation Industry (Supervision) Regulations 1994 (Cth), reg 1.04AAAA(1); *Income Tax Regulations 1936* (Cth), reg 8A(1).
- 48 M Stewart, 'Are You Two Interdependent? Family, Property and Same-Sex Couples in Australia's Superannuation Regime', *Sydney Law Review*, vol 28, no 3, 2006, p456. Stewart argues that while these additional matters may merely add substance to the definition, they may also require a more narrow reading, which could disadvantage same-sex couples.
- 49 M Stewart, 'Are You Two Interdependent? Family, Property and Same-Sex Couples in Australia's Superannuation Regime', *Sydney Law Review*, vol 28, no 3, 2006, p459.
- 50 Superannuation Industry (Supervision) Regulations 1994 (Cth), reg 1.04AAAA(2). *Income Tax Regulations 1936* (Cth), reg 8A(2) (until 30 June 2007).
- 51 Superannuation Industry (Supervision) Regulations 1994 (Cth), reg 1.04AAAA(2); *Income Tax Regulations 1936* (Cth), reg 8A(2) (until 30 June 2007). See also M Stewart, 'Are You Two Interdependent? Family, Property and Same-Sex Couples in Australia's Superannuation Regime', *Sydney Law Review*, vol 28, no 3, 2006, p462.
- 52 M Stewart, 'Are You Two Interdependent? Family, Property and Same-Sex Couples in Australia's Superannuation Regime', *Sydney Law Review*, vol 28, no 3, 2006, p462.
- 53 Miranda Stewart, Submission 266. The following Superannuation Complaints Tribunal Determinations demonstrate some of the difficulties that may be faced by a same-sex partner of a deceased person in establishing themselves as a dependant for the purposes of superannuation death benefits: D01-02\212 (21 June 2002); D05-06\061 (20 October 2005).
- 54 Name Withheld, Submission 67.
- 55 Victorian Gay and Lesbian Rights Lobby, Submission 256.
- 56 Marcus Blease, Submission 111.
- 57 Lynne Martin, Submission 38.
- 58 Margie Collins, Adelaide Hearing, 28 August 2006.
- 59 Name Withheld, Submission 67.
- 60 Brian Greig, Perth Hearing, 9 August 2006.
- 61 *Superannuation Industry (Supervision) Act 1993* (Cth), s 59(1A); Superannuation Industry (Supervision) Regulations 1994 (Cth), reg 6.17A(2).
- 62 M Stewart, 'Are You Two Interdependent? Family, Property and Same-Sex Couples in Australia's Superannuation Regime', *Sydney Law Review*, vol 28, no 3, 2006, p464. As noted earlier, superannuation funds were not compelled to adopt the amendments introducing 'interdependency relationship' as a category of 'dependant' to the *Superannuation Industry (Supervision) Act 1993* (Cth) and the *Income Tax Assessment Act 1936* (Cth). The relevant definitions have now been made part of the *Income Tax Assessment Act 1997* (Cth), effective 1 July 2007.

- 63 Miranda Stewart, Submission 266.
- 64 Good Process, Submission 284.
- 65 The *Retirement Savings Accounts Act 1997* (Cth) regulates the provision of retirement savings accounts.
- 66 *Retirement Savings Accounts Act 1997* (Cth), s 15(3)-(4).
- 67 *Retirement Savings Accounts Act 1997* (Cth), ss 20, 20A.
- 68 *Income Tax Assessment Act 1936* (Cth), s 27A(1): 'dependant' is defined as '(i) any spouse or former spouse of the first person; and (ii) any child, aged less than 18 years, of the first person; and (iii) any person with whom the first person has an interdependency relationship'; *Income Tax Assessment Act 1997* (Cth), s 302-195 defines a 'death benefits dependant' as: '(a) the deceased person's spouse or former spouse; or (b) the deceased person's child, aged less than 18; or (c) any other person with whom the deceased person had an interdependency relationship under s 302-200 just before he or she died; or (d) any other person who was a dependant of the deceased person just before he or she died'. 'Spouse' and 'child' are defined in the *Income Tax Assessment Act 1997* (Cth), s 995-1. The 1936 Act provisions continue to apply until 30 June 2007; the 1997 Act provisions become effective on 1 July 2007.
- 69 See *The Roll-over Relief Claimant and Commissioner of Taxation*, [2006] AATA 728 (23 August 2006).
- 70 *Income Tax Assessment Act 1936* (Cth), s 27A(1). As at 1 July 2007, the effective definition will be contained in the *Income Tax Assessment Act 1997* (Cth), s 302-195.
- 71 Parliament of the Commonwealth of Australia, House of Representatives, Tax Laws Amendment (Simplified Superannuation) Bill 2006, Explanatory Memorandum, Tables 2.3, 2.4.
- 72 Parliament of the Commonwealth of Australia, House of Representatives, Tax Laws Amendment (Simplified Superannuation) Bill 2006, Explanatory Memorandum, Tables 2.3, 2.4.
- 73 The superannuation fund claims a deduction in respect of an anti-detriment payment to a dependent beneficiary.
- 74 Association of Superannuation Funds of Australia, Submission 128; *Income Tax Assessment Act 1936* (Cth), s 279D; *Income Tax Assessment Act 1997* (Cth), s 295-485. The 1936 Act provisions continue to apply until 30 June 2007; the 1997 Act provisions become effective on 1 July 2007.
- 75 *Income Tax Assessment Act 1997* (Cth), s 295-485(1)(a); *Income Tax Assessment Act 1936* (Cth), s 279D(4). The 1936 Act provisions continue to apply until 30 June 2007; the 1997 Act provisions become effective on 1 July 2007. See also Association of Superannuation Funds of Australia, *Death Benefits*, Best Practice Paper No. 29, September 2006, p19.
- 76 This includes contributions made by an employer and personal contributions for which an income tax deduction is claimed: Australian Taxation Office, *Superannuation contributions splitting - individuals*, <http://www.ato.gov.au/print.asp?doc=/content/68032.htm>, viewed 2 March 2007.
- 77 In 2006-2007, the RBL threshold is \$678 149 for lump sum payments and \$1 356 291 for pensions: Australian Taxation Office, *Reasonable benefit limits - How these may affect you*, <http://www.ato.gov.au/super/content.asp?doc=/content/12253.htm&page=4&H4>, viewed 5 April 2007. The ETP low-rate threshold is \$135 590 for the 2006-07 financial year: Australian Taxation Office, *Key superannuation rates*, <http://www.ato.gov.au/super/content.asp?doc=/content/60489.htm&page=6&H6>, viewed 2 March 2007. From 1 July 2007, the concept of a Reasonable Benefit Limit will be abolished and no tax will be paid on superannuation benefits received by a member who is over the age of 60. However, a tax benefit [for contributions splitting] will remain for those who receive their superannuation benefits prior to the age of 60. Furthermore, as noted by Miranda Stewart, '[these benefits] remain in the [Superannuation Industry Act] and income tax law and provide a means for an individual to provide a superannuation balance for his or her low-income spouse, a concession which will not apply for same-sex couples': Miranda Stewart, Submission 266.
- 78 See Superannuation Industry (Supervision) Regulations 1994 (Cth), pt 6, div 6.7. Up to 85% of a member's deductible personal contributions and 100% of non-deductible personal contributions can be split with a spouse: Miranda Stewart, Submission 266.
- 79 Superannuation Industry (Supervision) Regulations 1994 (Cth), reg 6.44. See also Miranda Stewart, Submission 266; Victorian Gay and Lesbian Rights Lobby, Submission 256; ACON, Submission 281; Association of Superannuation Funds of Australia, Submission 128; Lynne Martin, Submission 38.

- 80 Association of Superannuation Funds of Australia, Sydney Hearing, 26 July 2006. See also Just Super, Submission 313.
- 81 ALSO Foundation, Submission 307h. See also Law Institute of Victoria, Submission 331.
- 82 Name Withheld, Submission 290. See also Julie Murphy, Submission 254.
- 83 Action Reform Change Queensland and Queensland AIDS Council, Submission 270.
- 84 *Income Tax Assessment Act 1997* (Cth), s 290-230; *Income Tax Assessment Act 1936* (Cth), s 159T. The 1936 Act provisions continue to apply until 30 June 2007; the 1997 Act provisions become effective on 1 July 2007. At the time of making the contribution, the person must not be living separately from their spouse on a permanent basis: *Income Tax Assessment Act 1997* (Cth), s 290-230. See *Income Tax Assessment Act 1997* (Cth), s 995-1(1) for the definition of 'spouse'.
- 85 *Income Tax Assessment Act 1997* (Cth), s 290-235; *Income Tax Assessment Act 1936* (Cth), ss 159T, 159TA. The 1936 Act provisions continue to apply until 30 June 2007; the 1997 Act provisions become effective on 1 July 2007. The full offset is available where a spouse earns less than \$10 800 that year and a partial offset is available where a spouse's income is up to \$13 800: *Income Tax Assessment Act 1997* (Cth), ss 290-230, 290-235. See also Name Withheld, Submission 290; Victorian Gay and Lesbian Rights Lobby, Submission 256; ACON, Submission 281; Gay and Lesbian Rights Lobby (NSW), Submission 333; Australian Coalition for Equality, Submission 228; Association of Superannuation Funds of Australia, Submission 128.
- 86 *Income Tax Assessment Act 1997* (Cth), ss 295-165, 295-170(b); *Income Tax Assessment Act 1936* (Cth), s 274. The 1936 Act provisions continue to apply until 30 June 2007; the 1997 Act provisions become effective on 1 July 2007.
- 87 *Income Tax Assessment Act 1997* (Cth), s 995-1(1).
- 88 Name Withheld, Submission 41.
- 89 *Judges' Pensions Act 1968* (Cth), ss 7-8.
- 90 *Judges' Pensions Act 1968* (Cth), ss 9-10.
- 91 *Judges' Pensions Act 1968* (Cth), ss 4AC, 4AB(1).
- 92 *Judges' Pensions Act 1968* (Cth), s 4AA.
- 93 Judicial Conference of Australia, Submission 197.
- 94 Judicial Conference of Australia, Submission 197. See also Australian Federation of AIDS Organisations, Submission 285; Gay and Lesbian Rights Lobby (NSW), Submission 333; Law Council of Australia, Submission 305; Anti-Discrimination Commission Queensland, Submission 264.
- 95 Judicial Conference of Australia, Submission 197.
- 96 See Federal Magistrates Amendment (Disability and Death Benefits) Bill 2006, sch 1, cl 13, inserting cls 9D-9F into Schedule 1 of the *Federal Magistrates Act 1999* (Cth). See further Judicial Conference of Australia, Submission 197; C Lorimer, Parliament of Australia, Department of Parliamentary Services, 'Federal Magistrates Amendment (Disability and Death Benefits) Bill 2006', *Bills Digest*, no 150, 2005-06, 13 June 2006; Commonwealth of Australia, Senate Legal and Constitutional Affairs Committee, *Provisions of the Federal Magistrates Amendment (Disability and Death Benefits) Bill 2006*, 2 May 2006, paras 2.18, 2.19, http://202.14.81.34/Senate/committee/legcon_ctte/federal_magistrates/report/c02.htm, viewed 21 March 2007.
- 97 The spouse and children of the Victorian Attorney-General are entitled to pensions in the same circumstances and at the same rates and on the same terms as a spouse or child of a Supreme Court judge: *Attorney-General and Solicitor-General Act 1972* (Vic), s 6(1).
- 98 The spouse of a Governor is entitled to a pension at the death of a Governor or former Governor until that spouse dies or remarries: *Constitution Act 1975* (Vic), s 7A(3). The spouse or eligible child of a Judge of the Supreme Court is entitled to a pension at a rate of three-eighths of the annual salary of the Judge at the date of death or of a former Judge at the date of resignation or retirement: *Constitution Act 1975* (Vic), s 83(2)-(3).
- 99 This Act provides benefits to the spouse, widow and eligible child of a Judge on the Judge's death: for example *County Court Act 1958* (Vic), ss 14, 14AA, 17B.
- 100 This Act provides for a pension payable to the spouse of a Chief Magistrate or former Magistrate on his or her death: *Magistrates' Court Act 1989* (Vic), s 10A. 'Spouse' is defined as 'a person to whom the person is or was married': *Magistrates' Court Act 1989* (Vic), s 3A(2)(d).

● Same-Sex: Same Entitlements

- 101 The spouse and children of the Chief Crown Prosecutor or a Senior Crown Prosecutor are entitled to pensions in the same circumstances and at the same rates and on the same terms and conditions as a spouse or child of a judge of the County Court: *Public Prosecutions Act 1994* (Vic), ss 18, 35.
- 102 This Act provides that spouses of Judges are entitled to a Judge's pension on the death of the judge: *Supreme Court Act 1986* (Vic), ss 104A – 104J.
- 103 Equal Opportunity Commission of Victoria, Submission 327. The Bill amends all of the Acts described above.
- 104 Judicial Conference of Australia, Submission 197.
- 105 *Governor-General Act 1974* (Cth), ss 4, 4A, 4AA.
- 106 *Governor-General Act 1974* (Cth), ss 2C, 2B.