



CHAPTER 8: *Tax*

CHAPTER CONTENTS

8.1	What is this chapter about?	166
8.2	Do the definitions in tax legislation exclude same-sex partners and parents?	167
8.2.1	'Spouse' excludes a same-sex partner	167
8.2.2	'Child' excludes the child of a lesbian co-mother or gay co-father	167
8.3	Do same-sex couples pay the same tax but get less back?	168
8.4	Do same-sex families qualify for dependant tax offsets?	168
8.4.1	'Dependant' excludes a same-sex partner and the child of a lesbian co-mother and gay co-father	169
8.4.2	A same-sex partner cannot access the dependent spouse tax offset	169
8.4.3	A same-sex partner cannot access the tax offset for a same-sex partner's parent	170
8.4.4	A same-sex partner, lesbian co-mother and gay co-father cannot access the housekeeper tax offset	171
8.4.5	The lesbian co-mother and gay co-father cannot access the child-housekeeper tax offset	171
8.4.6	A lesbian co-mother and gay co-father cannot access the invalid relative tax offset	172
8.4.7	A same-sex couple gets a smaller overseas forces tax offset	172
8.4.8	A same-sex couple gets a smaller zone tax offset	172
8.4.9	A US defence force same-sex partner cannot access tax exemptions	173
8.5	Do same-sex and opposite-sex couples get equal access to the senior Australians tax rebate?	173
8.5.1	Same-sex partners face individual income tests	173
8.5.2	Same-sex partners receive a higher rate of offset	173
8.5.3	Any unused entitlement cannot be transferred to a same-sex partner	174

8.6	Can same-sex couples claim the baby bonus?	174
8.6.1	The baby bonus is available to one parent only	174
8.6.2	A 'natural parent' has the primary entitlement	174
8.6.3	A 'natural parent' cannot transfer the entitlement to a same-sex partner	175
8.7	Can same-sex couples claim the child care tax rebate?	175
8.7.1	Payments by a lesbian co-mother or gay co-father may attract the rebate	175
8.7.2	Payments by a same-sex partner do not attract the rebate	175
8.7.3	A same-sex partner cannot transfer the unused value of the rebate	176
8.7.4	Restrictions on transfer may result in no rebate at all	176
8.8	Do same-sex couples have to spend more to access the medical expenses tax offset?	177
8.9	Do same-sex couples pay a higher Medicare levy and surcharge?	177
8.9.1	Same-sex couples may pay a higher Medicare levy	177
	<i>(a) It may be harder for a same-sex family to get an exemption</i>	177
	<i>(b) It may be harder for a same-sex family to qualify for a reduced Medicare levy</i>	178
	<i>(c) Impact of the Medicare levy on same-sex couples</i>	178
8.9.2	Same-sex couples may pay a higher Medicare levy surcharge	179
	<i>(a) Same-sex partners are assessed on individual thresholds</i>	179
	<i>(b) Impact of the Medicare levy surcharge thresholds on same-sex couples</i>	179
8.10	Do same-sex couples pay more tax on relationship breakdown?	180
8.10.1	Same-sex couples pay capital gains tax when transferring property to a partner	180
	<i>(a) Only a 'spouse' can attract the favourable tax treatment</i>	180
	<i>(b) Impact on same-sex couples</i>	180
8.10.2	Same-sex couples do not pay GST when transferring property	181
8.10.3	Same-sex families pay tax on property held for a child	181
	<i>(a) A family breakdown excludes separation of same-sex couples</i>	181
	<i>(b) Impact on same-sex couples</i>	182
8.10.4	Same-sex couples pay tax on maintenance payments	182
8.11	Do same-sex couples pay more capital gains tax?	182
8.12	Are employers liable for more fringe benefits tax in respect of same-sex couples?	183
8.12.1	A same-sex partner is not an 'associate'	183
8.12.2	There may be FBT where a same-sex partner gets benefits under an 'arrangement'	183
8.12.3	Same-sex partners are not eligible for FBT 'spouse' exemptions	183
8.12.4	Same-sex couples may not benefit from salary packaging	184

8.13	Are same-sex couples covered by tax integrity and anti-avoidance measures?	184
8.14	Does tax legislation breach human rights?	184
8.15	How should tax legislation be amended to avoid future breaches?	185
8.15.1	Narrow definitions are the main cause of discrimination	185
8.15.2	The solution is to amend the definitions and recognise both same-sex parents of a child	186
8.15.3	A list of legislation to be amended	187
	Endnotes	189

8.1 What is this chapter about?

This chapter focuses on discrimination against same-sex couples and their families in the context of Australia's federal taxation system.

Same-sex couples are not eligible for a range of rebates and tax concessions available to opposite-sex couples. This means same-sex couples may end up paying more tax than opposite-sex couples because tax legislation does not recognise their relationship.

Further, some children raised by same-sex couples are not recognised as the children of both members of that couple for the purposes of tax law. This means that same-sex parents and their children may miss out on tax benefits intended to help families.¹

The problem arises as a result of the definitions of 'spouse' and 'child' in the relevant taxation legislation. The definition of 'spouse' excludes a person in a same-sex couple. And the definition of 'child' does not encompass a child born to a lesbian co-mother or gay co-father.

The chapter explains how Australia's taxation system currently applies to same-sex couples and families. It discusses income tax, the Medicare levy, capital gains tax, fringe benefits tax and goods and services tax. The chapter sets out how discrimination against same-sex couples and families in tax law breaches Australia's human rights obligations. And it makes recommendations as to how to avoid future discrimination and human rights breaches.

Specifically, this chapter addresses the following questions:

- Do the definitions in tax legislation exclude same-sex partners and parents?
- Do same-sex couples pay the same tax but get less back?
- Do same-sex families qualify for dependant tax offsets?
- Do same-sex and opposite-sex couples get equal access to the senior Australians tax rebate?
- Can same-sex couples claim the baby bonus?
- Can same-sex couples claim the child care tax rebate?
- Do same-sex couples have to spend more to access the medical expenses tax offset?
- Do same-sex couples pay a higher Medicare levy and surcharge?
- Do same-sex couples pay more tax on relationship breakdown?
- Do same-sex couples pay more capital gains tax?
- Are employers liable for more fringe benefits tax in respect of same-sex couples?
- Are same-sex couples covered by tax integrity and anti-avoidance measures?
- Does tax legislation breach human rights?
- How should tax legislation be amended to avoid future breaches?

Taxation issues also arise in other chapters of this report. Chapter 13 on Superannuation discusses how superannuation is taxed. Chapter 9 on Social Security discusses the Family Tax Benefit (A and B) as these benefits are welfare payments established under family assistance legislation.

8.2 Do the definitions in tax legislation exclude same-sex partners and parents?

There are two principal pieces of federal income tax legislation, the *Income Tax Assessment Act 1936* (Cth) (Income Tax Assessment Act 1936) and the *Income Tax Assessment Act 1997* (Cth) (Income Tax Assessment Act 1997).² This legislation covers a variety of issues related to personal income taxation, including how to assess tax liability and various income deductions and tax offsets.

8.2.1 'Spouse' excludes a same-sex partner

The Income Tax Assessment Act 1997 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.³

The Income Tax Assessment Act 1936 adopts the definition in the 1997 legislation.⁴

In 1995, the Administrative Appeals Tribunal interpreted a similar definition of spouse and found that:

[t]he fact that the persons must be of opposite sex is inherent ... in the use of the words 'husband' and 'wife'.⁵

The Australian Taxation Office (ATO) has followed the interpretation of the Administrative Appeals Tribunal.⁶ Consequently, a same-sex partner cannot qualify as a 'spouse' under tax legislation.

8.2.2 'Child' excludes the child of a lesbian co-mother or gay co-father

The Income Tax Assessment Act 1997 defines a 'child' as follows:

child of a person includes the person's adopted child, step-child or ex-nuptial child.⁷

The Income Tax Assessment Act 1936 adopts the definition in the 1997 legislation.⁸

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).⁹

Chapter 5 also explains that definitions of 'child' like that in the Income Tax Assessment Act 1997 will generally *include* the child of a birth mother or birth father but *exclude* a child of a lesbian co-mother and gay co-father (in the absence of adoption).¹⁰

Therefore, where a child is born to and raised by a same-sex couple, taxation law will not recognise one of the child's two parents.

8.3 Do same-sex couples pay the same tax but get less back?

Submissions to the Inquiry repeatedly made the point that same-sex couples contribute through the payment of tax, without receiving the tax and other benefits available to most Australian families.

The following is a sample of the comments received:

- I do not think that [it's] right that the Commonwealth takes our tax and does not recognise our relationships.¹¹
- It's not like the government gives us a choice in these matters. We can't opt out of the Medicare Levy or superannuation. Given the compulsion in the tax, Medicare and superannuation systems, it's reasonable to expect that having contributed at the same rate as everyone else, we'll get the same benefits – but we don't. Very simply we believe that forcing us to contribute to a system which discriminates against us is just plain wrong.¹²
- I have a loving partner. I pay lots of tax. And yes I am gay. As a member of society who contributes financially through taxes and helps people every day in a health related profession why shouldn't my partner and I have the same rights as [heterosexual] couples[?]¹³
- If we are to pay the same tax as our heterosexual and de facto fellow citizens, we should be entitled to the same privileges.¹⁴
- Firstly, in relation to tax rebates ... neither of us is able to access a variety of tax rebates ... Although we both work in public government service industries, have lived together for several years with joint bank accounts, pool our salaries, pay taxes and contribute to charity, our relationship is not considered valid. Our contributions to our community and our society are taken gladly but our relationship remains invalid for financial purposes compared with heterosexual couples, whether they are legally married or not. In addition, we are unable to access the variable rates of Medicare levy charges ... which may be in our favour, particularly when we have dependent children.¹⁵
- Under the present definitions, my partner is not entitled to claim me or our child as dependents. It is unfair that we pay proportionally higher tax than heterosexual couples do, and that we get less benefits for our tax dollars than heterosexual couples do.¹⁶

8.4 Do same-sex families qualify for dependant tax offsets?

Income tax offsets (also known as rebates or credits) directly reduce the amount of tax an individual pays.¹⁷ There are a number of tax rebates available to a taxpayer because he or she is supporting a 'dependant'.¹⁸ Those rebates include:

- Dependent spouse tax offset
- Parent or spouse's parent tax offset
- Housekeeper tax offset
- Child-housekeeper tax offset
- Invalid relative tax offset.

A taxpayer in a same-sex relationship cannot access these offsets in many cases.

The Australian Coalition for Equality explains the purpose of such tax offsets as follows:

Australia's taxation laws provide deductions and offsets, assisting taxpayers in their individual and family situations. Families receive tax offsets and benefits to alleviate some of the financial strain of raising a family or having a dependant.¹⁹

There are also some tax offsets which are paid at a higher rate if the taxpayer has a 'dependant', including:

- Overseas forces tax offset
- Zone tax offset for people living in rural and remote areas.

Finally, the Australia-US Joint Space and Defence Projects tax exemption is only available to a 'dependant' of a tax payer.

The following sections explain that none of these tax credits are available in respect of a same-sex partner. And they are only available to a birth mother or birth father of a child born into a same-sex family – thus excluding a lesbian co-mother and gay co-father.

8.4.1 'Dependant' excludes a same-sex partner and the child of a lesbian co-mother and gay co-father

For the purposes of tax offsets, a 'dependant' includes, amongst others, a 'spouse', 'child', 'invalid relative' and 'child-housekeeper'.²⁰

The offsets relying on the definition of 'spouse' will exclude a taxpayer supporting a same-sex partner.

The offsets relying on the definition of 'child' will not permit either the lesbian co-mother or the gay co-father of a child to claim a rebate.

An 'invalid relative' is a 'child', brother or sister of the taxpayer who has a disability and who is receiving support or has a certificate to say he or she cannot work.²¹

A 'child housekeeper' is the 'child' of the taxpayer (but not necessarily under 18 years of age) who is wholly engaged in keeping house for that taxpayer.²²

8.4.2 A same-sex partner cannot access the dependent spouse tax offset

A taxpayer who is not already claiming Family Tax Benefit B (discussed in Chapter 9 on Social Security) can claim a dependent spouse tax offset.²³

The taxpayer will be eligible for the dependent spouse tax offset if he or she lives with and financially supports a 'spouse'.²⁴ Since the definition of a 'spouse' excludes a same-sex partner, a taxpayer with a same-sex partner can never claim this offset.²⁵

For the 2005–2006 tax year the maximum dependent spouse tax offset a taxpayer could claim was \$1610.²⁶ This means that a same-sex couple who does not qualify for Family Tax Benefit B is potentially \$1610 worse off than an opposite-sex couple in the same circumstances.

Many people making submissions to the Inquiry talked about the impact of being denied access to the dependent spouse tax offset:

● Same-Sex: Same Entitlements

- The first thing was when I started employment, I found out I could not claim dependent spouse tax rebate even though [my partner] was my dependent.²⁷
- When we first moved up here and my partner didn't work for a while. The tax write off for having a dependant for a while would have been fantastic. We live in the same house, have the same bank account, and pay the same bills.²⁸
- I earn a very good wage and pay very high taxes. I am unable to claim my partner as a dependent on my tax return during periods where he was not working, as the tax law discriminates between same-sex couples and heterosexual relationships. Why are tax breaks delivered to heterosexual couples, but not to same sex-couples?²⁹
- I would like to draw your attention to my experience of discrimination in the area of dependent spouse tax offset. As a woman in a relationship with another woman, I cannot claim the dependent spouse tax offset for my partner. We qualify against virtually all the necessary criteria:
 - both my partner and I are Australian citizens
 - I contributed to the maintenance of [my] partner
 - my partner as a student receives a tax free scholarship from the federal government, therefore is under the threshold for the entitlements of \$6,569
 - my partner and I were not eligible for the Family Tax Benefit (FTB) Part B.

However, I was unable to claim the dependent spouse tax offset for my partner because she does not meet the definition of 'spouse' under the legislation. A 'spouse' must be of the opposite sex to his or her partner.³⁰

- Shortly I will be an at-home mother, financially dependant on my partner. Because our relationship is not recognised, my partner will not be able to declare me as a dependant. We will not be able to access health or tax concessions available to heterosexual couples.³¹
- My partner and I are not able to enjoy any of the tax concessions which are currently available to married or de facto couples. Further, my partner did not qualify as a dependent spouse when he was not working.³²

8.4.3 A same-sex partner cannot access the tax offset for a same-sex partner's parent

A taxpayer supporting a parent or spouse's parent may claim a tax offset.³³

Because a same-sex partner does not qualify as a 'spouse', a taxpayer cannot claim this offset if he or she is maintaining the parent of his or her same-sex partner.

For the 2005–2006 tax year, the maximum spouse's parent tax offset a taxpayer could claim was \$1448.³⁴ This means that a same-sex couple who cannot claim this offset is potentially \$1448 worse off than an opposite-sex couple in the same circumstances.

Action Reform Change Queensland and the Queensland AIDS Council provide the following example of discrimination in accessing the spouse's parent tax offset:

...if Natalie's mother moves in with them and becomes in need of care and has medical expenses she cannot cover, Penny will not be able to claim her as a dependent for tax purposes, even if Natalie is unemployed and Penny is footing all of the bills.³⁵

8.4.4 A same-sex partner, lesbian co-mother and gay co-father cannot access the housekeeper tax offset

The housekeeper tax offset is designed to help a taxpayer who has employed a person full-time to keep house for them and to care for:

- a 'child' of the taxpayer who is under 21 years old
- any other 'child' aged under 21 years (including a student aged under 21 years) who is the taxpayer's dependant and whose Separate Net Income is less than \$1786
- an 'invalid relative' for whom the taxpayer can claim a dependant tax offset
- a 'spouse' who receives a disability support pension.³⁶

Because of the definitions of 'spouse', 'child' and 'invalid relative', a taxpayer in a same-sex family can only claim this offset if the taxpayer is the birth mother or birth father of a child who otherwise qualifies under these criteria.

In other words, it does not permit a person to claim the offset if there is a housekeeper looking after a same-sex partner or the child of a lesbian co-mother or gay co-father.

For the 2005–2006 tax year, the maximum claimable housekeeper tax offset for a taxpayer was \$1610, or \$1930 if the taxpayer had an eligible dependent 'child' or student.³⁷ Thus a same-sex couple who cannot claim this offset is potentially \$1930 worse off than an opposite-sex couple who can.

ACON expressed concern about discrimination against same-sex couples regarding this offset:

The Federal Government provides financial assistance to couples and families who employ carers to look after dependants and spouses who receive the disability support pension. Same-sex partners who hire a carer to care for a person living with HIV/AIDS are not eligible to receive the housekeeper rebate, which amounts to [\$1610] a year, because of the definition of 'spouse' under the *Income Tax Assessment Act*, which excludes same-sex couples.³⁸

8.4.5 The lesbian co-mother and gay co-father cannot access the child-housekeeper tax offset

Where a taxpayer's 'child' (of any age) is wholly engaged in keeping house for the taxpayer, the taxpayer is entitled to the child-housekeeper tax offset.³⁹

Because of the definition of 'child', this tax offset will only be available to a taxpayer parent in a same-sex couple if she is the birth mother or he is the birth father of the child who is keeping house.⁴⁰ Neither the lesbian co-mother nor the gay co-father of a child can claim this offset.

For the 2005–2006 tax year, the maximum child-housekeeper tax offset a taxpayer could claim was \$1610, or \$1930 if they had another eligible dependent child or student.⁴¹ This means that a same-sex parent who cannot claim this offset is potentially \$1930 worse off than an opposite-sex parent who can.

8.4.6 A lesbian co-mother and gay co-father cannot access the invalid relative tax offset

A taxpayer who maintains an 'invalid relative' may be entitled to claim the invalid relative tax offset.⁴²

In a same-sex couple only a birth mother or birth father of the person with a disability can claim this rebate. This is because the definition of an 'invalid relative' relies on the definition of 'child'.⁴³ The lesbian co-mother and gay co-father cannot claim this offset.

For the 2005–2006 tax year, the maximum amount of invalid relative tax offset that a taxpayer could claim was \$725 for each 'invalid relative'.⁴⁴ This means that a member of same-sex couple who cannot claim this offset is potentially \$725 worse off than an opposite-sex couple who can.

8.4.7 A same-sex couple gets a smaller overseas forces tax offset

A tax offset is available to Australians who serve overseas with:

- a United Nations force⁴⁵
- the Australian Defence Force (in a specified overseas locality if their income was not specifically exempt from tax).⁴⁶

Both of these tax offsets are paid at a higher rate if the taxpayer is eligible for a dependant rebate, including for their 'spouse' or 'child'.⁴⁷ A taxpayer cannot claim a same-sex partner or a child other than a birth child as a 'dependant'.

In addition to a fixed amount of \$338, a person eligible for the overseas forces tax offset may claim 50% of the sum of other tax offsets for 'dependants'. This means that a same-sex partner who is unable to claim a tax offset for a dependant can only claim the fixed amount of \$338.⁴⁸

8.4.8 A same-sex couple gets a smaller zone tax offset

Australians who live or work in a remote or isolated area of Australia are entitled to a zone tax offset.⁴⁹

This tax offset will be higher where the taxpayer has a 'dependant', including a 'spouse' or 'child'.⁵⁰ A taxpayer cannot claim a same-sex partner or a child other than a birth child as a 'dependant'.

In addition to a fixed amount which varies according to the location of work or residence, a person eligible for the zone tax offset may claim up to 50% of the sum of other tax offset components for dependants.⁵¹ This means that a same-sex partner who is unable to claim a tax offset for a dependant can only claim the fixed amount.

8.4.9 A US defence force same-sex partner cannot access tax exemptions

The 'dependants' of United States (US) Defence Forces and civilian employees working at specific US facilities in Australia are exempt from income tax if they are otherwise taxed in the United States.⁵²

A same-sex partner cannot claim a tax exemption; nor can the child of a lesbian co-mother or gay co-father.⁵³

8.5 Do same-sex and opposite-sex couples get equal access to the senior Australians tax rebate?

The senior Australians tax offset (also known as the low income aged persons rebate) is available to taxpayers who meet age and income eligibility conditions and are eligible for federal government pensions or similar payments.⁵⁴

8.5.1 Same-sex partners face individual income tests

Where a taxpayer has a 'spouse', the combined taxable income of the couple will be assessed against an income test to determine eligibility for the offset.⁵⁵ However, as a same-sex partner is not a 'spouse' under tax law, both members of a same-sex couple will be assessed as individuals.

This different tax treatment will generally benefit a same-sex couple. For example, a same-sex couple will be advantaged if the individual income of each partner is less than the individual income test threshold (\$39 808) but the combined income is more than the couple threshold (\$62 126). Each member of the same-sex couple would be able to claim the offset while neither member of an opposite-sex couple in the same circumstances would be able to do so.

8.5.2 Same-sex partners receive a higher rate of offset

The amount of senior Australians tax offset will depend upon whether the taxpayer has a spouse. Individuals receive a higher offset than taxpayers who are considered to be members of a couple.⁵⁶ Again, same-sex partners are treated as individuals. This will often benefit a taxpayer who is in a same-sex relationship. For example:

Fred and Eva are a married couple who are both eligible for the senior Australians tax offset.

- Fred's taxable income is \$25 000 and his tax offset is \$757.57
- Eva's taxable income is \$16 000 and her tax offset is \$1602.58

This opposite-sex couple's total tax offset is \$2359.

Fred and John are a same-sex couple who are each eligible for the senior Australians tax offset.

- Fred's taxable income is \$25 000 and his tax offset is \$1817.59
- John's taxable income is \$16 000 and his tax offset is \$2230.60

This same-sex couple's total tax offset is \$4047.

8.5.3 Any unused entitlement cannot be transferred to a same-sex partner

One same-sex partner is not able to transfer any unused offset entitlement to the other partner.

If a taxpayer is eligible for the senior Australians tax offset and his or her spouse is eligible for either the senior Australians tax offset or the pensioner tax offset, any unused portion of either person's offset may be transferred to the other person.⁶¹ As a same-sex partner is not considered a spouse, she or he cannot take advantage of this benefit.

The following is based on an example from the ATO:

Sonya is married to Russell and they lived together for the whole [income tax] year. Russell – who is a veteran – received a service pension. Sonya and Russell were both over pension age and their combined taxable income was less than \$62 126. They were both eligible for the senior Australians tax offset. Sonya's taxable income was \$20 800 and Russell's was \$10 200. Sonya is eligible for a senior Australian tax offset of \$1283, while Russell is eligible for the full offset of \$1602.

However if Russell only owes tax of \$485 then the remainder of his offset (\$1117) can be transferred to Sonya, who can claim a total tax offset of \$2400.⁶²

As a taxpayer in a same-sex relationship cannot transfer any unused offset to their partner, any excess amount that is not absorbed against his or her tax will be lost.

8.6 Can same-sex couples claim the baby bonus?

It is unclear whether the baby bonus is available to a lesbian co-mother or gay co-father.

8.6.1 The baby bonus is available to one parent only

The first-child tax offset, known as the 'baby bonus', was available to a parent having or adopting a child in the years 2001-2004.⁶³ Only one parent, usually the birth mother, could claim the offset.⁶⁴

The bonus is calculated according to the parent's reduction in income in the tax years after they gained responsibility for a child.⁶⁵ It is paid for the income years up to and including the year the child turns five.⁶⁶ While this offset has now been repealed, eligible taxpayers may continue to claim for the income years up to and including the year ending 30 June 2009.

8.6.2 A 'natural parent' has the primary entitlement

The relevant part of the Income Tax Assessment Act 1997 refers to a tax offset for a person's 'child', which is defined as including a 'person's adopted child, step-child or ex-nuptial child'.⁶⁷ This would exclude the child of a lesbian co-mother or gay co-father.

On the other hand, the offset becomes available when a person has a 'child event'. And this occurs when a person becomes 'legally responsible for a child'.⁶⁸

As explained in Chapter 5 on Recognising Children, a lesbian co-mother or gay co-father with a parenting order from the Family Court of Australia can be a person 'legally responsible for a child'.

However, the tax legislation sets out a hierarchy of who gets the primary entitlement to the offset, putting the 'natural' and adoptive parents first.⁶⁹ Thus, it seems that a same-sex parent with a parenting order will only have access to the baby bonus if there is no other person who can claim the rebate.

8.6.3 A 'natural parent' cannot transfer the entitlement to a same-sex partner

A parent with the primary entitlement can transfer the baby bonus to his or her 'spouse'.⁷⁰ This transfer can be valuable if the partner to whom the baby bonus is transferred would receive a higher payment for that year.⁷¹ However, because a same-sex partner is not a 'spouse' the birth mother cannot transfer the entitlement to her lesbian partner.⁷²

8.7 Can same-sex couples claim the child care tax rebate?

The child care rebate covers 30% of out-of-pocket child care expenses for approved child care. The maximum amount claimable is \$4000 per year for each eligible child.⁷³ The rebate is not 'refundable' and so does not generate cash in hand. Instead, like most dependant rebates, it reduces the amount of income tax paid by an eligible taxpayer.⁷⁴

8.7.1 Payments by a lesbian co-mother or gay co-father may attract the rebate

To be eligible for the child care tax rebate, an individual must be entitled to Child Care Benefit at least one week in a year.⁷⁵

Chapter 9 on Social Security explains that eligibility for Child Care Benefit depends on whether the child is an 'FTB child' of the taxpayer or the taxpayer's partner. A person who has legal responsibility for a child is considered to have an 'FTB child'.⁷⁶

As discussed in Chapter 9, this definition of 'FTB child' would likely include the child of a lesbian co-mother or gay co-father with a parenting order, as well as the child of a birth mother or birth father.

However, eligibility for the rebate may be restricted by the definition of 'child' in the Income Tax Assessment Act 1997. Thus, the rebate may only be available for the child of a birth mother or birth father (even though eligibility for Child Care Benefit may extend beyond those birth parents).⁷⁷

8.7.2 Payments by a same-sex partner do not attract the rebate

The child care tax rebate applies when child care payments are made by an eligible person or his or her 'partner'.⁷⁸ 'Partner' is limited to a member of an opposite-sex couple.⁷⁹

This means that any child care payments made by the same-sex partner of a person eligible for the rebate cannot be counted in calculating the amount of child care rebate to which

that person is entitled.⁸⁰ In contrast, payments made by a partner of an eligible person in an opposite-sex couple can be counted towards the approved fees in calculating the rebate. This will increase the available amount of the rebate for that member of the opposite-sex couple (up to a ceiling limit of \$4000 per child).

8.7.3 A same-sex partner cannot transfer the unused value of the rebate

A person in a same-sex couple cannot transfer any unused value of the child care rebate to their same-sex partner in order to minimise tax in a specific tax year.⁸¹ This is because of the narrow definition of 'spouse' in the tax legislation. In contrast, a person in an opposite-sex couple can transfer the unused value of the rebate to their partner, thereby potentially saving a large amount of tax.

The ATO provides the following example of how unused child care tax offset may be transferred:

Sean and Evelyn are [a de facto couple] with two children. Both children attended approved child care in 2004–2005. Sean is the manager of a local IT company and Evelyn is studying full time. Since Evelyn is the Child Care Benefit claimant she must be the parent to claim the 30% child care tax rebate. In July 2006, Evelyn visits the Tax Office website and discovers that she does not need to lodge a tax return as she received no income during the 2005–06 income year. Evelyn can transfer her 30% child care tax rebate to Sean to help reduce his tax liability.⁸²

The transfer function can amount to a significant amount of money. For example:

If the total rebate available was:

- David (for after school care) – \$1500
- Bella (for long day care) – \$3735

A total rebate of \$5325 would be available to Evelyn. Even though she pays no tax Sean can take advantage of this rebate.⁸³

8.7.4 Restrictions on transfer may result in no rebate at all

Restrictions on transferring the value of the rebate between same-sex partners may result in a same-sex couple being denied the child care rebate completely.

As indicated above, the rebate is not a 'cash in hand' refund. Instead, like most dependant rebates, it reduces the amount of income tax paid by an individual.⁸⁴ The rebate is only a benefit if a person has a tax liability in the year in which they claim the rebate.

The following example illustrates how a same-sex couple may lose the benefit of the rebate despite making eligible child care payments.

Anna and Christine are a same-sex couple raising a child, Joe, aged 4. Anna, who is the birth mother of Joe, is the Child Care Benefit claimant. She also pays the child care fees for the 2004–2005 income year. In 2005–2006 she is eligible for the child care tax offset. However, in that year, she has taxable income of only \$7000 from a casual job and so pays no income tax as a result of the tax-free threshold and low income tax rebate.

Anna cannot transfer the rebate to her partner Christine who has a much higher income and has been supporting the family. Even if Christine pays the child care fees as Anna's 'partner', she will not be eligible for the child care rebate.⁸⁵

8.8 Do same-sex couples have to spend more to access the medical expenses tax offset?

In addition to the Medicare Safety Net described in Chapter 11 on Health Care, if a taxpayer spends over \$1500 in net medical expenses, they may claim a 20% rebate for medical expenses over that sum.⁸⁶ This rebate is not a refund but reduces the taxpayer's income tax.

The taxpayer can meet the threshold of \$1500 by adding up his or her own expenses and the expenses paid on behalf of a 'dependant'.⁸⁷ A 'dependant' includes the 'spouse' or 'child' of the taxpayer.⁸⁸

These definitions exclude a same-sex partner and the child of a lesbian co-mother or gay co-father.

So, a taxpayer in a same-sex relationship can only meet the spending threshold on his or her own expenses.

The parent of a person in a same-sex relationship told the Inquiry:

My son and his partner are not second class citizens but this is how the government treats them. Their costs are higher because they can't combine their expenses. When my son was sick his partner paid most of the bills but couldn't claim tax benefits because they were not recognised as a couple.⁸⁹

8.9 Do same-sex couples pay a higher Medicare levy and surcharge?

The Medicare levy is a tax imposed upon personal incomes to fund the Medicare scheme. It is composed of two parts, the general Medicare levy and the Medicare surcharge.

8.9.1 Same-sex couples may pay a higher Medicare levy

The Medicare levy is 1.5% of an individual's taxable income.⁹⁰ However, at low levels of income the levy may reduce according to either individual or family income. Further, a taxpayer may be exempt from the levy depending, in part, on family circumstances.⁹¹

(a) It may be harder for a same-sex family to get an exemption

A Medicare levy exemption is available to an individual taxpayer whose income is less than \$16 284.⁹²

A Medicare levy exemption is also available to a taxpayer:

- with a married or de facto spouse; or
- who is entitled to a dependent rebate

if their family income (the combined income of a taxpayer and his or her spouse) is less than \$27 478. The family income threshold increases for each dependent child or student.⁹³

● Same-Sex: Same Entitlements

A taxpayer in a same-sex relationship can only receive an exemption if his or her income is under the individual income threshold exemption (\$16 284). This may be an advantage or disadvantage to a same-sex couple – depending on the income levels of each member of the couple.

In addition, a person will be eligible for the Medicare levy exemption if he or she is a ‘prescribed person’.⁹⁴ A ‘prescribed person’ who has dependants will only qualify for the exemption if his or her dependants are also:

- in an exemption category, or
- the dependants of a ‘spouse’ who had to pay the Medicare levy.⁹⁵

A taxpayer in a same-sex couple may be disadvantaged by this test because his or her birth children will not be considered the ‘dependants’ of his or her same-sex partner.⁹⁶ Further, a same-sex couple cannot complete a ‘family agreement’ determining which parent will pay the half levy for joint dependants.⁹⁷

(b) *It may be harder for a same-sex family to qualify for a reduced Medicare levy*

If an individual’s income is more than \$16 284, or the family income is more than \$27 478, the Medicare levy is phased in at a rate of 20 cents for each dollar over the threshold.

But a reduction in the Medicare levy, based on family income, Medicare levy is only available to taxpayers on low incomes if the taxpayer:

- has a spouse
- was entitled to a child-housekeeper or housekeeper tax offset
- has been a sole parent.⁹⁸

The definitions of both ‘spouse’ and ‘child’ in Medicare levy legislation adopt those in income tax law.⁹⁹ This means that a taxpayer in a same-sex relationship is excluded from any reduction in the general Medicare levy if his or her eligibility relies on a relationship with a spouse or a child who is not a birth child.¹⁰⁰

Whether this is an advantage or disadvantage to a same-sex couple depends on the income levels of each member of the couple.

(c) *Impact of the Medicare levy on same-sex couples*

A range of submissions to the Inquiry commented on the impact of being denied access to a reduced Medicare levy.

At the Townsville Forum, a same-sex couple told the Inquiry:

Under the *Medicare Levy Act 1986*, the eligibility of a taxpayer for payment of the Medicare Levy is decreased if they have a dependent spouse. This option is not available for same-sex interdependent couples as the law excludes same-sex partners from the definition of a ‘spouse’.¹⁰¹

The Law Institute of Victoria told the Inquiry:

Taxpayers can claim an exemption or reduction in the Medicare levy payable if they meet certain income threshold requirements. Based on the definition of 'spouse', taxpayers in same-sex relationships cannot benefit from access to low income exceptions for families.¹⁰²

8.9.2 Same-sex couples may pay a higher Medicare levy surcharge

The Medicare levy surcharge is an additional 1% of taxable income payable where:

- a person's income is above the relevant threshold; and
- the person or his or her 'spouse' do not have private health insurance for the tax year.¹⁰³

For the 2005–2006 tax year, the surcharge threshold was \$50 000 for an individual and \$100 000 for a family.¹⁰⁴ The family threshold increases by \$1500 for each dependent child when there is more than one.¹⁰⁵ The family threshold is met by a person's taxable income plus the taxable income of a spouse.¹⁰⁶

(a) *Same-sex partners are assessed on individual thresholds*

Since same-sex partners are excluded from the definition of a 'spouse', taxpayers who are in same-sex relationships are assessed under the individual rather than the family threshold.

This can disadvantage a same-sex couple. For example, if one partner in a same-sex couple was earning \$40 000 and the other \$59 000 the latter partner would be required to pay a surcharge of \$590 because \$59 000 is over the \$50 000 individual threshold. However, an opposite-sex couple in the same situation would not pay any surcharge because the joint income of the two partners (\$99 000) is under the family threshold of \$100 000.¹⁰⁷

(b) *Impact of the Medicare levy surcharge thresholds on same-sex couples*

A range of submissions to the Inquiry commented on the impact of this discrimination in the Medicare levy surcharge.

The submission from Action Reform Change Queensland and the Queensland AIDS Council included the following personal story:

My partner actually did our tax return one year on E TAX and it didn't have the tick box that you answer, asking you whether you do or don't have a partner of the opposite sex, just whether you have a partner. She ticked 'yes' and we paid over \$500 less tax that year. Being unsure of the legality of this my partner checked it out with a 'tax info person'. She was told that we should pay the higher amount, i.e. for two single person's tax, but we didn't opt to do that. I guess we would have been fined for being illegal if we'd been audited and that's ridiculous.¹⁰⁸

Trish Kernahan told the Inquiry:

The Federal government's refusal to define the term 'spouse' to include people in same sex relationships costs me over \$800 every year in additional tax via the Medicare Levy. I earn over \$50,000 p.a. which is the levy limit set for 'single' people but less than the \$100,000 limit set for a heterosexual person with a dependent spouse.¹⁰⁹

Another person reported:

On February 2006, [Mr A] was sent a letter by the Australian Taxation Office (ATO) claiming that he owed \$545.95 for a Medicare Levy Surcharge... While [Mr A] exceeded the individual person threshold (\$50,000), [Mr A] and [Mr B] as a married family did not exceed the combined threshold for a married couple with no children (\$100,000).¹¹⁰

8.10 Do same-sex couples pay more tax on relationship breakdown?

The transfer of property to a spouse or child following family breakdown may attract favourable tax treatment. Further, income earned on property held for the benefit of a child after a relationship breakdown may also be eligible for favourable treatment. These concessions are not available to same-sex families.

8.10.1 Same-sex couples pay capital gains tax when transferring property to a partner

Favourable capital gains tax treatment is available for transfer of property to a 'spouse' or 'former spouse' following a relationship breakdown. However, a transfer to a same-sex partner is not a transfer to a 'spouse' so same-sex couples do not enjoy these benefits.

As explained by Miranda Stewart:

Effectively, the tax on any capital gain in the assets transferred to the spouse is deferred and the gain is taxable only on the subsequent disposal of those assets by the spouse.¹¹¹

(a) *Only a 'spouse' can attract the favourable tax treatment*

The property transfer only attracts the favourable tax treatment if the transfer is made:

- under a federal court order issued by the Family Court of Australia
- under a state or territory court order dealing with property division in de facto relationships
- pursuant to a binding financial or written agreement.¹¹²

As discussed in Chapter 12 on Family Law, a state and territory court can issue property division orders in relation to same-sex couples. However, because of the narrow definition of 'spouse' under tax law, these court-ordered transfers still do not attract favourable tax treatment.¹¹³

(b) *Impact on same-sex couples*

The burden of this discrimination is described in a recent decision of the Administrative Appeals Tribunal.

In *The Roll-over Relief Claimant and Commissioner of Taxation* the applicant and her partner faced a bill for capital gains tax of \$19 262 and \$22 780 respectively on relationship breakdown.¹¹⁴ An opposite-sex couple in the same situation would pay no capital gains tax on this property transfer.

The Victorian Gay and Lesbian Rights Lobby provided another example of the impact on same-sex couples:

Jane and Sarah have been in a relationship for 8 years. On breakdown of the relationship, under state relationship property laws, Jane transfers some shares to Sarah. The shares cost \$3000 in the year 2000 and are currently worth \$7000.

The transfer of the shares from Jane to Sarah will lead to a capital gains tax liability for Jane, calculated on [50% of] the amount of appreciation in value of the shares, being \$7000 – \$3000 = \$4000 [x 50%], even if the shares are transferred as a gift, as the transfer will be deemed to take place for market value consideration.¹¹⁵

In contrast, if Jane and Sarah were an opposite-sex couple and Jane agreed to transfer the shares as part of a court order or maintenance agreement under either the *Family Law Act 1975* (Cth) or state property relationship legislation, the transfer of the shares would not attract capital gains tax at that time. Instead, Sarah would be deemed to acquire the shares at a cost of \$3,000 (Jane's original cost). Capital gains tax would only apply at a time in the future when Sarah decides to sell the shares.¹¹⁶

8.10.2 Same-sex couples do not pay GST when transferring property

A goods and services tax (GST) applies to most transactions involving the supply of goods and services.¹¹⁷ However, the ATO has determined that the transfer of assets as a result of matrimonial property division will not usually be subject to GST because of the private nature of the transaction.¹¹⁸

The term 'matrimonial property division' is not defined, but the ATO ruling specifically states that the directions apply to property distributions between 'de facto or same-sex relationship breakdown'.¹¹⁹

This means that same-sex couples will not usually be liable to pay GST on property transfers arising from an agreement concerning property division on relationship breakdown.

8.10.3 Same-sex families pay tax on property held for a child

Favourable tax treatment is available for income earned on property that has been transferred to a child, or a trustee on behalf of a child, if such a transfer is 'the result of a family breakdown'.¹²⁰ The property transfer must be pursuant to an order, determination or assessment for maintenance of the child, which could include an order for child support under the *Child Support (Assessment) Act 1989* (Cth).¹²¹ Without this favourable tax treatment, the income would be taxable at a penalty rate.

(a) *A family breakdown excludes separation of same-sex couples*

The Income Tax Assessment Act 1936 states that a family breakdown occurs when:

a person ceases to live with another person as the spouse of that person on a genuine domestic basis (whether or not legally married to that person).¹²²

Since a same-sex partner is not a 'spouse' this provision does not cover a separating same-sex couple.¹²³

(b) Impact on same-sex couples

The effect of the family breakdown provision is that a same-sex couple transferring property to a child (or a trustee on behalf of a child) when their relationship breaks down will be taxed at the top marginal rate. An opposite-sex couple in the same situation will be taxed at normal marginal rates, which usually are much lower.

Miranda Stewart explains the impact of this exclusion as follows:

On breakdown of an opposite-sex marriage or de facto couple relationship, a taxpayer may establish a child maintenance trust for the financial support of children of the relationship. The income of such a trust [is] exempted from the penal “children’s tax” rules that usually apply tax at (approximately) the top individual marginal rate in respect of income of minor children.¹²⁴ The income from such trusts is taxable at normal marginal tax rates to the trustee; where the child has no or little other income, this means that a low rate of tax will frequently apply...

For a child maintenance trust to be eligible for this tax concession, the contributing parent must have maintenance obligations in respect of the child and the contributions must be made because of a family breakdown.¹²⁵

For example, shares may be transferred to a trust for the benefit of a child following an eligible family breakdown. Dividends earned on the shares held on trust for the child will be taxed at normal marginal rates in respect of that child, rather than at a penalty rate equal to the top individual rate.

8.10.4 Same-sex couples pay tax on maintenance payments

A ‘spouse’ or ‘former spouse’ receiving maintenance payments for him or herself or a child does not have to pay income tax on those payments.¹²⁶

Since a same-sex partner is not a ‘spouse’, he or she is likely to be liable for income tax on those periodic payments.¹²⁷

8.11 Do same-sex couples pay more capital gains tax?

As noted above, same-sex couples are excluded from a capital gains tax concession for property that is transferred after a relationship breakdown.

Two further aspects of capital gains provisions affect same-sex couples.

Same-sex couples are excluded from a capital gains tax exemption for an inherited dwelling that was the main residence of the ‘spouse’ of the deceased.¹²⁸ Thus, same-sex couples have a higher liability for capital gains tax on the death of a partner.

On the other hand, a same-sex couple may have a tax advantage if they own and live in two separate properties. This is because capital gains tax is not payable on capital gains on a dwelling that is the taxpayer’s main residence.¹²⁹

If a person lives in a separate main dwelling from their ‘spouse’, they must either choose one of the residences or nominate both as their main residences. If both are nominated, the capital gains tax exemption is split.¹³⁰

Same-sex couples are not subject to this provision. So, if a same-sex couple owns and lives in two separate properties, they may legitimately claim an exemption for each residence.¹³¹

8.12 Are employers liable for more fringe benefits tax in respect of same-sex couples?

Fringe benefits tax (FBT) is assessed on an employer who provides benefits such as loans, free housing or other benefits to an employee or his or her 'associates'.

8.12.1 A same-sex partner is not an 'associate'

An 'associate' includes a 'spouse', 'relative', or 'child'.¹³² The *Fringe Benefits Tax Assessment Act 1986* (Cth) defines all these terms by reference to the *Income Tax Assessment Act 1997*.¹³³ This means that a same-sex partner and his or her relations would not be included when considering liability for FBT.

8.12.2 There may be FBT where a same-sex partner gets benefits under an 'arrangement'

The ATO accepts that same-sex partners are not 'associates' under the legislation. But a same-sex partner will be treated as receiving a fringe benefit if there is an 'arrangement'.¹³⁴ It seems likely that where a fringe benefit is provided to a same-sex partner of an employee, an 'arrangement' will be found to exist in many cases such that this integrity provision will apply.

8.12.3 Same-sex partners are not eligible for FBT 'spouse' exemptions

However, a same-sex partner is not covered by a range of FBT exemptions available to a 'spouse'.

For example, FBT is not payable on the following benefits for a 'spouse' or 'child':

- provision of accommodation, residential fuel and meals to a residential employee during a period of accommodation¹³⁵
- benefits provided by a religious employer to an employee who is a religious practitioner, or to their spouse or child¹³⁶
- provision of transport benefits for an employee and a 'close relative' of the employee if they are used to attend the funeral of a 'close relative' of the employee.¹³⁷

Since a same-sex partner is not a 'spouse' there will be no FBT exemption if a same-sex couple enjoys these benefits.

8.12.4 Same-sex couples may not benefit from salary packaging

Employment benefits which are FBT-exempt can be used for salary packaging. Salary packaging allows an employee to receive less income as salary and to receive non-taxable benefits for the benefit of themselves or an eligible spouse or child. These benefits will not be available to a same-sex couple.

Dr Jeremy Field talks about salary packaging in the public health service:

My small contribution to this inquiry concerns an employment benefit of working, as I do, for the public health service. Salary packaging is available to employees of 'public benevolent institutions' and allows certain personal expenses to be claimed as fringe benefits – free of tax. These expenses may be incurred under the employee's name or their partner's, providing they be of opposite sex. I would like to echo the feeling of being a 'first-class taxpayer but second-class citizen' expressed by others making submissions to this inquiry.¹³⁸

8.13 Are same-sex couples covered by tax integrity and anti-avoidance measures?

Tax law contains numerous anti-avoidance measures.¹³⁹ For example:

- a taxpayer is not entitled to deduct a payment to a 'relative' from an income assessment if it exceeds a reasonable amount¹⁴⁰
- rules that deem loans or payments to be dividends from private companies generally apply to loans or payments to a shareholder or his or her 'associates'.¹⁴¹

'Associate' is variously defined within different provisions, but includes a 'relative', 'child' or 'spouse' of the taxpayer in all instances.¹⁴² All of these definitions exclude same-sex partners and children other than birth children.

This means that anti-avoidance rules relating to 'spouse' or family of a taxpayer may not apply to same-sex couples.

However, it should be noted that the general income tax anti-avoidance rule in Part IVA of the *Income Tax Assessment Act 1936* may apply to transactions entered into for the dominant purpose of obtaining a tax benefit, whether or not a same-sex partner is included in the definition of 'spouse'.¹⁴³ Further, some anti-avoidance rules specifically exclude 'ordinary family or commercial dealing'.¹⁴⁴ It is unclear whether the provision of a benefit to a same-sex partner would qualify as 'ordinary' family dealing for this purpose. But it may be the case that same-sex couples are not accorded the safe harbour that is available for opposite-sex spouses.

8.14 Does tax legislation breach human rights?

This chapter identifies a number of taxation laws which fail to ensure that same-sex and opposite-sex couples and families enjoy the same taxation benefits.

The failure of tax legislation to recognise same-sex couples and, in some circumstances, the lesbian co-mother or gay co-father of a child, amounts to discrimination in breach of article 26 of the *International Covenant on Civil and Political Rights* (ICCPR).

The failure to ensure that same-sex parents can access the tax concessions and rebates available to assist opposite-sex parents support their children, results in further breaches of Australia's obligations to protect the rights of families without discrimination. Those rights are protected by the ICCPR (articles 23(1), 2(1)) and the *International Covenant on Economic Social and Cultural Rights* (ICESCR) (articles 10, 2(2)).

The fact that lesbian and gay families will often pay more tax than opposite-sex families, just because of the sexuality of the parents, may also breach the *Convention on the Rights of the Child* (CRC) because:

- A same-sex family will be at a financial disadvantage when compared to an opposite-sex family in the same position. This amounts to *discrimination* against the child on the basis of the status of his or her parents (CRC, article 2(2)).
- The *best interests of a child* being raised in a same-sex family are not a primary consideration – if they were, the people raising a child would be entitled to the same tax benefits irrespective of their sexuality (CRC, articles 2(1), 3(1)).
- The tax provisions do not *recognise and support the common responsibilities* of both same-sex parents to fulfil child-rearing responsibilities – in particular tax legislation does not recognise the responsibilities of the lesbian co-mother or gay co-father of a child (CRC, articles 18, 2(1)).

Finally, under ICESCR, any steps Australia takes to guarantee the right to social security (including tax concessions intended to assist individuals and families in certain circumstances) must occur without discrimination (articles 9, 2(2)). The discriminatory treatment of same-sex couples and families in taxation law may breach this right.

Chapter 3 on Human Rights Protections describes Australia's human rights obligations towards same-sex couples and families in more detail.

8.15 How should tax legislation be amended to avoid future breaches?

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

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

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

8.15.1 Narrow definitions are the main cause of discrimination

Same-sex couples are worse off than opposite-sex couples because the definitions in the taxation legislation fail to include same-sex couples and families.

In particular, the narrow definition of 'spouse' in the Income Tax Assessment Act 1997 has a huge impact on same-sex couples because most other tax legislation refers back to this definition.

The definition of 'child' in the Income Tax Assessment Act 1997 is also problematic because it excludes one of a child's parents where a child is born to a gay or lesbian couple.

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

Since the main problem is the narrow scope of legislative definitions, the solution is to amend those definitions so they are inclusive, rather than exclusive, of same-sex couples and families.

Chapter 4 on Recognising Relationships presents two alternative approaches to amending federal law to remove discrimination against same-sex couples.

The Inquiry's preferred approach for bringing equality to *same-sex couples* is to:

- retain the current terminology used in federal legislation (for example retain the term 'spouse' in the Income Tax Assessment Act 1997)
- redefine the terms in the legislation to include same-sex couples (for example, redefine 'spouse' to include a 'de facto partner')
- insert new definitions of 'de facto relationship' and 'de facto partner' which include same-sex couples.

Chapter 5 on Recognising Children sets out how to better protect the rights of 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 (an ART child). 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 or 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 the definition of '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 current definition.

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 gay and lesbian parents with parenting orders could more confidently assert their rights as people who are 'legally responsible'.

The following list sets out the definitions which would need to be amended according to these suggested approaches.

The Inquiry notes that if the government were to adopt the alternative approach set out in Chapter 4, then different amendments would be required.

8.15.3 A list of legislation to be amended

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

A New Tax System (Family Assistance) Act 1999 (Cth)

‘member of a couple’ (s 3 – no need to amend if ‘member of a couple’ is amended in the *Social Security Act 1991* (Cth) (Social Security Act))

‘partner’ (s 3 – no need to amend if ‘member of a couple’ is amended in the Social Security Act)

‘FTB child’ (s 22 – 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)

Fringe Benefits Tax Assessment Act 1986 (Cth)

‘associate’ (s 136(1) – no need to amend if ‘spouse’ is amended in the *Income Tax Assessment Act 1997* (Cth) (Income Tax Assessment Act 1997) 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’ in the Income Tax Assessment Act 1997)

‘child’ (s 136(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 136(1) – no need to amend if ‘spouse’ is amended in the Income Tax Assessment Act 1997 and a lesbian co-mother or gay co-father may be recognised as a parent through reformed parenting presumptions, adoption laws or a new definition of ‘step-child’ in the Income Tax Assessment Act 1997)

‘spouse’ (s 136(1) – no need to amend if ‘spouse’ is amended in the Income Tax Assessment Act 1997)

Income Tax Assessment Act 1936 (Cth)

‘associate’ (s 318 – no need to amend if ‘spouse’ is amended in the Income Tax Assessment Act 1997 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’ in the Income Tax Assessment Act 1997)

‘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)

‘child-housekeeper’ (s 159J(6) – 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)

‘dependant’ (s 251R – no need to amend if ‘spouse’ is amended in the Income Tax Assessment Act 1997; ‘member of a couple’ is amended in the Social Security Act; 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’ in the Income Tax Assessment Act 1997)

‘invalid relative’ (s 159J(6) – 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 in the Income Tax Assessment Act 1997 and a lesbian co-mother or gay co-father may be recognised as a parent through reformed parenting presumptions or adoption laws or a new definition of ‘step-child’ 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(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’)

‘child event’ (s 61-360(a) – no need to amend if ‘legally responsible’ is amended and the child of a lesbian co-mother or gay co-father may also be recognised through reformed parenting presumptions or adoption laws)

‘de facto partner’ (insert new definition)

‘de facto relationship’ (insert new definition)

‘legally responsible’ (s 995-1(1) – amend to clarify that a parenting order is evidence of legal responsibility)

‘partner’ (s 61-490(1)(b) – no need to amend if ‘member of a couple’ is amended in the Social Security Act 1991)

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

‘step-child’ (insert new definition)

Medicare Levy Act 1986 (Cth)

The *Medicare Levy Act 1986* (Cth) does not define the relevant terms, but relies on definitions in the *Income Tax Assessment Act 1936* (Cth)(s 3(1)). Changes to that Act will automatically change definitions in the *Medicare Levy Act 1986* (Cth).

Social Security Act 1991 (Cth)

‘de facto partner’ (insert new definition)

‘de facto relationship’ (insert new definition)

‘marriage-like relationship’ (s 4(2), (3), (3A) – replace with ‘de facto relationship’)

‘member of a couple’ (s 4(2)(b) – amend to include a ‘de facto partner’ and ‘de facto relationship’)

‘partner’ (s 4(1) – no need to amend if ‘member of a couple’ is amended)

Endnotes

- 1 Australian Coalition for Equality, Submission 228; Tasmanian Gay and Lesbian Rights Group, Submission 233; ACON, Submission 281; Action Reform Change Queensland and Queensland AIDS Council, Submission 270.
- 2 In addition, the federal government assesses fringe benefits tax on employers under the *Fringe Benefits Tax Assessment Act 1986* (Cth) and goods and services tax under *A New Tax System (Goods and Services Tax) Act 1999* (Cth) and related legislation.
- 3 *Income Tax Assessment Act 1997* (Cth), s 995-1(1).
- 4 *Income Tax Assessment Act 1936* (Cth), s 6(1).
- 5 *Gregory Brown v Commissioner for Superannuation* (1995) 21 AAR 378, para 62.
- 6 See for example the following: Australian Taxation Office, *Interpretative Decision 2002/211*; Australian Taxation Office, *Interpretative Decision 2002/826*.
- 7 *Income Tax Assessment Act 1997* (Cth), s 995-1(1).
- 8 *Income Tax Assessment Act 1936* (Cth), s 6(1).
- 9 For an explanation of these terms see the Glossary of Terms.
- 10 See further Chapter 5 on Recognising Children.
- 11 Melbourne Forum, 26 September 2006.
- 12 Jim Woulfe, Opening Statement, Sydney Hearing, 26 July 2006.
- 13 Dylan Deinert, Submission 242.
- 14 Name Withheld, Submission 83.
- 15 Lynne Martin, Submission 38.
- 16 Name Withheld, Submission 267.
- 17 Australian Taxation Office, *About tax offsets*, <http://www.ato.gov.au/individuals/content.asp?doc=/content/19605.htm>, viewed 20 February 2007. See also Tasmanian Gay and Lesbian Rights Group, Submission 233; Action Reform Change Queensland and Queensland AIDS Council, Submission 270; Young Lawyers Human Rights Committee, Submission 311; Victorian Gay and Lesbian Rights Lobby, Submission 256; Law Council of Australia, Submission 305; Australian Coalition for Equality, Submission 228; Anti-Discrimination Commission Queensland, Submission 264.
- 18 The Australian Tax Office's view is that a taxpayer will be maintaining a dependant if:
- they and their dependant lived in the same house
 - they gave their dependant food, clothing and lodging, or
 - they helped them to pay for their living, medical and educational costs.
- Australian Taxation Office, *Dependants and separate net income*, <http://www.ato.gov.au/individuals/content.asp?doc=/content/19187.htm&page=2&H2>, viewed 14 February 2007. 'Maintaining' is not defined in taxation legislation.
- 19 Australian Coalition for Equality, Submission 228. See also Law Council of Australia, Submission 305.
- 20 *Income Tax Assessment Act 1936* (Cth), s 159J(2). See also the Australian Taxation Office, *Dependants and separate net income*, <http://www.ato.gov.au/individuals/content.asp?doc=/content/19187.htm&page=1&H1>, viewed 14 February 2007.
- 21 *Income Tax Assessment Act 1936* (Cth), s 159J(6). This rebate is payable in addition to the housekeeper tax offset: *Income Tax Assessment Act 1936* (Cth), s 159L.
- 22 *Income Tax Assessment Act 1936* (Cth), s 159J(6).
- 23 Australian Taxation Office, *Dependent spouse tax offset*, <http://www.ato.gov.au/individuals/content.asp?doc=/content/19201.htm>, viewed 20 February 2007; Australian Taxation Office, *Family tax benefit (FTB) – introduction*, <http://www.ato.gov.au/individuals/content.asp?doc=/content/21556.htm&page=1&H1>, viewed 20 February 2007. See also Miranda Stewart, Submission 266; The Treasury, *Tax Expenditures Statement 2006*, Item A31, http://www.treasury.gov.au/documents/1211/PDF/06_Chapter6.pdf, viewed 14 February 2007.
- 24 *Income Tax Assessment Act 1936* (Cth), s 159J. Miranda Stewart, Submission 266.

- 25 See Australian Taxation Office, *Interpretative Decision 2002/211*. This decision applies the Administrative Appeal Tribunal's decision in *Gregory Brown v Commissioner for Superannuation* (1995) 21 AAR 378.
- 26 Australian Taxation Office, *Dependent spouse tax offset*, <http://www.ato.gov.au/print.asp?doc=/content/19201.htm>, viewed 14 February 2007. A spouse's separate net income (SNI) for the period(s) a taxpayer claims a spouse tax offset reduces the claim by \$1 for every \$4 by which their SNI exceeded \$282. A spouse tax offset cannot be claimed if a spouse's SNI was more than \$6721.
- 27 Brisbane Forum, 10 October 2006. See also Bryce Peterson, Opening Statement, Launceston Forum, 25 September 2006; Action Reform Change Queensland and Queensland AIDS Council, Submission 270; Lyn Holowaty, Submission 157; Cara Jones, Submission 118; Victorian Gay and Lesbian Rights Lobby, Submission 256.
- 28 Newcastle Forum, 24 October 2006.
- 29 Name Withheld, Submission 246.
- 30 Name Withheld, Submission 253. See also Alison Treanor and Liz Scott, Submission 136; Michael Wilson and Robert Kings, Submission 169.
- 31 Name Withheld, Submission 297.
- 32 The Hon Ian Hunter MLC, Submission 306.
- 33 *Income Tax Assessment Act 1936* (Cth), s 159J. Subsection 159J(1) states that where a taxpayer contributes to the maintenance of a dependant and the dependant is a resident, the taxpayer is entitled to a tax offset. Subsection 159J(2) specifies that a dependant includes the parent of the taxpayer or of the taxpayer's spouse.
- 34 This rebate is reduced where the spouse's parent's income was \$286 or more. Australian Taxation Office, *Parent or spouse's parent tax offset*, <http://www.ato.gov.au/individuals/content.asp?doc=/content/19362.htm&pc=001/002/005/011/003&mnu=&mf=&st=&cy=1>, viewed 14 February 2007.
- 35 Action Reform Change Queensland and Queensland AIDS Council, Submission 270.
- 36 *Income Tax Assessment Act 1936* (Cth), ss 159L(1), 159J; Australian Taxation Office, *Housekeeper tax offset*, <http://www.ato.gov.au/print.asp?doc=/content/19202.htm>, viewed 14 February 2007.
- 37 Australian Taxation Office, *Housekeeper tax offset*, <http://www.ato.gov.au/print.asp?doc=/content/19202.htm>, viewed 14 February 2007.
- 38 ACON, Submission 281. See also Law Council of Australia, Submission 305.
- 39 *Income Tax Assessment Act 1936* (Cth), s 159J. Subsection 159J(1) states that where a taxpayer contributes to the maintenance of a dependant and the dependant is a resident, the taxpayer is entitled to a tax offset. Subsection 159J(2) specifies that a dependant includes a taxpayer's child-housekeeper. Note that the child-housekeeper and dependent spouse tax offsets are mutually exclusive.
- 40 For definition of 'child' see: *Income Tax Assessment Act 1997* (Cth), s 995-1(1); *Income Tax Assessment Act 1936* (Cth), s 6(1).
- 41 Australian Taxation Office, *Child-housekeeper tax offset*, <http://www.ato.gov.au/print.asp?doc=/content/19211.htm>, viewed 14 February 2007.
- 42 *Income Tax Assessment Act 1936* (Cth), s 159J. Subsection 159J(1) states that where a taxpayer contributes to the maintenance of a dependant and the dependant is a resident, the taxpayer is entitled to a tax offset. Subsection 159J(2) specifies that a dependant includes a taxpayer's invalid relative.
- 43 For definition of 'child' see: *Income Tax Assessment Act 1997* (Cth), s 995-1(1); *Income Tax Assessment Act 1936* (Cth), s 6(1).
- 44 Australian Taxation Office, *Invalid relative tax offset*, <http://www.ato.gov.au/individuals/content.asp?doc=/content/19349.htm>, viewed 14 February 2007.
- 45 *Income Tax Assessment Act 1936* (Cth), s 23AB(7).
- 46 *Income Tax Assessment Act 1936* (Cth), s 79B. See also Australian Taxation Office, *What is the overseas forces tax offset?* <http://www.ato.gov.au/individuals/content.asp?doc=/content/40488.htm&page=1&H1>, viewed 20 February 2007.
- 47 Relevant rebates include those set out in *Income Tax Assessment Act 1936* (Cth), ss 159J, 159L and 159K (for the Australian Defence Force rebate only): *Income Tax Assessment Act 1936* (Cth), ss 23AB(7), 79B(6).

- 48 *Income Tax Assessment Act 1936* (Cth), ss 23AB(7), 79AB(4)-(4A). Australian Taxation Office, *Calculating the two components of your zone/overseas forces tax offset*, <http://www.ato.gov.au/individuals/content.asp?doc=/content/40485.htm>, viewed 19 February 2007; Australian Taxation Office, *Calculating the base amount of your zone/overseas forces tax offset*, <http://www.ato.gov.au/individuals/content.asp?doc=/content/40492.htm>, viewed 19 February 2007.
- 49 *Income Tax Assessment Act 1936* (Cth), s 79A. See also Australian Taxation Office, *What is the zone tax offset*, <http://www.ato.gov.au/individuals/content.asp?doc=/content/19529.htm>, viewed 20 February 2007.
- 50 Relevant rebates include those set out in *Income Tax Assessment Act 1936* (Cth), ss 159J-L; *Income Tax Assessment Act 1936* (Cth), s 79A(4).
- 51 *Income Tax Assessment Act 1936* (Cth), s 79A(2). Australian Taxation Office, *Calculating the two components of your zone/overseas forces tax offset*, <http://www.ato.gov.au/individuals/content.asp?doc=/content/40485.htm>, viewed 19 February 2007; Australian Taxation Office, *Calculating the base amount of your zone/overseas forces tax offset*, <http://www.ato.gov.au/individuals/content.asp?doc=/content/40492.htm>, viewed 19 February 2007.
- 52 *Income Tax Assessment Act 1936* (Cth), s 23AA. A 'dependant' is defined as a spouse, or a relative who is wholly or mainly dependent for support on the person, excluding certain spouses and dependent relatives who are ordinarily resident in Australia: *Income Tax Assessment Act 1936* (Cth), s 23AA(1). See also Australian Taxation Office, *Australia/United States Joint Space and Defence Projects*, <http://www.ato.gov.au/print.asp?doc=/content/22255.htm>, viewed 14 February 2007.
- 53 For definitions of 'spouse' and 'relative' see: *Income Tax Assessment Act 1997* (Cth), s 995-1(1); *Income Tax Assessment Act 1936* (Cth), s 6(1).
- 54 *Income Tax Assessment Act 1936* (Cth), s 160AAAA; Australian Taxation Office, *Senior Australians tax offset 2005-2006*, <http://www.ato.gov.au/print.asp?doc=/content/76928.htm>, viewed 14 February 2007.
- 55 Australian Taxation Office, *Senior Australians tax offset 2005-2006*, <http://www.ato.gov.au/print.asp?doc=/content/76928.htm>, viewed 14 February 2007. For example, for the Senior Australians tax offset, in 2005-2006, the income threshold for an individual was \$39 808 and for a couple was \$62 126.
- 56 The maximum offset payable to a member of a couple in 2005-2006 is \$1602; the maximum offset payable to an individual in 2005-2006 is \$2230: *Income Tax Regulations 1936* (Cth), reg 150AB(2).
- 57 \$1602 (maximum offset for a spouse) minus 12.5% of the difference between \$25 000 (income) and \$18 247 (lower taxable income threshold for a spouse). *Income Tax Regulations 1936* (Cth), reg 150AD.
- 58 The maximum offset available as her income is less than the lower taxable income threshold for a spouse. *Income Tax Regulations 1936* (Cth), reg 150AD.
- 59 \$2230 (maximum offset for an individual) minus 12.5% of the difference between \$25 000 (income) and \$21 698 (lower taxable income threshold for an individual). *Income Tax Regulations 1936* (Cth), reg 150AD.
- 60 The maximum offset available as her income is less than the lower taxable income threshold for an individual. *Income Tax Regulations 1936* (Cth), reg 150AD.
- 61 *Income Tax Regulations 1936* (Cth), reg 150AE. See also Australian Taxation Office, *Transferring unused tax offset entitlement from your spouse*, <http://www.ato.gov.au/individuals/content.asp?doc=/content/36498.htm>, viewed 20 February 2007.
- 62 This example is partially taken from Australian Taxation Office, *Transferring unused tax offset entitlement from your spouse*, <http://www.ato.gov.au/individuals/content.asp?doc=/content/36498.htm>, viewed 20 February 2007.
- 63 *Income Tax Assessment Act 1997* (Cth), ss 61-355, 61-360.
- 64 The legislation sets out who has a 'primary entitlement' to the offset: *Income Tax Assessment Act 1997* (Cth), ss 61-355, 61-375.
- 65 *Income Tax Assessment Act 1997* (Cth), ss 61-415-61-430. Australian Taxation Office, *Baby bonus instructions and claim 2006*, NAT 6580-6.2006, Canberra, May 2006. A minimum annual amount of \$500 per year is paid.
- 66 *Income Tax Assessment Act 1997* (Cth), s 61-355. Section 61-440 provides an additional tax offset for a child who is in the taxpayer's care prior to being adopted.

- 67 *Income Tax Assessment Act 1997* (Cth), s 995-1(1).
- 68 *Income Tax Assessment Act 1997* (Cth), ss 61-355, 61-360. Section 995-1(1) defines 'legally responsible' as meaning: 'legally responsible (whether alone or jointly with someone else) for the day-to-day care, welfare and development of the child'.
- 69 *Income Tax Assessment Act 1997* (Cth), s 61-375.
- 70 *Income Tax Assessment Act 1997* (Cth), s 61-385.
- 71 Australian Taxation Office, *Baby bonus instructions and claim 2006*, NAT 6580-6.2006, Canberra, May 2006.
- 72 This has been confirmed by Australian Taxation Office, *Interpretative Decision 2002/826*, which relied on the Administrative Appeal Tribunal decision in *Gregory Brown v Commissioner for Superannuation* (1995) 21 AAR 378.
- 73 *Income Tax Assessment Act 1997* (Cth), s 61-495.
- 74 Australian Taxation Office, *30% child care tax rebate*, <http://www.ato.gov.au/individuals/content.asp?doc=/content/52998.htm>, viewed 27 February 2007. To be eligible for the Child Care Rebate, a person must also be eligible for the Child Care Benefit: *Income Tax Assessment Act 1997* (Cth), ss 61-470, 61-480. For a discussion of Child Care Benefit see section 9.7 in Chapter 9 on Social Security.
- 75 *Income Tax Assessment Act 1997* (Cth), s 61-470. The entitlement to child care benefit is determined by the Family Assistance Office: s 61-480(2).
- 76 *A New Tax System (Family Assistance) Act 1999* (Cth), s 22(2)-(4).
- 77 *Income Tax Assessment Act 1997* (Cth), s 995-1(1).
- 78 *Income Tax Assessment Act 1997* (Cth), s 61-490.
- 79 The term 'partner' is defined as having the same meaning as in the *A New Tax System (Family Assistance) Act 1999*, which in section 3(1) defines 'partner' as having the same meaning as in the *Social Security Act 1991* (Cth). In subsection 4(2)(b), the *Social Security Act* defines 'partner' as meaning 'member of a couple' where the relationship is with a person of the opposite sex.
- 80 See Miranda Stewart, Submission 266.
- 81 *Income Tax Assessment Act 1997* (Cth), s 61-496.
- 82 Australian Taxation Office, *30% child care tax rebate case studies*, <http://www.ato.gov.au/print.asp?doc=/content/76853.htm>, viewed 14 February 2007.
- 83 This example is partially taken from Australian Taxation Office, *30% child care tax rebate case studies*, <http://www.ato.gov.au/print.asp?doc=/content/76853.htm>, viewed 14 February 2007.
- 84 Australian Taxation Office, *30% child care tax rebate*, <http://www.ato.gov.au/individuals/content.asp?doc=/content/52998.htm>, viewed 27 February 2007.
- 85 See also Action Reform Change Queensland and Queensland AIDS Council, Submission 270.
- 86 *Income Tax Assessment Act 1936* (Cth), s 159P(3A). See also, Australian Taxation Office, *Net medical expenses tax offset*, <http://www.ato.gov.au/individuals/content.asp?doc=/content/19181.htm>, viewed 27 February 2007. Net medical expenses are the medical expenses paid less any refunds from Medicare or private health funds.
- 87 *Income Tax Assessment Act 1936* (Cth), s 159P(1).
- 88 *Income Tax Assessment Act 1936* (Cth), s 159P(4). 'Dependant' also includes persons for whom the taxpayer is entitled to a rebate under section 159J, such as a parent or spouse's parent, a child-housekeeper, or an invalid relative: *Income Tax Assessment Act 1936* (Cth), s 159P(4)(c). See also Law Council of Australia, Submission 305.
- 89 Person A, Parents and Friends of Lesbians and Gays, Brisbane Hearing, 11 October 2006.
- 90 *Medicare Levy Act 1986* (Cth), s 6. See also Australian Taxation Office, *What is the Medicare levy?* <http://www.ato.gov.au/individuals/content.asp?doc=/content/17482.htm&pc=001/002/030/003/001&mnu=&mpf=&st=&cy=1>, viewed 27 February 2007.
- 91 *Medicare Levy Act 1986* (Cth), s 8.
- 92 For taxpayers entitled to a senior Australians tax offset, this amount is \$24 867. *Medicare Levy Act 1986* (Cth), ss 7(1), 3(1). See also Australian Taxation Office, *Medicare levy reduction for people on low incomes*, <http://www.ato.gov.au/print.asp?doc=/content/40500.htm>, viewed 14 February 2007.

- 93 *Medicare Levy Act 1986* (Cth), s 8(1), (5). The family income threshold is increased by \$2523 for each dependent child. See also Australian Taxation Office, *Medicare levy reduction for people on low incomes*, <http://www.ato.gov.au/print.asp?doc=/content/40500.htm>, viewed 14 February 2007.
- 94 *Income Tax Assessment Act 1936* (Cth), s 251T(a).
- 95 *Income Tax Assessment Act 1936* (Cth), s 251U(1), (2). A 'prescribed person' includes a person who is:
- a blind pensioner or a person who receives the sickness allowance from Centrelink
 - entitled to full free medical treatment under defence force arrangements or Veterans' Affairs Repatriation health card or repatriation arrangements
 - not an Australian resident for tax purposes
 - a resident of Norfolk Island
 - a member of a diplomatic mission or consular post in Australia, or a member of such a person's family and living with them (and who does not normally live in Australia)
 - in possession of a certificate Medicare Levy Exemption Certification Unit of Medicare Australia showing that he or she is not entitled to Medicare benefits.
- See Australian Taxation Office, *Medicare levy exemption*, <http://www.ato.gov.au/print.asp?doc=/content/40501.htm>, viewed 27 February 2007.
- 96 *Income Tax Assessment Act 1936* (Cth), s 251R(3), which relies on definitions of 'spouse' and 'child' in the *Income Tax Assessment Act 1997* (Cth), s 995-1(1) via the *Income Tax Assessment Act 1936* (Cth), s 6(1).
- 97 *Income Tax Assessment Act 1936* (Cth), s 251R(6D).
- 98 *Medicare Levy Act 1986* (Cth), s 8(1). See also Australian Taxation Office, *Medicare levy reduction for people on low incomes*, <http://www.ato.gov.au/print.asp?doc=/content/40500.htm>, viewed 14 February 2007.
- 99 *Medicare Levy Act 1986* (Cth), ss 8B, 8C, 8D refer to the *Income Tax Assessment Act 1936* (Cth), s 251R. The *Income Tax Assessment Act 1936* (Cth) refers to definitions contained in the *Income Tax Assessment Act 1997* (Cth), s 995-1(1).
- 100 See also Law Institute of Victoria, Submission 331; Young Lawyers Human Rights Committee, Submission 311.
- 101 Sarah and Suzey Whitby, Opening Statement, Townsville Forum, 12 October 2006. See also Wollongong Forum, 12 October 2006; Name Withheld, Submission 268; Action Reform Change Queensland and Queensland AIDS Council, Submission 270.
- 102 Law Institute of Victoria, Submission 331.
- 103 *Medicare Levy Act 1986* (Cth), ss 8B-8D.
- 104 *Medicare Levy Act 1986* (Cth), ss 3A, 8B(2).
- 105 *Medicare Levy Act 1986* (Cth), s 3A. See also Australian Taxation Office, *Medicare levy surcharge*, <http://www.ato.gov.au/print.asp?doc=/content/7128.htm>, viewed 14 February 2007.
- 106 *Medicare Levy Act 1986* (Cth), s 8D(3).
- 107 J Millbank, 'Areas of Federal Law that Exclude Same-Sex Couples and their Children', Inquiry Research Paper, September 2006, available at <http://www.humanrights.gov.au/samesex/index.html>, p43, footnote 219.
- 108 Action Reform Change Queensland and Queensland AIDS Council, Submission 270. See also Gay and Lesbian Rights Lobby (NSW), Submission 333.
- 109 Trish Kernahan, Submission 217.
- 110 Name Withheld, Submission 326.
- 111 Miranda Stewart, Submission 266.
- 112 *Income Tax Assessment Act 1997* (Cth), ss 126-5(1), 126-15(1). For example, a financial agreement made under Part VIIIA of the *Family Law Act 1975* (Cth) that is binding because of section 90G of that Act (s 126-5(1)(d)); or a written agreement that is binding because of a state law, territory law or foreign law relating to de facto marriage breakdowns (s 126-5(1)(f)).
- 113 *The Roll-over Relief Claimant and Commissioner of Taxation* [2006] AATA 728 (23 August 2006) paras 35-37. The term 'spouse' in s 995-1(1) of the *Income Tax Assessment Act 1997* (Cth), discussed in section 8.2.1 above, applies for the capital gains tax provisions, which are in that Act.

● Same-Sex: Same Entitlements

- 114 *The Roll-over Relief Claimant and Commissioner of Taxation* [2006] AATA 728 (23 August 2006) para 5.
- 115 There is a 50% on capital gains tax payable by individuals. *Income Tax Assessment Act 1997* (Cth), div 115.
- 116 Victorian Gay and Lesbian Rights Lobby, Submission 256.
- 117 *A New Tax System (Goods and Services Tax) Act 1999* (Cth).
- 118 Commissioner of Taxation, *Goods and Services Tax Ruling 2003/6*, 'Goods and services tax: transfers of enterprise assets as a result of property distributions under the Family Law Act 1975 or in similar circumstances'.
- 119 Commissioner of Taxation, *Goods and Services Tax Ruling 2003/6*, 'Goods and services tax: transfers of enterprise assets as a result of property distributions under the Family Law Act 1975 or in similar circumstances', para 44.
- 120 *Income Tax Assessment Act 1936* (Cth), s 102AE(2)(b)(viii).
- 121 *Income Tax Assessment Act 1936* (Cth), s 102AGA(2).
- 122 *Income Tax Assessment Act 1936* (Cth), s 102AGA(2)(a).
- 123 *Income Tax Assessment Act 1997* (Cth), s 995-5(1).
- 124 *Income Tax Assessment Act 1936* (Cth), pt III, div 6AA. Commissioner of Taxation, *Taxation Ruling TR 98/4*, 18 March 1998, para 6.
- 125 Miranda Stewart, Submission 266.
- 126 *Income Tax Assessment Act 1997* (Cth), s 51-50.
- 127 Miranda Stewart, Submission 266; Victorian Gay and Lesbian Rights Lobby, Submission 256.
- 128 *Income Tax Assessment Act 1997* (Cth), s 118-205.
- 129 *Income Tax Assessment Act 1997* (Cth), s 118-110(1).
- 130 *Income Tax Assessment Act 1997* (Cth), s 118-170.
- 131 Law Council of Australia, Submission 305.
- 132 *Fringe Benefits Tax Assessment Act 1986* (Cth), s 136(1). 'Associate' has the meaning given by s 318 of the *Income Tax Assessment Act 1936* (Cth), where the category includes a 'relative' or 'partner', which in turn include a 'spouse' or 'child'.
- 133 *Fringe Benefits Tax Assessment Act 1986* (Cth), s 136(1); *Income Tax Assessment Act 1997* (Cth), s 995-1(1).
- 134 Australian Taxation Office, *Interpretative Decision 2003/7*. Same-sex partners are deemed to be associates under s 148(2) of the *Fringe Benefits Tax Assessment Act 1986* (Cth).
- 135 *Fringe Benefits Tax Assessment Act 1986* (Cth), ss 58, 58T, 58U. These benefits may be provided to the 'spouse' or 'child' of the employee.
- 136 *Fringe Benefits Tax Assessment Act 1986* (Cth), s 57. This benefit may be provided to the 'spouse' or 'child' of the employee.
- 137 *Fringe Benefits Tax Assessment Act 1986* (Cth), s 58LA. Section 136(1) defines a 'close relative' as including 'the spouse of the person', 'a child or parent of the person', or 'a parent of the person's spouse'.
- 138 Dr Jeremy Field, Submission 295. See also Gay and Lesbian Rights Lobby (NSW), Submission 333.
- 139 See for example, *Income Tax Assessment Act 1936* (Cth), ss 26AAC, 78A.
- 140 *Income Tax Assessment Act 1997* (Cth), ss 26-35. A 'relative' includes a taxpayer's spouse; a parent, grandparent, brother, sister, uncle, aunt, nephew, niece, lineal descent or adopted child of the person; or such a relative of the taxpayer's spouse; or the spouse of one of such specified relatives: *Income Tax Assessment Act 1997* (Cth), s 995-1(1).
- 141 *Income Tax Assessment Act 1936* (Cth), s 109D.
- 142 See for example, *Income Tax Assessment Act 1936* (Cth), ss 82KH(1), 159GE(1), 318(1), 491.
- 143 *Income Tax Assessment Act 1936* (Cth), pt IVA.
- 144 See for example, *Income Tax Assessment Act 1936* (Cth), s 100A(13), concerning trusts.