



CHAPTER 18:

Summary of Findings and Recommendations

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18.1 What is this chapter about?

The following chapter summarises the findings and recommendations made in each of Chapters 4–16 in this report. This chapter should be read in conjunction with Appendix 1 which sets out the list of legislation to be amended in order to eliminate discrimination against same-sex couples and their children.

18.2 What are the Inquiry's findings?

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

18.2.1 The laws in Appendix 1 discriminate against same-sex couples and families

The Inquiry finds that:

1. **The 58 federal laws in Appendix 1 discriminate against same-sex couples in the area of financial and work-related entitlements.**

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

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

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

18.2.2 Discrimination can lead to further human rights breaches

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

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

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

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

- the right to *equal protection* and *non-discrimination* under the law (ICCPR, article 26)
- the right to *non-discrimination* in the enjoyment of human rights (ICCPR, article 2(1); CRC, article 2; ICESCR, article 2(2))

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- the right to just and favourable conditions of work, *non-discrimination* and equality of opportunity *in the workplace* (ICESCR, article 7; ILO 111, articles 2-3)
- the obligation to ensure that the *best interests of the child is a primary consideration* in all decisions and laws relating to children (CRC, article 3)
- the right of *both parents to be assisted* in fulfilling *common parental responsibilities* (CRC, article 18)
- the right to *protection of, and assistance for, the family* (ICCPR, article 23(1); ICESCR, article 10)
- the right to *privacy and protection from interference with the family* (ICCPR, article 17; CRC, article 16)
- the right to access and benefit from *social security* (CRC, article 26; ICESCR, article 9)
- the *child's right to an identity* and to know and be cared for by his or her parents (CRC, articles 7–8; ICCPR, article 24)
- the *best interests of the child* must be the *paramount consideration* in *adoption* (CRC, article 21)
- the right to the *highest attainable standard of health* (CRC, article 24; ICESCR, article 12)
- the right to an *effective remedy* for a breach of human rights (ICCPR, article 2(3)).

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

18.3 What are the reasons for the Inquiry's findings?

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

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

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

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

- definitions using the words 'opposite sex' to describe a couple
- definitions using the words 'husband or wife' to describe a couple

- definitions using the words ‘spouse’ or ‘de facto spouse’ to describe a couple
- definitions using the words ‘marriage-like relationship’ to describe a couple.

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

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

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

18.3.2 The ‘interdependency’ category does not give full equality to same-sex couples

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

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

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

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

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

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

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

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

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

As Chapter 5 explains, a child born to a gay or lesbian couple could have any one or more of a birth mother, birth father, lesbian co-mother or gay co-father(s).¹

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

The result of this uncertainty is that a same-sex family will often have more difficulty accessing financial and work-related benefits, which are intended to support children than an opposite-sex family. This may mean that the best interests of a child born to a same-sex couple will be compromised.

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

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

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

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

(a) Discrimination under employment laws

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

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

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

(b) Discrimination under workers' compensation laws

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

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

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

(c) Discrimination under tax laws

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

- A same-sex partner cannot access the *dependent spouse tax offset* available to an opposite-sex partner.
- A same-sex partner cannot access the *tax offset for a partner's parent* available to an opposite-sex partner.
- A same-sex partner, lesbian co-mother or gay co-father cannot access the *housekeeper tax offset* available to an opposite-sex partner, birth mother or birth father.

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

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

(d) Discrimination under social security laws

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

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

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

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

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

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

(e) *Discrimination under veterans' entitlements laws*

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

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

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

(f) Discrimination under health care laws

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

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

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

(g) Discrimination under family laws

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

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

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

(h) Discrimination under superannuation laws

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

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

- It is harder for a surviving same-sex partner to access *death benefits tax concessions* than for a surviving opposite-sex partner.
- A same-sex partner cannot access the *death benefits anti-detriment payment* available to an opposite-sex partner.
- A same-sex partner cannot engage in *superannuation contributions splitting* and the associated tax advantages available to an opposite-sex partner.
- A same-sex partner cannot access the *superannuation spouse tax offset* available to an opposite-sex partner.
- A surviving same-sex partner of a *federal judge* cannot access the *reversionary pension* available to a surviving opposite-sex partner.
- A surviving same-sex partner of a *Governor-General* cannot access the *allowance* available to a surviving opposite-sex partner.

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

(i) Discrimination under aged care laws

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

As discussed in Chapter 14 on Aged Care, the main point of concern is that aged care laws treat a same-sex couple differently to an opposite-sex couple.

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

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

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

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

(j) Discrimination under immigration laws

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

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

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

18.4 What are the Inquiry's recommendations?

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

Those recommendations are:

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

18.5 How can the federal government fulfil those recommendations?

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

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

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

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

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

18.5.1 Enact omnibus legislation amending all discriminatory laws

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

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

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

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

18.5.2 Insert a new definition of ‘de facto relationship’ and ‘de facto partner’ in federal law

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

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

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

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

The following definition of ‘de facto relationship’ has sought to include the following features:

- **Inclusiveness.** The focus of the definition is on the genuineness of the relationship rather than the gender of the partners.
- **Flexibility.** The definition considers a range of factors relevant to a relationship, but no one factor is determinative. Further, the definition starts with the assumption that the couple must live together, but allows for the possibility that they may be temporarily separated.

- **Consistency.** The proposed federal definition is generally consistent with definitions in state and territory jurisdictions. The goal is to reduce the uncertainty currently facing same-sex couples seeking to access entitlements in different jurisdictions.
- **Evidentiary guidelines.** The definition seeks to indicate the type of evidence that may assist a couple to prove the genuineness of the relationship, including statutory declarations and other formal recognition schemes if available.

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

- (1) *'De facto relationship' means the relationship between two people living together as a couple on a genuine domestic basis.*
- (2) *In determining whether two people are in a de facto relationship, all the circumstances of the relationship must be taken into account, including any of the following:*
 - (a) *the length of their relationship*
 - (b) *how long and under what circumstances they have lived together*
 - (c) *whether there is a sexual relationship between them*
 - (d) *their degree of financial dependence or interdependence, and any arrangements for financial support, between or by them*
 - (e) *the ownership, use and acquisition of their property, including any property that they own individually*
 - (f) *their degree of mutual commitment to a shared life*
 - (g) *whether they mutually care for and support children*
 - (h) *the performance of household duties*
 - (i) *the reputation, and public aspects, of the relationship between them*
 - (j) *the existence of a statutory declaration signed by both persons stating that they regard themselves to be in a de facto relationship with the other person.*
- (3) *No one factor, or any combination of factors, under (2) is necessary to establish a de facto relationship.*
- (4) *A de facto relationship may be between two people, irrespective of gender.*
- (5) *Two people may still be in a de facto relationship if they are living apart from each other on a temporary basis.*

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

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

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

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

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

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

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

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

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

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

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

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

This could be achieved by amending:

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

It could also be achieved if:

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

While parenting presumptions are appropriate for the ART child of a lesbian couple, broader adoption laws are the better solution for a gay couple having an ART child (as set out in the following Recommendations 4–5).²

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

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

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

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

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

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

This will require amendments to adoption laws in all states and territories other than in WA and the ACT. Further, the federal government should not introduce legislation limiting the possibility of overseas adoptions by gay and lesbian couples.

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

This could be achieved by amending:

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

In particular, same-sex parents should be:

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

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

Endnotes

- 1 The Glossary of Terms in this report and Chapter 5 on Recognising Children explain these terms more fully.
- 2 For further discussion see Chapter 5 on Recognising Children, sections 5.2.2(b) and 5.2.4(d).