



CHAPTER 4:

Recognising Relationships of Same-Sex Couples

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4.1 What is this chapter about?

It is simple to remove discrimination against same-sex couples in laws conferring financial and work-related benefits: amend the definitions describing a couple to include same-sex and opposite-sex couples alike.

The primary source of discrimination against same-sex couples in federal laws conferring financial and work-related entitlements is the way in which terms such as ‘spouse’, ‘de facto spouse’, ‘partner’, ‘member of a couple’ and other similar terms are defined in legislation. These definitions routinely include an opposite-sex partner and exclude a same-sex partner.

The consequence of these narrow definitions is that same-sex partners are treated differently to opposite-sex partners in a myriad of laws conferring financial and work-related entitlements. This differential treatment is contrary to one of the most fundamental principles of international law: the right to equality.

Some federal legislation has introduced the concept of an ‘interdependency relationship’ to allow same-sex couples access to selected entitlements which are already available to opposite-sex de facto couples. This new category of relationship has undoubtedly improved access to certain superannuation, employment and visa entitlements for some same-sex couples. But the introduction of a new category of relationship is an unnecessary and overly complicated method of removing discrimination against same-sex couples. It could end up giving financial entitlements to more people than intended. And it suggests that a same-sex relationship is unequal to an opposite-sex de facto relationship. Rather than create a new category of relationship, same-sex couples should be included in the existing category of couple relationships.

Where the definition of ‘spouse’, ‘de facto spouse’, ‘partner’, or ‘member of a couple’ already includes a person in an opposite-sex couple it should also include a person in a same-sex couple. There is no need to rewrite the entirety of social security, taxation, superannuation, workers’ compensation, aged care, migration and other legislation. But there is a need to redefine the way a relationship is recognised under that legislation.

This type of reform has already occurred in all states and territories and it should now occur in the federal jurisdiction.

This chapter discusses how the definitions currently used in federal law exclude same-sex couples. The chapter also considers the new ‘interdependency relationship’ provisions in federal law and discusses the weaknesses of that approach in addressing discrimination against same-sex couples.

The chapter summarises how all the states and territories have reformed their laws to remove discrimination against same-sex couples. It also considers how the introduction of formal relationship recognition schemes for same-sex couples may assist in accessing financial and work-related entitlements.

Finally, the chapter makes recommendations about how federal law should be amended to remove discrimination against same-sex couples when accessing financial and work-related entitlements.

Specifically, this chapter addresses the following questions:

- Do federal laws giving financial and work-related entitlements currently recognise same-sex relationships?
- Should the ‘interdependency’ category of relationships be extended to all federal laws?
- How have states and territories removed discrimination against same-sex couples?
- Would formal relationship recognition schemes help same-sex couples access financial and work-related entitlements?
- How should federal law change to ensure same-sex couples can access financial and work-related entitlements?

4.2 Do federal laws giving financial and work-related entitlements currently recognise same-sex relationships?

There is a wide range of federal legislation which uses different definitions of ‘spouse’, ‘de facto spouse’, ‘marital relationship’, ‘member of a couple’, ‘partner’ and other terms used to describe a couple. There is also a range of federal legislation which uses terms like ‘spouse’ and ‘de facto spouse’ in substantive provisions, but does not define those words.

None of these laws recognise same-sex relationships.

Superannuation and migration legislation and Australian Defence Force instructions have introduced the concept of an ‘interdependency relationship’. This new category recognises a relationship where there is an element of interdependency between two people – be it between members of a same-sex couple or any other two people who rely on each other. Legislation including the ‘interdependency relationship’ category will usually mean that a same-sex couple can access similar entitlements to an opposite-sex couple. But a same-sex couple is sometimes required to meet different criteria to qualify for those entitlements when compared with an opposite-sex couple.

The following sections discuss the different definitions of ‘spouse’, ‘de facto spouse’, ‘partner’, ‘member of a couple’, ‘interdependency relationship’ and other such terms, and how they treat a same-sex couple.

The discussion is organised according to the features of the definitions which create the discrimination, rather than the terminology used. The categories are:

- definitions using the words ‘opposite sex’
- definitions using the words ‘husband or wife’
- definitions using the words ‘spouse’ or ‘de facto spouse’
- definitions using the words ‘marriage-like relationship’
- definitions using the words ‘interdependency relationship’
- legislation without definitions.

4.2.1 Definitions using 'opposite sex' exclude a same-sex partner

There are some definitions which explicitly use the words 'opposite sex' to identify the second member of a couple. These definitions unambiguously exclude same-sex relationships.

The following are examples of different definitions using these words.

(a) Definitions of 'spouse' and 'de facto spouse' using 'opposite sex'

Some definitions of 'spouse', 'de facto spouse' and 'de facto relationship' include a genuine relationship with a person of the 'opposite sex', even though the woman and man are not married.

For example, the *Defence Force (Home Loans Assistance) Act 1990* (Cth) defines a 'spouse' as follows:

a person of the *opposite sex* to the person who lives with the person as his or her *spouse*, on a permanent and bona fide domestic basis, although not legally married to the person.¹ (emphasis added)

The Medicare legislation defines a 'de facto spouse' as:

a person who is living with another person of the *opposite sex* on a bona fide domestic basis although not legally married to that other person.² (emphasis added)

Similarly, the Migration Regulations 1994 (Cth) state that two people will be in a 'de facto relationship' if they are of the opposite sex to each other.³

(b) Definitions of 'partner' using 'opposite sex'

The *Military Rehabilitation and Compensation Act 2004* (Cth) relevantly defines a member's 'partner' as follows:

a person of the *opposite sex* to the member in respect of whom at least one of the following applies:

...

(b) the person is legally married to the member;

(c) the person lives with the member as his or her partner on a bona fide domestic basis although not legally married to the member.⁴ (emphasis added)

(c) Definitions of 'member of a couple' using 'opposite sex'

Social security legislation, income tax legislation and legislation conferring veterans' entitlements define a 'partner' by reference to a person who is a 'member of a couple'. The definitions of 'member of a couple' specify that the two people are of the 'opposite sex'.

For example, the social security legislation states that a person will be a 'member of a couple' if a person is married, or:

...

(b) all of the following conditions are met:

- (i) the person has a relationship with a person of the *opposite sex* (in this paragraph called the partner);
- (ii) the person is not legally married to the partner;
- (iii) the relationship between the person and the partner is, in the [decision-maker's] opinion (formed as mentioned in subsections (3) and (3A)), a *marriage-like relationship*; ...⁵ (emphasis added)

The legislation goes on to set out criteria of what constitutes a 'marriage-like relationship' (see section 4.2.4 below).

4.2.2 Definitions using 'husband or wife' exclude a same-sex partner

Some definitions of 'spouse', 'de facto spouse' and 'marital relationship' use the words 'husband or wife' to describe the quality of the relationship between an unmarried couple.

In *Gregory Brown v Commissioner of Superannuation*, the Administrative Appeals Tribunal found that the terms 'husband' and 'wife' do not require that a couple be married.⁶ But they do require a woman and man to be involved in the relationship. Specifically, the Tribunal stated:

It is unnecessary for us to determine in these proceedings whether the words 'husband' and 'wife' now include men and women who live together in a de facto relationship without having undergone a formal marriage ceremony. We are inclined to think that they might. If so, the meaning of the words has indeed moved on since the compilation of the Macquarie Dictionary. However, any such movement, if it has occurred, reflects changing social attitudes towards the necessity of undergoing a marriage ceremony in order to have a marital relationship. It does not, in our view, reflect any diminution of the gender connotations in these words.⁷

(a) Definitions of 'spouse' and 'de facto spouse' using 'husband or wife'

Some of the definitions define a 'spouse' or 'de facto spouse' to include a person who is not legally married, but who lives with another person on a genuine domestic basis as '*husband or wife*'.

For example, tax and superannuation legislation uses the following definition of 'spouse':

a person who, although not legally married to the person, lives with the person on a genuine domestic basis as the person's *husband or wife*.⁸ (emphasis added)

Some employment laws use the words 'husband or wife' and 'opposite sex' in the same definition of 'de facto spouse'. For example the *Workplace Relations Act 1996* (Cth) defines a 'de facto spouse' of an employee as:

a person of the *opposite sex* to the employee who lives with the employee as the employee's *husband or wife* on a genuine domestic basis although not legally married to the employee.⁹ (emphasis added)

It is clear that this type of definition excludes a same-sex couple by using the terms 'husband', 'wife' and 'opposite sex' to describe the relationship.

(b) *Definitions of 'marital relationship' using 'husband or wife'*

Some legislation uses the term '*marital relationship*' to describe a genuine relationship between two people, whether or not they are legally married. Those definitions tend to use the words 'husband or wife'.

For example, some superannuation legislation uses the following words to describe a 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 bona fide domestic basis at that time.¹⁰ (emphasis added)

4.2.3 Definitions using 'spouse' probably exclude a same-sex partner

Some definitions of 'spouse' or 'de facto spouse' include a person who is not legally married, but who lives with another person:

- on a genuine domestic basis as a 'spouse', or
- in a marriage-like relationship.

For example, the *Parliamentary Entitlements Act 1990* (Cth) defines a 'spouse' to include:

a person who is living with the member as the *spouse* of the member on a genuine domestic basis although not legally married to the member.¹¹ (emphasis added)

Although these definitions broaden the coverage of spouse to include a person who is not legally married, they are unlikely to cover a same-sex partner for several reasons.

Firstly, some of the definitions explicitly exclude a same-sex partner by including the words 'opposite sex' as well as 'spouse'.¹²

Secondly, even where the words 'opposite sex' are not used, case law suggests that using the word 'spouse' or 'marriage-like relationship' will exclude a same-sex partner.

In 1998, the Federal Court held in *Commonwealth of Australia v HREOC and Muller* (*Muller's Case*) that living 'as a spouse' meant that a couple, although not married, must be capable of becoming legally married.¹³ Since a same-sex couple cannot marry in Australia, they cannot qualify under a definition using the word 'spouse'.

The reasoning in *Muller's Case* is debatable because heterosexual de facto partners are recognised in numerous federal statutes even if one of them is still in a current legal marriage with another person. Such couples live 'as a spouse' even though they are not able to marry.¹⁴

Further, since 1998, many state laws now define a 'spouse' to include a same-sex partner.¹⁵ So, it could be argued that these developments will change the interpretation of the phrase 'living as a spouse'.

However, based on the law as it stands in *Muller's Case*, using 'spouse' in any part of a definition of a couple in federal law is likely to exclude a same-sex partner.

4.2.4 Definitions using ‘marriage-like relationship’ probably exclude a same-sex partner

The *Aged Care Act 1997* (Cth) uses the words ‘marriage-like relationship’ to define a ‘member of a couple’. A person will be a ‘member of a couple’ if he or she is:

a person who lives with another person in a *marriage-like relationship*, although not legally married to the other person.¹⁶ (emphasis added)

Again, it is arguable that a ‘marriage-like relationship’ could include a genuine same-sex relationship because some state legislation now describes a same-sex and opposite-sex de facto relationship as a ‘marriage-like relationship’.¹⁷ However, the reasoning in *Muller’s Case* suggests that this interpretation is unlikely to be adopted.

The *Social Security Act 1991* (Cth) also uses the words ‘marriage-like relationship’ to help define a ‘member of a couple’.¹⁸ The legislation sets out a range of criteria indicating what amounts to a ‘marriage-like relationship’.¹⁹ While those criteria do not specifically exclude a same-sex relationship, the precursor to considering whether a person is in a ‘marriage-like relationship’ is that he or she is an opposite-sex ‘member of a couple’.²⁰

4.2.5 Laws where there are no definitions probably exclude a same-sex relationship

There is some legislation which uses the term ‘spouse’ without defining the term.²¹ Other legislation uses the term ‘de facto spouse’ without defining that term.²²

While each piece of legislation should be interpreted in the context of its own provisions, it is unlikely that those terms will include same-sex partnerships. This is because the approach taken in *Muller’s Case* to the term ‘spouse’ excludes a same-sex partner. Further, the terms ‘spouse’ and ‘de facto spouse’ are routinely defined in federal legislation in a way that excludes same-sex partners.

4.2.6 An ‘interdependency’ relationship generally includes a same-sex relationship

There are three different areas of federal law which incorporate an ‘interdependency’ category:

- superannuation (and superannuation tax) law
- migration law
- Australian Defence Force instructions relating to certain defence force personnel.

In each of these three areas, the interdependency category was introduced to broaden who would qualify for the relevant entitlements and benefits.²³ These definitions will generally include people in a same-sex relationship. They may also include people in other forms of dependency relationships – for example, two elderly friends or siblings living with, and caring for, each other.

Under migration law and defence force instructions, a same-sex couple seeking to qualify as an interdependency relationship must prove similar relationship characteristics as an

opposite-sex couple.²⁴ However, in superannuation law, the ‘interdependency’ criteria shifts the focus towards a *carer* relationship and away from a couple relationship. This may mean that some same-sex couples will be excluded from superannuation benefits which would be available to an opposite-sex couple in the same circumstances.

The definition of ‘interdependency relationship’ in the *Superannuation Industry (Supervision) Act 1993* (Cth) relevantly reads as follows:

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.²⁵

The various interdependency definitions are discussed in more detail in Chapter 6 on Employment, Chapter 13 on Superannuation and Chapter 15 on Migration.

4.3 Should the ‘interdependency’ category of relationships be extended to all federal laws?

As discussed above, the few areas which give equal access to same-sex couples do so through the introduction of an ‘interdependency’ category of relationships.

The introduction of this category has meant that same-sex couples can now access superannuation, migration and certain defence force employment entitlements that were previously denied to them. However, the ‘interdependency’ category has not brought about full equality to same-sex couples.

If the goal of legislative change is to remove discrimination against same-sex couples, then there are several reasons why using an ‘interdependency’ category is inappropriate.

4.3.1 An ‘interdependency’ category will give financial entitlements to people who are not in a couple

Most of the legislation under discussion in this report confines rights to members of a couple. There are very few instances where financial benefits like tax, social security and workers’ compensation are intended to extend to a broader range of non-couple relationships.

Using an ‘interdependency’ relationship as a tool for including same-sex couples could have the unintended consequence of covering non-couple relationships – for example friends or siblings living together and caring for each other in old age.

4.3.2 An 'interdependency' relationship may impose different criteria than a couple relationship

In order to ensure that the 'interdependency' relationship category does not cover too many people, legislation may (and does in the case of superannuation) impose more onerous criteria to qualify for a benefit.

This does not provide equality for same-sex couples because it does not recognise them on the same terms as opposite-sex couples. It may be more difficult for a same-sex couple to qualify for the relevant entitlement than it would be for an opposite-sex couple in the same situation.

4.3.3 An 'interdependency' relationship mischaracterises a same-sex relationship

Some gay and lesbian groups have rejected the use of 'interdependency' to describe their relationships, because it does not characterise same-sex partners as committed and intimate couples.²⁶

The 'interdependency' term suggests that same-sex couples are different to, and lesser than, similarly situated opposite-sex couples. Put another way, it is an *almost* de facto relationship, or a *de facto* de facto relationship.

This is not only insulting to the couple; it imposes an unspoken hurdle in front of a same-sex couple trying to prove the genuineness of the partnership.

James Magel describes his feelings about the term 'interdependency' as follows:

This is a prime example of how federal law discriminates by only allowing the word 'de facto' to apply to heterosexual couples. Furthermore the use of 'interdependent' is a demeaning manner in which to acknowledge a same-sex couple that has been living together for a long time. It is a 'cop out' because the term itself only wishes to acknowledge some interdependency instead of acknowledging that it is a bone fide relationship.²⁷

Miranda Stewart argues that the term 'interdependency' should only be used in relation to non-couples:

While the notion of 'interdependency relationship' in the superannuation law may have a place with respect to non-couple interdependent relationships, it is not an adequate mechanism for recognition of same-sex couples.²⁸

4.3.4 A federal 'interdependency' category creates inconsistencies with state and territory laws

Using an 'interdependency' relationship category instead of a 'de facto' relationship category creates further inconsistencies between federal law and state and territory laws. This can create uncertainty and difficulties for same-sex couples trying to assert their right to financial and work-related entitlements in state, territory and federal jurisdictions.

As discussed in the following section, all states and territories have amended their laws to ensure that same-sex and opposite-sex couples are covered in the same category of relationship – be it 'de facto relationship', 'domestic relationship' or 'significant relationship'.

Some states and territories have also introduced a category of relationship which captures people who are dependent on each other (interdependent) but *not* in a couple.

Creating one category for *people who are in a couple* (irrespective of gender), and another category for *people who are interdependent but not in a couple*, is a more appropriate way to ensure equality for same-sex couples. It is also a better way to contain the scope of entitlements available to people who are not in a couple.

4.4 How have states and territories removed discrimination against same-sex couples?

The way to remove discrimination against same-sex couples is to include same-sex couples in the definitions which already cover opposite-sex couples. This is what occurred in state and territory laws as a result of law reforms taking place between 1999 and 2006.

As described in more detail below, each state and territory enacted legislation which simultaneously amended a wide range of existing legislation (omnibus legislation). In each case, the amending legislation identified and amended (or replaced) definitions relating to *de facto* couples, which otherwise failed to include same-sex couples.

The effect of these reforms is that, in almost all circumstances, same-sex and opposite-sex couples can access the same state and territory financial and work-related entitlements. Where differences still exist they have been noted elsewhere in this report.

There is also a far higher degree of consistency in the definitions used within and between states and territories. ‘*De facto relationship*’ and ‘*de facto partner*’ are the most commonly used terms in state and territory law. The meaning of these terms is well understood and the courts have developed case law around borderline determinations which dates back to the 1980s.²⁹

The state and territory reform process provides a useful model for federal law reform. In particular, it is worth noting that the states and territories did not add a category of ‘interdependency’ to cover same-sex couples. Rather, they made sure that the definitions of ‘*de facto*’, ‘*domestic*’ or ‘*significant*’ relationships include same-sex couples and opposite-sex couples alike.

4.4.1 NSW reforms (1999)

In NSW, the *Property (Relationships) Legislation Amendment Act 1999* (NSW) inserted a new definition of ‘*de facto relationship*’ into what was the *De Facto Relationships Act 1984* (NSW) (now the *Property (Relationships) Act 1984* (NSW)) and amended around 20 other pieces of legislation.

These amendments introduced the terms ‘*de facto relationship*’ and ‘*de facto partner*’. A ‘*de facto relationship*’ is now defined in NSW as:

a relationship between two adult persons:

- (a) who live together as a couple, and
- (b) who are not married to one another or related by family.³⁰

There are also criteria setting out what will constitute a ‘de facto relationship’.³¹

As a result of these amendments, in some NSW legislation, ‘spouse’ is now defined to include a party to a ‘de facto relationship’. Thus, in some circumstances, a same-sex partner will be accessing benefits available to a ‘spouse’ even though the couple are not married and have no possibility of marrying under federal law.³²

In 2000, the NSW Parliament amended its superannuation legislation to ensure equal access for same-sex couples.³³ In 2002, the *Miscellaneous Acts Amendment (Relationships) Act 2002* (NSW) amended around 25 additional laws to include same-sex couples.³⁴

The NSW Law Reform Commission and NSW Anti-Discrimination Board have both identified further areas for reform.³⁵

4.4.2 Victorian reforms (2001)

In 2001, the Victorian Parliament introduced two pieces of amending legislation – the *Statute Law Amendment (Relationships) Act 2001* (Vic) and the *Statute Law Further Amendment (Relationships) Act 2001* (Vic). Together they amended around 60 enactments, introducing the term ‘domestic partner’ and replacing definitions of ‘de facto spouse’ and in some instances ‘spouse’.³⁶ In some legislation, the term ‘domestic partner’ has been inserted as an additional definition of a relationship.

A ‘domestic partner’ of a person is now defined in Victorian law as:

a person with whom the person is or has been in a domestic relationship.³⁷

A ‘domestic relationship’ means:

the relationship between two people who, although not married to each other, are living or have lived together as a couple on a genuine domestic basis (irrespective of gender).³⁸

There are also criteria setting out what will constitute a ‘domestic relationship’.³⁹

The *Statute Law Amendment (Relationships) Act 2001* (Vic) also adds a new category of relationship to certain laws for couples who do not live with each other. This category is also called ‘domestic partner’:

‘domestic partner’ of a person means an adult person to whom the person is not married but with whom the person is in a relationship as a couple where one or each of them provides personal or financial commitment and support of a domestic nature for the material benefit of the other, irrespective of their genders and whether or not they are living under the same roof, but does not include a person who provides domestic support and personal care to the person—

(a) for fee or reward; or

(b) on behalf of another person or an organisation (including a government or government agency, a body corporate or a charitable or benevolent organisation).⁴⁰

This definition applies to health-related legislation, legislation dealing with criminal law and consumer and business legislation.

The submission from the Equal Opportunity Commission of Victoria identifies further areas for reform in the future.⁴¹

4.4.3 Queensland reforms (2002)

In 2002, the *Discrimination Law Amendment Act 2002* (Qld) amended a wide range of existing Acts to introduce the term ‘de facto partner’ as a category of ‘spouse’ or to replace the term ‘de facto spouse’ with ‘de facto partner’.⁴² The new definition of ‘de facto partner’ (which is very similar to the NSW definition) is as follows:

either 1 of 2 persons who are living together as a couple on a genuine domestic basis but who are not married to each other or related by family.⁴³

There are also criteria setting out what will constitute a ‘de facto partner’.⁴⁴

Importantly, these amendments also made changes to the *Acts Interpretation Act 1954* (Qld). This Act now says that any reference to a ‘spouse’ in other legislation includes a ‘de facto partner’ unless the particular legislation expressly states the contrary.⁴⁵ Thus, a same-sex partner in Queensland now has access to entitlements available to a ‘spouse’.

The submission from the Anti-Discrimination Commission Queensland identifies further potential areas for reform.⁴⁶

4.4.4 Western Australian reforms (2002–2003)

In 2002 and 2003, the Western Australian Parliament passed the *Acts Amendment (Lesbian and Gay Reform) Act 2002* (WA) and the *Acts Amendment (Equality of Status) Act 2003* (WA). These Acts removed discriminatory definitions from many pieces of Western Australian legislation. This was largely done through introducing the terms ‘de facto partner’ and ‘de facto relationship’, for example by replacing the words ‘de facto spouse’ with ‘de facto partner’.⁴⁷

Unlike other states, the definition of ‘de facto relationship’ under the *Interpretation Act 1984* (WA) refers to a ‘marriage-like relationship’ as follows:

a relationship (other than legal marriage) between 2 persons who live together in a marriage-like relationship.⁴⁸

A later subsection clarifies that the two persons can be of the same sex.⁴⁹

There are also criteria setting out what will constitute a ‘de facto relationship’.⁵⁰

In some cases, these amendments gave same-sex couples the same entitlements as a ‘spouse’, by including a ‘de facto partner’ in the definition of ‘spouse’ or inserting a reference to a ‘de facto partner’ directly after a reference to ‘spouse’.⁵¹

A number of people spoke to the Inquiry about the positive impact of de facto laws in Western Australia.⁵²

4.4.5 Northern Territory reforms (2003)

In 2003, the Northern Territory Parliament enacted the *Law Reform (Gender, Sexuality and De Facto Relationships) Act 2003* (NT). That legislation amended Northern Territory legislation by redefining the term ‘de facto partner’ to include same-sex couples.

Northern Territory law had already established a distinction between the definition of 'spouse' (people who are married) and the definition of a de facto 'partner' (people who are not married) so the legislative terminology did not need to change, just the scope of the definition of de facto 'partner'.⁵³

The new definition of de facto partner is similar to the definition used in WA, in that it refers to a 'marriage-like relationship':

2 persons are in a de facto relationship if they are not married but have a marriage-like relationship.⁵⁴

A later subsection clarifies that the two persons can be of the same sex.⁵⁵

There are also criteria setting out what will constitute a 'de facto relationship'.⁵⁶

4.4.6 Tasmanian reforms (2003)

In 2003, the Tasmanian Parliament amended around 70 laws through the *Relationships Act 2003* (Tas) and the *Relationships (Consequential Amendments) Act 2003* (Tas).⁵⁷

There are three main differences between the Tasmanian reforms and the reforms in other states and territories.

Firstly, the Tasmanian legislation is the only one that uses the term 'significant relationship' to describe an unmarried couple.⁵⁸

Secondly, the Tasmanian reforms introduce a relationship register alongside the introduction of the term 'significant relationship'.⁵⁹ A couple (same-sex or opposite-sex) who registers their relationship as a significant relationship will have prima facie proof of the existence of that relationship.⁶⁰

Thirdly, Tasmanian law does *not* require the couple to live together in order to prove a significant relationship. This is probably because of the registration scheme. A registered couple has prima facie proof of the existence of their relationship, so cohabitation need not be a fundamental element of proving a 'significant relationship'.

The definition of 'significant relationship' is:

a relationship between two adult persons –

- (a) who have a relationship as a couple; and
- (b) who are not married to one another or related by family.⁶¹

There are also criteria setting out when a 'significant relationship' exists even if the relationship has not been registered.⁶²

4.4.7 Australian Capital Territory reforms (2003–2004)

Although the ACT Parliament had already made some legislative amendments in 1994, more sweeping reforms occurred in 2003 and 2004.⁶³

The *Legislation (Gay, Lesbian and Transgender) Amendment Act 2003* (ACT) and the *Sexuality Discrimination Legislation Amendment Act 2004* (ACT) together amended a wide range of ACT legislation. Among the amendments was the replacement of the term 'spouse' with 'domestic partner'.⁶⁴

The definition of 'domestic partnership' is very similar to the definition of 'de facto partnership' in other states except that it explicitly includes people of the same sex. The definition reads as follows:

the relationship between 2 people, whether of a different or the same sex, living together as a couple on a genuine domestic basis.⁶⁵

An earlier subsection provides that 'domestic partner' refers to a person who lives with another person in a 'domestic partnership' and also a spouse.⁶⁶ There are also criteria setting out what will constitute a 'domestic relationship'.⁶⁷

4.4.8 South Australian reforms (2006)

South Australia was the last state to enact reforms in the area of de facto relationships. The *Statutes Amendment (Domestic Partners) Act 2006* (SA) was assented to on 14 December 2006. However, the Act had not come into force as at 10 April 2007.

The legislation will amend around 90 South Australian enactments by introducing the concept of a 'domestic partner', which is defined as follows:

A person is, on a certain date, the domestic partner of another person if he or she is, on that date, living with that person in a close personal relationship and—

(a) he or she—

(i) has so lived with that other person continuously for the period of 3 years immediately preceding that date; or

(ii) has during the period of 4 years immediately preceding that date so lived with that other person for periods aggregating not less than 3 years; or

(b) a child, of whom he or she and the other person are the parents, has been born (whether or not the child is still living at that date).⁶⁸

The Act also allows for two people to apply to the Court for a declaration of domestic partnership.⁶⁹ However, this declaration has limited impact as:

[i]t must not be inferred from the fact that the Court has declared that 2 persons were domestic partners 1 of the other, on a certain date, that they were domestic partners at any prior or subsequent date.⁷⁰

There are also criteria setting out what will constitute a 'domestic partnership'.⁷¹

4.5 Would formal relationship recognition schemes help same-sex couples access financial and work-related entitlements?

Many submissions to the Inquiry discuss the importance of formal recognition of same-sex relationships through registration schemes, civil unions or marriage.⁷² They also discuss some of the advantages and disadvantages of the different recognition models.

Recent consultations and surveys by a variety of gay and lesbian lobby groups note general support for formal relationship recognition schemes. However, there does not appear to be consensus about the most appropriate way to recognise same-sex relationships when given the choice between registration schemes, civil unions, or same-sex marriage.⁷³

On the other hand, there is absolute consensus that gay and lesbian couples should have the same rights to financial and work-related entitlements as their opposite-sex counterparts. This is the primary goal of this Inquiry.

The following discussion focuses on whether formal systems of relationship recognition of same-sex couples could assist those couples in accessing financial and work-related entitlements. In particular, the discussion highlights how formal relationship recognition may assist a same-sex couple to prove the existence of their relationship for the purposes of accessing financial and work-related entitlements.

The Inquiry recognises that formal relationship recognition is an important issue to many people for reasons other than access to financial entitlements. The recent report of the Gay and Lesbian Rights Lobby (NSW), *All Love is Equal*, highlights that for some people, formal relationship recognition is seen not only as a path to legal rights and equality, but as an important symbolic expression of love between two people.⁷⁴ Several written submissions and many of the people who attended the Inquiry's forums and hearings expressed a similar view.⁷⁵

Further, while only some people in same-sex relationships wish to formalise their relationships through marriage, civil union or registration, many wish to have the option to do so, just like an opposite-sex couple.⁷⁶

These are all valid and important arguments. However, the focus of this Inquiry is on how formal relationship recognition might help or hinder access to financial and work-related entitlements.

4.5.1 Three possible models of relationship recognition

Submissions to the Inquiry discuss three models of formal relationship recognition for same-sex couples:

- relationship registration schemes
- civil unions
- same-sex marriage.

Of these models, only relationship registration currently exists as an option for some same-sex couples in Australia.

(a) Relationship registration for same-sex couples

Registration of a relationship does not confer legal rights in itself but it may assist in demonstrating the existence of a de facto relationship.

Tasmania introduced registration for 'significant relationships' under the *Relationships Act 2003* (Tas). Both same-sex and opposite-sex couples can register their relationship.⁷⁷ Some city councils have also introduced relationship registration schemes.⁷⁸

However, it seems that few couples have registered under these schemes.⁷⁹

(b) Civil union for same-sex couples

Civil unions may provide greater ceremony and symbolism than relationship registration. However, there is currently no civil union scheme in Australia.

The ACT government introduced legislation for civil unions in early 2006. Shortly after the *Civil Unions Act 2006* (ACT) passed through the ACT Legislative Assembly, it was disallowed by the federal government pursuant to the *Australian Capital Territory (Self-Government) Act 1988* (Cth).⁸⁰

In disallowing the legislation, the federal Attorney-General stated that the civil union scheme proposed by the ACT government was 'deliberately intended to make the ACT arrangements as close as possible to marriage; when the marriage power is clearly vested in the Commonwealth.'⁸¹

On 12 December 2006, the ACT Attorney-General presented the *Civil Partnerships Bill 2006* (ACT) to the ACT Legislative Assembly. The new Bill is similar to the disallowed *Civil Unions Act 2006* (ACT) but with modifications designed to address the concerns expressed by the federal Attorney-General. The Bill uses the term 'civil partnership' to avoid using the language of marriage.⁸² However, the federal Attorney-General has indicated that the new Bill still does not address the federal government's concerns.⁸³

There are various models of civil unions in other countries.⁸⁴

(c) Marriage for same-sex couples

In 2004, the federal government amended the *Marriage Act 1961* (Cth) to clarify that 'marriage' is 'the union of a man and a woman to the exclusion of all others.'⁸⁵

Same-sex marriage is permitted in a range of other countries.⁸⁶ However, the *Marriage Amendment Act 2004* (Cth) clarified that same-sex marriages taking place overseas will not be recognised under Australian law.⁸⁷

Marriage is clearly the most politically contentious of the three models. Many of the submissions to the Inquiry emphasised the utmost importance of giving same-sex couples and opposite-sex couples the same right to affirm their relationship in marriage.⁸⁸ Other submissions argued that same-sex marriage: 'promotes different models, values and behaviours' compared to opposite-sex marriage,⁸⁹ is 'highly unstable',⁹⁰ and is not in the best interests of children.⁹¹

4.5.2 Formal recognition can provide evidence of a relationship

While there are many persuasive and valid reasons for introducing formal relationship recognition for same-sex couples, the focus of this Inquiry is on how formal relationship recognition could help a same-sex couple prove the right to financial entitlements.

Sometimes it is difficult for a couple to provide the evidence necessary to prove the criteria for a genuine domestic relationship. This may be particularly difficult for a same-sex couple who has not yet declared their sexuality to friends, family or workplaces for fear of the public reaction. Further, some same-sex couples have told stories of decision-makers who are resistant to the possibility that a same-sex couple can be a genuine couple.

Several people told the Inquiry that a formal 'piece of paper' could assist same-sex couples in proving the genuineness of their relationship and in asserting the rights that flow from such a relationship.

The NSW Law Reform Commission believes that the advantages of registration schemes include greater certainty and recognition. They comment:

Registration has the benefit of certainty. That certainty removes the need for legislative preconditions such as requiring cohabitation. The parties to a relationship can be readily identified, and have demonstrated that they know about, and agree to be bound by, the legislation and its provisions. It would give people who do not wish or are legally unable to marry, such as gay and lesbian couples, the opportunity to have their relationship registered and formally recognised by the State. It also provides a system of recognition for people who do not wish to live together, but want to acknowledge their relationship of mutual support.⁹²

A woman from PFLAG Brisbane told the Inquiry about how civil unions could help her gay son assert his rights under law:

I want the government to relent on the issue of civil unions. It would give my son and his partner instant recognition and give them the rights that the rest of us take for granted.⁹³

Doug Pollard told the Inquiry of the advantages that marriage might have brought him in proving his relationship for visa purposes:

You are accepted as someone's heterosexual partner if you can provide ONE piece of paper – a marriage certificate. To prove our interdependency took a blizzard of paper – bank statements, phone bills, rent receipts, credit card statements, letters, airline tickets, hotel and restaurant bills etc. etc. - and a major intrusion into our private life.⁹⁴

As this example suggests, if a same-sex couple were entitled to marry, those who did in fact marry could by-pass the 'de facto relationship' or 'interdependency relationship' definitions and qualify automatically as a 'spouse'.

4.5.3 Formal relationship recognition is helpful but not necessary to access financial entitlements

Almost all of the financial entitlements discussed throughout this report are available to opposite-sex couples, whether or not they are married. The goal of this Inquiry is to ensure that same-sex couples also have access to all financial entitlements, whether or not they are married.

Even if there were formal relationship recognition schemes for same-sex couples, only some same-sex couples will choose to formalise their relationships. This is no different to opposite-sex couples, only some of whom choose to formalise their relationships.

So, while marriage, civil unions or relationship registration might help some same-sex couples prove a genuine relationship, formal recognition is not, and should not be a necessary prerequisite.

Thus, the following recommendations focus on ensuring that same-sex couples can access the same financial entitlements available to opposite-sex couples – irrespective of formal recognition schemes.

4.6 How should federal law change to ensure same-sex couples can access financial and work-related entitlements?

The primary source of discrimination against same-sex couples is the way in which federal law describes who constitutes a legitimate couple.

Same-sex couples are excluded from all definitions describing a couple-like relationship, except where the ‘interdependency’ category has been introduced. While that category has brought improvements, it still treats same-sex couples differently to opposite-sex de facto couples.

Discrimination will continue for as long as the definitions continue to limit their scope to opposite-sex couples. Discrimination will disappear as soon as the definitions include same-sex couples.

All of the states and territories have enacted broad-based law reform to achieve this goal. They have done this by inserting new definitions of ‘de facto’, ‘domestic’ or ‘significant’ relationship into the relevant state and territory laws. Federal Parliament should also amend the definitions in federal laws to remove discrimination against same-sex couples.

4.6.1 Introduce omnibus legislation replacing discriminatory definitions in federal law

The Inquiry recommends that the federal Parliament enact legislation which ensures that all discriminatory definitions are amended to include same-sex couples. Such legislation should be ‘omnibus’ legislation that simultaneously amends all discriminatory federal laws – including those laws set out in Appendix 1 to this report.

The following sets out two possible ways that this omnibus legislation could amend the laws to remove discrimination. However, the Inquiry prefers the first approach.

(a) *Preferred approach: retain current terminology and introduce the concept of a ‘de facto relationship’*

This first option for amendment is to:

● Same-Sex: Same Entitlements

- retain the current terminology used in federal legislation
- redefine the terminology in the legislation to include same-sex couples
- insert new definitions of ‘de facto relationship’ and ‘de facto partner’ which include same-sex couples (as set out in section 4.6.2(b) below).

For example, the *Income Tax Assessment Act 1997* (Cth) currently defines a ‘spouse’ as follows:

‘spouse’ of a person includes a person who, although not legally married to the person, lives with the person on a genuine domestic basis *as the person’s husband or wife*.⁹⁵ (emphasis added)

This definition has been interpreted to exclude same-sex couples because of the reference to a ‘husband or wife’.

There is no need to change the term ‘spouse’, but it must be redefined to include a same-sex couple. A new definition of ‘spouse’ could read:

‘spouse’ of a person includes a person who is in a de facto relationship.

But ‘de facto relationship’ must also be defined in the legislation to include a same-sex relationship.

The main advantage of this strategy is that minimal changes are required to the existing legislation. For the most part, the only amendments necessary would be in the ‘interpretation’ or ‘definitions’ sections in the relevant legislation.

For example, if this approach is adopted, the substantive provisions of the tax legislation which confer rights on a ‘spouse’ need not be amended, because ‘spouse’ will remain the term to describe married and unmarried couples. But the term will now also incorporate same-sex couples (and opposite-sex couples) in a ‘de facto relationship’.

Appendix 1 to this report sets out the relevant sections which would need to be amended if this approach were taken.

(b) *Alternative approach: change current terminology describing married and unmarried couples*

This alternative approach makes a clearer distinction between the way a married couple is described and an unmarried couple is described, because it amends both the terminology and the substantive provisions. This approach is in line with that taken in several states and territories.

This approach involves:

- narrowing the scope of marriage-related terms to apply only to people who are (or were) legally married (for example ‘spouse’ only includes a person who is married)
- introducing the terms ‘de facto partner’ and ‘de facto relationship’ to apply to unmarried opposite-sex and same-sex couples
- amending all sections conferring substantive entitlements to ensure that they include both the marriage-related terms and de facto-related terms.

There will need to be many more amendments to the existing legislation if this approach is taken, because the substantive provisions relying on current terminology must be amended to recognise the new terminology.

For example, some of the changes which may need to occur pursuant to this approach include:

- Legislation will need to add a new definition of ‘de facto relationship’.
- Where there is currently a definition of ‘spouse’, that term should only describe a person who is legally married; a definition of ‘de facto partner’ should be inserted to cover a person who is unmarried but in a genuine relationship, irrespective of gender.
- Wherever there is a reference to a ‘spouse’ in the substantive provisions of legislation, there should also be a reference to a ‘de facto partner’.
- Wherever there is a reference to a ‘de facto spouse’ that term should be replaced with the term ‘de facto partner’.
- Wherever there is a definition of ‘member of a couple’ that definition should include a person in a ‘de facto relationship’.
- Wherever there is a reference to a ‘marital relationship’ or ‘marriage-like relationship’, ‘de facto relationship’ should either replace that term or be added to that term.
- Wherever there is a reference to a person who lives with another person ‘on a bona fide (or genuine) domestic basis, although not legally married to the employee’, that phrase can be replaced with the phrase ‘in a de facto relationship’.

These are broad guidelines only. There needs to be special care in ensuring that the amendments do not alter the nature of the entitlements described by these terms, other than to put opposite-sex and same-sex de facto relationships on the same footing.

4.6.2 Introduce an inclusive definition of ‘de facto relationship’ into federal law

In developing the following definition of ‘de facto relationship’ the Inquiry has considered definitions and criteria used in state and territory laws; criteria used in federal law definitions of ‘interdependency’; and the criteria for a ‘marriage-like relationship’ in social security law.

(a) *Important features of the model definition*

The Inquiry has used the term ‘de facto’ because it is the most common of the terms used in state and territory law. However, the Inquiry has no strong preference for the term ‘de facto relationship’ above terms such as ‘domestic relationship’ or ‘significant relationship’.

The Inquiry is concerned to ensure that a new definition has the following features:

- **Inclusiveness.** The focus of the definition is on the genuineness of the relationship between two people rather than their gender.
- **Flexibility.** The definition considers a range of factors relevant to a relationship with no one determinative factor. Further, the definition starts with the assumption

that the couple must live together, but allows for the possibility that they may be temporarily separated.

- **Consistency.** The federal definition should be consistent with definitions in state and territory jurisdictions to reduce the uncertainty currently facing same-sex couples.
- **Evidentiary guidelines.** The definition should indicate the type of evidence that can assist a couple in proving the genuineness of the relationship, including statutory declarations and other formal recognition schemes if available.

(b) A model definition of 'de facto relationship' and 'de facto partner'

The following is the definition of 'de facto relationship' which the Inquiry recommends be introduced into federal laws conferring financial and work-related entitlements.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

4.6.3 Summary of recommendations

The Inquiry recommends that the federal Parliament amend federal law to ensure equal access to financial entitlements and benefits for all couples – be they married or unmarried, opposite-sex or same-sex.

The federal Parliament should introduce ‘omnibus’ legislation to simultaneously eliminate discrimination against same-sex couples in all federal laws identified in Appendix 1 to this report.

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

- retain the current terminology used in federal legislation
- redefine the current terminology to include same-sex couples
- insert a new definition of ‘de facto relationship’ and ‘de facto partner’ following the model definition in section 4.6.2(b) above.

Endnotes

- 1 *Defence Force (Home Loans Assistance) Act 1990* (Cth), s 3. Examples of legislation using minor semantic variations on this definition: *Corporations Act 2001* (Cth), s 9; *Bankruptcy Act 1966* (Cth), s 5(1); *Pooled Development Funds Act 1992* (Cth), s 4(1).
- 2 *National Health Act 1953* (Cth), s 4.
- 3 Migration Regulations 1994 (Cth), reg 1.15A(2). Note, however, that the Migration Regulations include same-sex couples within the definition of an ‘interdependency relationship’.
- 4 *Military Rehabilitation and Compensation Act 2004* (Cth), s 5.
- 5 *Social Security Act 1991* (Cth), s 4(2); *A New Tax System (Family Assistance) Act 1999* (Cth), s 3(1); *Income Tax Assessment Act 1997* (Cth), s 61.490(1)(b); *Veterans’ Entitlements Act 1986* (Cth), s 5E(2).
- 6 *Gregory Brown v Commissioner of Superannuation* (1995) 21 AAR 378. See also *Re: The Roll-over Relief Claimant and Commissioner of Taxation* [2006] AATA 728.
- 7 See *Gregory Brown v Commissioner of Superannuation* (1995) 21 AAR 378 at [33].
- 8 *Income Tax Assessment Act 1936* (Cth), s 6(1); *Income Tax Assessment Act 1997* (Cth), s 995.1(1); *Fringe Benefits Tax Assessment Act 1986* (Cth), s 136(1). Minor semantic variations: *Passenger Movement Charge Collection Act 1978* (Cth), s 3; *Superannuation Industry (Supervision) Act 1993* (Cth), s 10; *Retirement Savings Accounts Act 1997* (Cth), s 20(2); *Life Insurance Act 1995* (Cth), sch 1, s 8; Foreign Acquisition and Takeovers Regulations 1989 (Cth), reg 2; *Superannuation Act 1990* (Cth), sch 1, r 1.1.1. Definition used as a subset of ‘relative’ in: *Financial Sector (Shareholdings) Act 1998* (Cth), sch 1, s 2; *Insurance Acquisitions and Takeovers Act 1991* (Cth), s 4. Other context: *Income Tax Assessment Act 1936* (Cth), s 251R(2).
- 9 *Workplace Relations Act 1996* (Cth), ss 240, 263. Minor semantic variations: *Sex Discrimination Act 1984* (Cth), s 4(1); *Military Superannuation and Benefits Act 1991* (Cth), sch 1, r 7(4); *Evidence Act 1995* (Cth), Dictionary, pt 1.
- 10 *Superannuation Act 1976* (Cth), s 8A(1); *Defence Force Retirement and Death Benefits Act 1973* (Cth), s 6A(1); *Governor-General Act 1974* (Cth), s 2B(2); *Judges’ Pensions Act 1968* (Cth), s 4AB(1); *Parliamentary Contributory Superannuation Act 1948* (Cth), s 4B(1).
- 11 *Parliamentary Entitlements Act 1990* (Cth), s 3. Minor semantic variations: *Aboriginal Land Grant (Jervis Bay Territory) Act 1986* (Cth), s 37(1); *Aboriginal Councils and Associations Act 1976* (Cth), s 3; *Commonwealth Electoral Act 1918* (Cth), s 4(1); *Safety, Rehabilitation and Compensation Act 1988* (Cth), s 4(1).
- 12 *Defence Force (Home Loans Assistance) Act 1990* (Cth), s 3; *Corporations Act 2001* (Cth), s 9; *Bankruptcy Act 1966* (Cth), s 5(1); *Pooled Development Funds Act 1992* (Cth), s 4(1).
- 13 *Commonwealth of Australia v Human Rights and Equal Opportunity Commission and Anor* [1998] 138 FCA (27 February 1998).
- 14 A number of federal acts discussed in this paper make specific provision for exactly this situation (i.e. where there is both a *de jure* and a *de facto* spouse): see, for example, *Superannuation Act 1976* (Cth), s 110; *Military Superannuation and Benefits Act 1991* (Cth), sch 1, r 47; *Defence Force Retirement and Death Benefits Act 1973* (Cth), s 41; *Parliamentary Contributory Superannuation Act 1948* (Cth), s 21AA.
- 15 For a full discussion of the changes to state and territory laws needed to recognise same-sex couples, see J Millbank, ‘Recognition of Lesbian and Gay Families in Australian Law – Part One: Couples’, *Federal Law Review*, vol 34, no 1, 2006, pp1-35.
- 16 *Aged Care Act 1997* (Cth), s 44.11(b).
- 17 See *Interpretation Act 1984* (WA), s 13A(1); *Commonwealth Powers (De facto Relationships) Act 2003* (NSW), s 3(1); *Commonwealth Powers (De facto Relationships) Act 2003* (Qld), s 3(1); *De facto Relationships (Northern Territory Request) Act 2003* (NT), s 3A(1).
- 18 *Social Security Act 1991* (Cth), s 4(2)(b)(iii).
- 19 *Social Security Act 1991* (Cth), s 4(3)-(3A).
- 20 *Social Security Act 1991* (Cth), s 4(2)(b)(i).

- 21 *Disability Discrimination Act 1992* (Cth); *Financial Transactions Reports Act 1988* (Cth); *Australian Citizenship Act 1948* (Cth); *Foreign States Immunities Act 1985* (Cth); *International Organisations (Privileges and Immunities) Act 1963* (Cth); *Proceeds of Crime Act 2002* (Cth); *Higher Education Funding Act 1988* (Cth); *Higher Education Support Act 2003* (Cth).
- 22 *Age Discrimination Act 2004* (Cth); *Health Insurance Act 1973* (Cth); *Education Services for Overseas Students Act 2000* (Cth); *Broadcasting Services Act 1992* (Cth); *Australian Meat and Live-Stock Industry Act 1997* (Cth); *Financial Transactions Reports Act 1988* (Cth); *Civil Aviation (Carriers Liability) Act 1959* (Cth).
- 23 See Minister for Revenue and the Assistant Treasurer, *Fairer Treatment for Interdependent Relationships*, Media Release, 27 May 2004, concerning superannuation legislation.
- 24 *Migration Act 1958* (Cth), s 238; *Migration Regulations 1994* (Cth), regs 1.09A(2), 1.09A(5)-(6); Australian Government Department of Defence, *Defence Instructions (General) Personnel 53-1* (1 December 2005), issued pursuant to s 9A of the *Defence Act 1903* (Cth), amended the *Defence Instruction (General) Manual* and the *ADF Pay and Conditions Manual*; *Defence Act 1903* (Cth). In order to be recognised, a person *must* first complete a statutory declaration and attach documentary evidence from a prescribed list: see Item 9 and Annex A and B of the Instructions.
- 25 *Superannuation Industry (Supervision) Act 1993* (Cth), s 10A(1). The *Superannuation Industry (Supervision) Regulations 1994* (Cth), reg 1.04AAAA(1), sets out the criteria for satisfying this definition which, although onerous, do not specify the sex of the two people involved in the relationship.
- 26 See ACON, Sydney Hearing, 26 July 2006; Brian Greig, Perth Hearing, 9 August 2006; Law Institute of Victoria, Melbourne Hearing, 26 September 2006; Good Process, Submission 284; Miranda Stewart, Submission 266; Tasmanian Gay and Lesbian Rights Group, Submission 233; Victorian Gay and Lesbian Rights Lobby, Submission 256; Women's Health Victoria, Submission 318.
- 27 James Magel, Submission 245.
- 28 Miranda Stewart, Submission 266.
- 29 See for example, *Roy v Sturgeon* (1986) 11 NSWLR 454; *Weston v Public Trustee* (1986) 4 NSWLR 407. See also Australian De Facto Relationships Cases (looseleaf) (2005) 9-695.
- 30 *Property Relationships Act 1984* (NSW), s 4(1). See also Anti-Discrimination Board of NSW, Submission 317.
- 31 *Property Relationships Act 1984* (NSW), s 4(2).
- 32 See for example *Anatomy Act 1977* (NSW), s 4(2)(d); *Coroners Act 1980* (NSW), s 4(1); *Guardianship Act 1987* (NSW), s 3(1). See also J Millbank, 'Lesbian and Gay Families in Australian Law – Part One: Couples', *Federal Law Review*, vol 34, no 1, 2006, p11.
- 33 The *Superannuation Legislation Amendment (Same Sex Partners) Act 2000* (NSW) amended the *Parliamentary Contributory Superannuation Act 1971* (NSW); *Police Association Employees (Superannuation) Act 1969* (NSW); *Police Regulation (Superannuation) Act 1906* (NSW); *State Authorities Non-contributory Superannuation Act 1987* (NSW); *State Authorities Superannuation Act 1987* (NSW); *Superannuation Act 1916* (NSW). See J Millbank, 'Lesbian and Gay Families in Australian Law – Part One: Couples', *Federal Law Review*, vol 34, no 1, 2006, p13.
- 34 *Miscellaneous Acts Amendment (Relationships) Act 2002* (NSW). See J Millbank, 'Lesbian and Gay Families in Australian Law – Part One: Couples', *Federal Law Review*, vol 34, no 1, 2006, p13. See also Anti-Discrimination Board of NSW, Submission 317.
- 35 NSW Law Reform Commission, *Discussion Paper 44 (2002) - Review of the Property (Relationships) Act 1984* (NSW), <http://www.lawlink.nsw.gov.au/lrc.nsf/pages/dp44chp3#H8>, viewed 1 March 2007; Anti-Discrimination Board of NSW, Submission 317.
- 36 J Millbank, 'Lesbian and Gay Families in Australian Law – Part One: Couples', *Federal Law Review*, vol 34, no 1, 2006, p15. See also Attorney-General of Victoria, Submission 343; Equal Opportunity Commission of Victoria, Submission 327; Law Institute of Victoria, Submission 331; Victorian Gay and Lesbian Rights Lobby, Submission 256.
- 37 *Property Law Act 1958* (Vic), s 275(1).
- 38 *Property Law Act 1958* (Vic), s 275(1).
- 39 *Property Law Act 1958* (Vic), s 275(2).
- 40 See *Statute Law Amendment (Relationships) Act 2001* (Vic), schs 4-6.

- 41 Equal Opportunity Commission of Victoria, Submission 327.
- 42 A large number of amendments also removed references to 'husband' and 'wife' and replaced them with 'spouse'. See, for example, *Discrimination Law Amendment Act 2002* (Qld), ss 53-57, 59. J Millbank, 'Lesbian and Gay Families in Australian Law – Part One: Couples', *Federal Law Review*, vol 34, no 1, 2006, p19. See also Action Reform Change Queensland and Queensland AIDS Council, Submission 270.
- 43 *Acts Interpretation Act 1954* (Qld), s 32DA(1).
- 44 *Acts Interpretation Act 1954* (Qld), s 32DA(2).
- 45 *Acts Interpretation Act 1954* (Qld), s 32DA(6).
- 46 Anti-Discrimination Commission Queensland, Submission 264.
- 47 See for example *Acts Amendment (Equality of Status) Act 2003* (WA), ss 29, 59.
- 48 *Interpretation Act 1984* (WA), s 13A(1).
- 49 *Interpretation Act 1984* (WA), s 13A(3).
- 50 *Interpretation Act 1984* (WA), s 13A(2).
- 51 See, for example, *Acts Amendment (Lesbian and Gay Reform) Act 2002* (WA), ss 69(2), 102; *Acts Amendment (Equality of Status) Act 2003* (WA), ss 40, 48, 63.
- 52 See Rod Swift, Perth Hearing, 9 August 2006; Speaker, Perth Forum, 10 August 2006; Equal Opportunity Commission of Western Australia, Submission 342; Samantha and Kelly Pilgrim-Byrne, Submission 13; The Hon Penny Sharpe MLC, Submission 341; Giz Watson MLC, Submission 262.
- 53 J Millbank, 'Lesbian and Gay Families in Australian Law – Part One: Couples', *Federal Law Review*, vol 34, no 1, 2006, p25.
- 54 *De Facto Relationships Act 1991* (NT), s 3A(1).
- 55 *De Facto Relationships Act 1991* (NT), s 3A(3).
- 56 *De Facto Relationships Act 1991* (NT), s 3A(2).
- 57 J Millbank, 'Lesbian and Gay Families in Australian Law – Part One: Couples', *Federal Law Review*, vol 34, no 1, 2006, p26.
- 58 *Relationships Act 2003* (Tas), s 4(1).
- 59 *Relationships Act 2003* (Tas), pt 2.
- 60 *Relationships Act 2003* (Tas), s 4(2).
- 61 *Relationships Act 2003* (Tas), s 4(1).
- 62 *Relationships Act 2003* (Tas), s 4(3).
- 63 *Domestic Relationships Act 1994* (ACT), s 3(1), introduced the concept of a 'domestic relationship' in the context of property rights. The definition was intended to include same-sex couples. See J Millbank, 'Lesbian and Gay Families in Australian Law – Part One: Couples', *Federal Law Review*, vol 34, no 1, 2006, pp29-30.
- 64 See for example *Legislation (Gay, Lesbian and Transgender) Amendment Act 2003* (ACT), sch 1, amendments 1.23-1.25, 1.32, 1.28, 1.62, 1.55; *Sexuality Discrimination Legislation Amendment Act 2004* (ACT), sch 1, amendments 1.14, 1.55, 1.63.
- 65 *Legislation Act 2001* (ACT), s 169(2).
- 66 *Legislation Act 2001* (ACT), s 169(1).
- 67 *Legislation Act 2001* (ACT), s 169(2).
- 68 *Statutes Amendment (Domestic Partners) Act 2006* (SA), s 5, will insert this definition into the *Family Relationships Act 1975* (SA), s 11A. This Act had not commenced as at 5 April 2007.
- 69 *Statutes Amendment (Domestic Partners) Act 2006* (SA), s 5, will insert this provision into the *Family Relationships Act 1975* (SA), s 11B. This Act had not commenced as at 5 April 2007.
- 70 *Statutes Amendment (Domestic Partners) Act 2006* (SA), s 5, will insert this provision into the *Family Relationships Act 1975* (SA), s 11B(5). This Act had not commenced as at 5 April 2007.
- 71 *Statutes Amendment (Domestic Partners) Act 2006* (SA), s 5, will insert this provision into the *Family Relationships Act 1975* (SA), s 11B(3). This Act had not commenced as at 5 April 2007.

- 72 See Action Reform Change Queensland and Queensland AIDS Council, Submission 270; Associate Professor Jenni Millbank, Submission 27; Australian Coalition for Equality, Submission 228; Australian Marriage Equality, Submissions 238 and 238a; Gay and Lesbian Equality (WA), Submission 251; Gay and Lesbian Rights Lobby (NSW), Submission 333; Lesbian and Gay Solidarity (Melbourne), Submission 89a; Gilbert and Tobin Centre of Public Law, Submission 179; Good Process, Submission 184; Let's Get Equal Campaign (SA), Submission 260; Tasmanian Gay and Lesbian Rights Group, Submission 233a; ALSO Foundation, Submissions 307 and 307f; Victorian Gay and Lesbian Rights Lobby, Submissions 233 and 233a.
- 73 For more discussion on the importance of such schemes to gay and lesbian communities and the advantages and disadvantages of each scheme, see Gay and Lesbian Rights Lobby (NSW), *All Love Is Equal ... Isn't It? The recognition of same-sex relationships under federal law*, Consultation Report, February 2007; R McNair and N Thomacos, *Not Yet Equal*, Report of the Victorian Gay and Lesbian Rights Lobby, Same Sex Relationships Survey 2005, July 2005; Gay and Lesbian Legal Rights Service, *The Bride Wore Pink, Legal Recognition of our Relationships*, Discussion Paper, 2nd ed, February 1994.
- 74 See Gay and Lesbian Rights Lobby (NSW), *All Love Is Equal ... Isn't It? The recognition of same-sex relationships under federal law*, Consultation Report, February 2007; R McNair and N Thomacos, *Not Yet Equal*, Report of the Victorian Gay and Lesbian Rights Lobby, Same Sex Relationships Survey 2005, July 2005; Gay and Lesbian Legal Rights Service, *The Bride Wore Pink, Legal Recognition of our Relationships*, Discussion Paper, 2nd ed, February 1994; K Anthony and T Drabsch, *Legal Recognition of Same-Sex Relationships*, NSW Parliamentary Library Research Service, Briefing Paper No. 9/06, June 2006.
- 75 See Speaker, Adelaide Forum, 28 August 2006; Speaker, Melbourne Forum, 26 September 2006; Speaker, Brisbane Forum, 10 October 2006; Let's Get Equal Campaign (SA), Adelaide Hearing, 28 August 2006; David Bocabella, Submission 4; Ralph Barrand and Douglas Collins, Submission 258.
- 76 See for example, Gay and Lesbian Rights Lobby (NSW), *All Love Is Equal ... Isn't It? The recognition of same-sex relationships under federal law*, Consultation Report, February 2007; R McNair and N Thomacos, *Not Yet Equal*, Report of the Victorian Gay and Lesbian Rights Lobby, Same Sex Relationships Survey 2005, July 2005; Gay and Lesbian Legal Rights Service, *The Bride Wore Pink, Legal Recognition of our Relationships*, Discussion Paper, 2nd ed, February 1994; K Anthony and T Drabsch, *Legal Recognition of Same-Sex Relationships*, NSW Parliamentary Library Research Service, Briefing Paper No. 9/06, June 2006.
- 77 *Relationships Act 2003* (Tas), s 11(1).
- 78 In September 2005, the City of Sydney adopted a Relationships Declaration Program. While making a relationship declaration does not confer legal rights in the way marriage does, it may be used to demonstrate the existence of a de facto relationship within the meaning of the *Property (Relationships) Act 1984* (NSW) and other legislation: City of Sydney, *Relationship Declaration Program Information Pack*, 2005, p2. Melbourne City Council introduced a Relationship Declaration Register on 2 April 2007: City of Melbourne, *Relationship Declaration Register*, <http://www.melbourne.vic.gov.au/info.cfm?top=208&pg=3483>, viewed 20 April 2007.
- 79 As at 1 January 2006, 57 couples had registered a 'significant relationship' in Tasmania. Of these relationships, 45 were same-sex couples (24 gay male and 21 lesbian couples) and 12 were opposite-sex couples: J Millbank, 'Lesbian and Gay Families in Australian Law - Part One: Couples', *Federal Law Review*, vol 34, no 1, 2006, p27. There is evidence of a low take up of registration regimes internationally, 'with a much lower take up by women, and a high urban concentration': K Anthony and T Drabsch, *Legal Recognition of Same-Sex Relationships*, NSW Parliamentary Library Research Service, Briefing Paper No. 9/06, June 2006, pp4-5.
- 80 *Australian Capital Territory (Self-Government) Act 1988* (Cth), s 35(2). See Commonwealth of Australia, Special Gazette No S93, 14 June 2006.
- 81 The Attorney-General, Transcript of Interview, Doorstop Interview, House of Representatives Alcove, Parliament House, Canberra, 13 June 2006, http://www.ag.gov.au/agd/WWW/MinisterRuddockHome.nsf/Page/Interview_Transcripts_2006_Transcripts_13_June_2006_-_Transcript_-_Doorstop_Interview_-_House_of_Representatives_Alcove_-_Parliament_House_-_Canberra, viewed 30 March 2007.

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- 82 Chief Minister, Australian Capital Territory, *Corbell Introduces Civil Partnerships Bill*, Media Release, 12 December 2006, <http://www.chiefminister.act.gov.au/media.asp?media=2031§ion=52&title=Media%20Release&id=52>, viewed 30 March 2007.
- 83 The Attorney-General, *ACT Civil Partnerships Bill does not remove concerns*, Media Release, 6 February 2007. See also The Attorney-General, Transcript, ABC Local Radio Canberra, 7 February 2007, http://www.ag.gov.au/agd/WWW/MinisterRuddockHome.nsf/Page/Interview_Transcripts_2007_Transcripts_7_February_2007_-_Transcript_-_ABC_Local_Radio_Canberra, viewed 30 March 2007.
- 84 Countries with civil unions include Denmark, New Zealand and the UK: K Anthony and T Drabsch, *Legal Recognition of Same-Sex Relationships*, NSW Parliamentary Library Research Service, Briefing Paper No. 9/06, June 2006, pp45-48. See also Public Interest Advocacy Centre (PIAC), Submission 328.
- 85 *Marriage Act 1961* (Cth), s 5(1), amended by the *Marriage Amendment Act 2004* (Cth), sch 1, cl 1.
- 86 Countries with same-sex marriage include Canada, Spain, the Netherlands, and Belgium: K Anthony and T Drabsch, *Legal Recognition of Same-Sex Relationships*, NSW Parliamentary Library Research Service, Briefing Paper No. 9/06, 2006, p41. See also Public Interest Advocacy Centre (PIAC), Submission 328.
- 87 *Marriage Act 1961* (Cth), s 88EA, amended by the *Marriage Amendment Act 2004* (Cth), sch 1, cl 3.
- 88 See Anthony Brien, Submission 64a; Australian Lawyers for Human Rights, Submission 286; Australian Marriage Equality, Submissions 238 and 238a; Castan Centre for Human Rights Law, Monash University, Submission 126; Frank Gomez, Submission 216; Walter Lee, Submission 250a; Russell Pollard, Submission 300; Tasmanian Gay and Lesbian Rights Group, Submission 233a.
- 89 Marriage and Family Office, Catholic Archdiocese of Sydney, Submission 364.
- 90 Festival of Light Australia, Submission 31.
- 91 Festival of Light Australia, Submission 31, Marriage and Family Office, Catholic Archdiocese of Sydney, Submission 364, Lutheran Church of Australia, Submission 494; Australian Family Association, South Australian Branch, Submission 399.
- 92 NSW Law Reform Commission, *Review of the Property (Relationships) Act 1984* (NSW), Discussion Paper 44, 2002, para 2.73, <http://www.lawlink.nsw.gov.au/lrc.nsf/pages/dp44toc>, viewed 30 March 2007. See also K Anthony and T Drabsch, *Legal Recognition of Same-Sex Relationships*, NSW Parliamentary Library Research Service, Briefing Paper No. 9/06, June 2006, p5.
- 93 Person A, Parents and Friends of Lesbians and Gays Brisbane (PFLAG), Brisbane Hearing, 11 October 2006.
- 94 Doug Pollard, Opening Statement, Melbourne Hearing, 27 September 2006.
- 95 *Income Tax Assessment Act 1997* (Cth), s 995-1(1).