



CHAPTER 9: *Social Security*

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9.1 What is this chapter about?

This chapter focuses on discrimination against same-sex couples and their families in the context of accessing social security payments.

Social security is an income support system that acts as a safety-net for people who, for some reason, are unable to financially support themselves. Entitlements to social security are largely governed by the *Social Security Act 1991* (Cth) (Social Security Act) and the *A New Tax System (Family Assistance) Act 1999* (Cth) (Family Assistance Act). The payments are usually administered by Centrelink.

Many aspects of the social security system in Australia relate to couples and families. Discrimination against same-sex couples occurs because the definitions of 'member of a couple' and 'partner' do not recognise same-sex relationships. And, in certain circumstances, the definition of 'dependent child' may exclude a child of a lesbian co-mother or gay co-father.

Since social security legislation does not recognise same-sex couples, a person who has a same-sex partner will be treated as a single person for social security purposes. This can have either a positive or negative impact on the type and rate of payments a person is eligible to receive because of the way income and assets tests are administered.

Thus, the exclusion of same-sex couples under social security law sometimes operates to the financial benefit of a same-sex family and other times to the financial detriment. Either way it is clear that same-sex couples are treated differently to opposite-sex couples.

This chapter explains how social security law applies to same-sex couples and their children and the financial impact it can have on a family. It makes findings about the human rights breaches caused by the exclusion of same-sex partners and their children in certain circumstances. It then makes recommendations about how to make sure that same-sex and opposite-sex couples are treated equally in the future.

Specifically, this chapter addresses the following questions:

- Are same-sex couples and their children recognised by social security legislation?
- Which social security benefits are available to a same-sex partner?
- How do income and assets tests impact on same-sex couples?
- How do partnered payment rates impact on same-sex couples?
- Can a young same-sex couple access Youth Allowance?
- How does the calculation of family payments impact on same-sex families?
- What do same-sex couples say about social security law?
- Does social security legislation breach human rights?
- How should social security legislation be amended to avoid future breaches?

9.2 Are same-sex couples and their children recognised by social security legislation?

The Social Security Act contains a range of definitions relating to a couple and the children in a family.

The effect of these definitions extends beyond social security, as a number of other acts adopt the definitions relating to couples in the Social Security Act. That legislation includes the Family Assistance Act and the *Veterans' Entitlements Act 1986* (Cth) (*Veterans' Entitlements Act*) (see Chapter 10 on *Veterans' Entitlements*).¹

9.2.1 A same-sex partner is not a 'partner' or a 'member of a couple'

Whether a person is a 'partner' is very important in determining entitlement to social security benefits.

Some payments are only made if a person has a 'partner'. For other payments, the amount will be determined (in part) by the financial status of a person's 'partner'. And some payments are paid at different rates for individuals and members of a couple.

The Social Security Act defines a 'partner' by reference to a person who is a 'member of a couple'.²

A person is a 'member of a couple' if, amongst other things, 'the person has a relationship with a person of the opposite sex'.³

The use of the words 'opposite sex' in this definition automatically excludes a member of a same-sex couple.⁴

The definition of 'member of a couple' also refers to a person being in a 'marriage-like relationship'.⁵

The criteria used to determine whether someone is in a 'marriage-like relationship' do not necessarily exclude a same-sex couple.⁶ However, being of the opposite-sex is a pre-requisite to being in a marriage-like relationship under the Social Security Act.

Thus, the definition of 'member of a couple' (and therefore the definition of 'partner') clearly excludes a person in a same-sex couple.

As noted above, these definitions are adopted by the Family Assistance Act, which governs some of the payments made to assist families.

9.2.2 A child of a lesbian co-mother or gay co-father may be recognised

There are many social security payments which depend on whether a person is recognised as the child of an adult.

Some social security payments are made only if a person or couple has a child.⁷ For other payments, the amount paid may depend on whether a person or couple has one or more children.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.⁹

There are many laws which focus only on the relationship between a child and his or her birth parent. When this occurs, the child of a same-sex couple may be at a disadvantage because the child's relationship with their lesbian co-mother or gay co-father is ignored.

The Social Security Act contains a number of different definitions to describe the parent-child relationship. Most of the relevant definitions seem to include the birth mother, birth father, lesbian co-mother and gay co-father.¹⁰ However, it may be more difficult for a lesbian co-mother or gay co-father to prove her or his relationship with their child than it would be for a birth mother or birth father.

(a) 'Dependent child' may include a child of a lesbian co-mother or gay co-father

A person is a 'young person' if they are under 16 years of age or they are a full-time student under the age of 22.¹¹

A 'young person' is considered the 'dependent child' of an adult under the Social Security Act if:

- (a) the adult is legally responsible (whether alone or jointly with another person) for the day-to-day care, welfare and development of the young person, and the young person is in the adult's care; or
- (b) the young person:
 - i. is not a dependent child of someone else under paragraph (a); and
 - ii. is wholly or substantially in the adult's care.¹²

As discussed in Chapter 5 on Recognising Children, a birth mother or birth father are considered the legal parents of a child. They are therefore generally *assumed* to be 'legally responsible' for a child. As long as the young person is in that parent's care he or she will be a 'dependent child'.

Chapter 5 also notes that a lesbian co-mother or gay co-father will generally only qualify as legal parents under federal law if they successfully adopt a child. And this is extremely unlikely.

So a lesbian co-mother and gay co-father will have to take additional steps to prove 'legal responsibility'.

While the legislation is not clear about how to prove that a person is 'legally responsible' for a child, it appears that an adult with a parenting order will qualify. Therefore, if a gay co-father or lesbian co-mother:

- has a parenting order in favour of a child
- the child is under his or her care

that child will be considered his or her 'dependent child'.

However, as Chapter 5 explains, parenting orders can be expensive and may involve lengthy court proceedings. A same-sex couple seeking to access social security benefits may not have the resources to go through this process. Therefore, a lesbian co-mother and gay co-father may not enjoy equality with the birth mother and birth father who do not need anything other than a birth certificate to prove that a child is a 'dependent child'.

(b) 'FTB child' may include a child of a lesbian co-mother or gay co-father

The definition of an 'FTB child' is discussed later in this chapter in the context of the Family Tax Benefit and Child Care Benefit. The definition is similar to 'dependent child' and may therefore incorporate the child of a lesbian co-mother or gay co-father in certain circumstances.

9.3 Which social security benefits are available to a same-sex family?

Eligibility for some social security benefits, and the rate at which they are paid, depends on whether a person has a 'partner'.

These benefits include:

- **Partner Allowance**, paid to a person whose partner is receiving particular benefits.
- **Bereavement benefits**, paid to a person whose partner (or in some cases whose dependent child) has died.
- **Widow Allowance**, paid to a woman who has been widowed, divorced or separated in later life.¹³
- **Youth Allowance**, paid at a higher rate if a person is deemed 'independent' – which may depend on the person being a 'member of a Youth Allowance couple'.

Same-sex couples are not eligible for the payments because a same-sex partner does not qualify as a 'partner' under social security legislation.

9.3.1 A same-sex partner cannot access the Partner Allowance

The Partner Allowance is designed to assist a couple when one partner is unable to work. The maximum rate of payment is \$382.80 per fortnight.¹⁴ The Partner Allowance has been phased out since September 2003, but applicants who were receiving the Allowance before this date will continue to receive it.¹⁵

The Partner Allowance is paid to a person, subject to an assets test, if:

- the person does not have recent workforce experience
- the person is a 'member of a couple'
- the person's 'partner' is receiving a particular qualifying benefit.¹⁶

A same-sex partner can never be a 'member of a couple' or a person's 'partner' under the Social Security Act, so will never be eligible for the Partner Allowance.¹⁷

9.3.2 A same-sex partner cannot access bereavement benefits

A person whose 'partner' has died (or in some circumstances their child or an adult in their care) may be entitled to a:

- **Bereavement Allowance**, payable to a person who does not have any dependent children and whose recognised partner has died. The allowance may be paid for up to 14 weeks and is subject to the Pension Income and Assets tests¹⁸

or

- **Bereavement Payment**, a lump sum payable to someone who has been receiving certain types of benefits and whose partner or child has died; or if an adult or child they have been caring for has died.¹⁹

The surviving member of a same-sex couple is not eligible for either the Bereavement Allowance or Bereavement Payment on the death of his or her same-sex partner (unless he or she qualifies separately as a carer), because a member of a same-sex couple is not considered a 'partner'.

Michael Burge told the Inquiry of the difficulties he faced in trying to access support after the sudden death of his long term partner:

...surviving spouses of same sex de facto relationships are NOT entitled to access bereavement support from Centrelink. Centrelink makes no acknowledgement of same sex relationships of any kind (since it is Federally governed)... Centrelink's approach, and the advice of others, is to "just go on the dole", but that would mean going onto Newstart which is basically a job search programme during which you must actively search for work to be eligible to receive your benefit...why should genuinely bereaved surviving same-sex spouses, particularly since they are in that situation due to a death, and are bound to be in a state of grief and genuine need of support have to go through this?²⁰

The impact of this discrimination is also described by the Australian Coalition for Equality:

A partner's death provides evidence of the greatest discrimination for same-sex couples in this area. For many Centrelink payments, a surviving heterosexual partner can be paid a lump sum or continuing bereavement payment of up to 14 weeks of benefit payments. In addition, because their relationships are not recognised, the surviving member of a same-sex couple does not qualify for a widow's pension or payments. The pain suffered from the loss of a same-sex partner is the same as that of a lost heterosexual partner – and bereavement benefits should be equal to those available to heterosexuals.²¹

This discrimination can impact heavily on people who are mourning the loss of a partner. As the Young Lawyers Human Rights Committee states:

...partner bereavement payments can mean the difference between being able to maintain an adequate standard of living and health while one accommodates and mourns the loss of another and sliding into economic deprivation and social isolation.²²

9.3.3 A lesbian co-mother or gay co-father may access bereavement benefits in relation to the Parenting Payment

The Bereavement Payment is made to parents who qualified for certain social security payments before their child died, including the Parenting Payment.²³ The Bereavement Payment is equivalent to 14 additional weeks of Parenting Payment.²⁴

A person will be eligible for the Parenting Payment if he or she is the 'principal carer' of a child.²⁵ And a person will be the 'principal carer' of a child if the child is a 'dependent child' of the person and the child has not turned 16.²⁶

Since the definition of 'dependent child' may include a child of a lesbian co-mother or gay co-father, it appears that both same-sex parents can qualify for the Bereavement Payment when applied to the Parenting Payment.

9.3.4 A same-sex partner cannot access the Widow Allowance

Centrelink currently pays two types of widow benefits:

- **Widow B Pension** – this pension has been phased out since 20 March 1997.²⁷
- **Widow Allowance** – since 1 July 2005, this pension will only be paid to a woman born on or before 1 July 1955 who has become widowed, divorced, or separated later in life and who has no recent workforce experience.²⁸

Both of these benefits rely on the definition of a 'widow' in the Social Security Act which states that a 'widow' is 'a woman who was the partner of a man immediately before he died'.²⁹ This definition will exclude the lesbian partner of a woman who dies.

ACON states:

Lesbians and other women in same-sex relationships are not entitled to either the Widow [Allowance] or Widow [B Pension] as this entitlement is only made available to women who were in a heterosexual relationship and have either been widowed, deserted or divorced.³⁰

9.3.5 A same-sex partner cannot access concession card benefits

Concession cards provide an important form of financial support to individuals who receive particular benefits including the Age Pension, Carer Payment, income support benefits and a range of allowances.³¹

Two concession cards provide health care concessions to the 'dependants' of the cardholder:

- Pensioner Concession Card³²
- Health Care Card.³³

(a) *A same-sex partner is not a 'dependant'*

In relation to a concession card, the Social Security Act defines 'dependant' to include a 'partner'.³⁴

Since a same-sex partner is not considered a 'partner', he or she will not qualify for any health care concessions.³⁵

(b) *The child of a same-sex parent may be a 'dependant'*

A 'dependant' also includes an 'FTB child' or 'dependent child'.³⁶

As discussed earlier in this chapter, the child of a birth mother or birth father will generally qualify under these definitions if the child is in her or his care.

The child of a lesbian co-mother or gay co-father may also qualify as a 'dependant' if there is a parenting order in his or her favour and/or the child lives with the co-mother or co-father and the child is not cared for by the birth parent.³⁷

Thus, a child of a same-sex parent may be a 'dependant' for the purposes of health care concessions.

(c) *Financial impact on a same-sex couple*

Concession card holders and any qualifying dependants can claim a number of medical and pharmaceutical benefits, including:

- concession rates on Pharmaceutical Benefits Scheme (PBS) prescription medicines³⁸
- an increase in benefits for out-of-pocket, out-of-hospital medical expenses above a certain threshold, through the Medicare Safety Net³⁹
- assistance with certain hearing services such as hearing tests and hearing aids⁴⁰
- in some cases, bulk-billed general practitioner appointments.⁴¹

All of these benefits will be denied to the same-sex partner of a health care concession card holder.

9.3.6 A same-sex partner cannot access a gaol partner's pension

If a social security pension recipient is in gaol or in psychiatric confinement on a criminal charge, his or her social security payment may be redirected to a dependent 'partner'.⁴² Further, the 'partner' will receive the social security pension at a higher rate (equivalent to a single rate).⁴³

A same-sex partner is not eligible to receive this payment because he or she is not considered a 'partner' in the Social Security Act.

9.4 How do income and assets tests impact on same-sex couples?

As discussed above, a same-sex partner is denied access to a range of benefits which are designed to assist the partner of a person in a couple.

However, there are also a range of social security benefits available to a person in his or her own right. A member of a same-sex couple will be eligible for those benefits in principle.

However, eligibility for, and the amount of, those benefits are subject to various income and assets tests. And those income and assets tests apply differently to same-sex couples than they do to opposite-sex couples. This is because those tests often assess the income and assets of both an individual and his or her ‘partner’.

Since a same-sex partner is excluded from the definition of ‘member of a couple’ and ‘partner’, Centrelink does not assess the finances of a person’s same-sex partner when deciding their eligibility for a payment or the rate at which it is paid.

This may have a number of consequences, depending on the financial circumstances of a same-sex couple, and the type of payment for which they are applying.⁴⁴

It could mean that a member of a same-sex couple is denied a payment available to a member of an opposite-sex couple in the same financial position.

It could also mean that a member of a same-sex couple is granted a payment not available to a member of an opposite-sex couple in the same financial position.

Or it could mean that a member of a same-sex couple receives a benefit at a different rate to a member of an opposite-sex couple in the same financial position (this is discussed in the section 9.5 on Partnered Payment Rates).

Two types of financial tests are used by Centrelink to assess people’s eligibility for payments: income and assets tests. There are two different income tests for different types of payments:

- Pension Income Test for social security pensions⁴⁵
- Allowance Income Test for social security allowances⁴⁶

Both the assets test and one of the income tests are applied to all payments. The test result conferring the lowest rate of payment (or no payment) is the test result used by Centrelink.⁴⁷

9.4.1 The Pension Income Test treats a same-sex couple as two individuals

The Pension Income Test assesses a person’s income and that of his or her partner. The Pension Income Test determines whether the person is entitled to a pension, and the rate of payment to which he or she is entitled. A person may be entitled to a full payment, part payment, reduced payment or no payment.⁴⁸

Because the Social Security Act does not recognise a same-sex partner, the combined value of a same-sex couple’s income is irrelevant to the Pension Income Test. A member of a same-sex couple applies as an individual for a pension, and has his or her income assessed at the individual level.

(a) *Different thresholds for individuals and couples*

The income threshold for a couple is less than twice the threshold for an individual. The amount of income that may be earned before a person loses an entitlement to a full payment is:

Individual income threshold:	\$128 per fortnight
Couple income threshold:	\$228 per fortnight ⁴⁹

It may be easier – or more difficult – for a member of a same-sex couple to qualify under the Pension Income Test, depending on the financial circumstances of a same-sex couple.

(b) *Income distribution between same-sex partners will affect eligibility for the pension*

It may be **more difficult** for a member of a same-sex couple to qualify for a full pension payment, than a member of an opposite-sex couple, if his or her partner does not earn a significant income. A member of a same-sex couple can only earn up to \$128 per fortnight to qualify under the test, even if his or her partner earns no income. However, a member of an opposite-sex couple can earn up to \$228 per fortnight and still qualify for a full pension payment if his or her partner earns no income.

The following example illustrates how a same-sex couple could be disadvantaged by the Pension Income Test:

Sue is applying for the Age Pension. She lives with her partner, Bill. Sue's income is assessed at \$150 per fortnight and Bill's income is assessed at \$70 per fortnight. Together their income is assessed at \$220 per fortnight. This income is lower than the threshold for a person in a couple (\$228 per fortnight). Sue is therefore eligible for the full Age Pension under the Pension Income Test.

Dawn is applying for the Age Pension. She lives with her partner, Sally. Dawn is treated as a single person under the Pension Income Test. Dawn's income of \$150 is higher than the threshold for a single person (\$128 per fortnight). Dawn cannot claim the full Age Pension.⁵⁰

It may also be **easier** for a member of a same-sex couple to qualify for a full pension payment than a member of an opposite-sex couple, if the partner in a same-sex couple who is not claiming the pension earns a higher income.

A member of a same-sex couple will qualify under the Pension Income Test if his or her personal income falls below the single rate threshold, regardless of his or her partner's income. A member of an opposite-sex couple will not qualify under the Pension Income Test if his or her income falls below the couple rate threshold but his or her partner earns a level of income that pushes their combined income over the couple threshold.

9.4.2 The Allowance Income Test treats a same-sex couple as two individuals

The Allowance Income Test assesses an individual's income and that of his or her partner. It determines whether the person is entitled to an allowance, and the rate of payment to which he or she is entitled.

Because the Social Security Act does not recognise a same-sex couple, a member of a same-sex couple applies as an individual for an allowance and has his or her income assessed at the individual level.

(a) *Same thresholds for individuals and couples to determine eligibility for full allowance*

An opposite-sex couple can earn up to \$62 each per fortnight and still receive a full allowance payment.

A same-sex couple, who are considered as individuals under the Act, can also earn up to \$62 each per fortnight.⁵¹ This means there is no difference in how the income test for a full allowance payment applies to members of same-sex couples and opposite-sex couples in terms of eligibility.⁵²

(b) *A same-sex partner's income is disregarded in determining the amount of the full allowance*

While there is no difference between a member of a same-sex and opposite-sex couple in whether they will qualify for a payment, there may be a difference in the amount of allowance paid.

The rate of allowance is progressively reduced for every dollar over the full allowance threshold a person earns.⁵³ A person's partner's income will be relevant for this test.⁵⁴ Since a same-sex partner's income will not be considered, a same-sex couple may financially benefit under this test.

(c) *Different thresholds for individuals and couples to determine eligibility for part allowance*

Same-sex and opposite-sex couples will be affected differently in relation to part allowances.

Under the Allowance Income Test a single person can earn up to \$800.50 per fortnight and still be entitled to a part allowance. A partnered person can only earn up to \$731.34 per fortnight and still receive the part allowance.⁵⁵

As a member of a same-sex couple is not recognised by social security legislation, he or she may earn more money than a member of an opposite-sex couple and still qualify for a payment under the Allowance Income Test.

9.4.3 The assets test treats a same-sex couple as two individuals

The same assets test is used to determine whether a single person or a couple qualify for all pensions and allowances.

If a person is a member of an opposite-sex couple the assets of both members of the couple will be assessed. As a member of a same-sex couple is considered a single person by social security legislation, only his or her assets will be assessed. The outcome of the assets test for a member of a same-sex couple will depend on how assets are divided between the members of the couple.

(a) *Different thresholds for individuals and couples*

There are two assets test limits: one for homeowners and one for non-homeowners. The principal place of residence is not included in the homeowner assets test.⁵⁶

The amounts of assets a person or couple can hold and still be eligible for a full payment are:⁵⁷

	Homeowner	Non-homeowner
Single	\$161 500	\$278 500
Couple	\$229 000	\$346 000

A single person or couple may still qualify for part payments if they exceed the threshold.⁵⁸

(b) Asset distribution between same-sex partners will affect the outcome

Where a same-sex partner with relatively few assets applies for a benefit, he or she may be eligible, even if the couple together holds more assets than the couple threshold. This is because the assets of the other same-sex partner will not be counted in the assets test.

As the Hon Penny Sharpe MLC explains:

if [each] member of a home owning same-sex couple [has] assets of \$150,000, [each] will meet the assets test for individuals [and be eligible for a payment], whereas a heterosexual couple would not meet the test on their combined assets.⁵⁹

On the other hand, if the same-sex partner applying for a benefit has substantially more assets than the other partner, he or she may be disqualified if those assets are worth more than the individual threshold, even if the couple together holds fewer assets than the couple threshold.

For an opposite-sex couple the asset distribution is irrelevant – the assets of both partners are added together and the couple threshold is applied.

The following example illustrates how a same-sex couple could be disadvantaged by the assets test:

Richard is applying for the Age Pension. He lives with his partner, Barbara. They are homeowners. The couple own a number of other assets which are in Richard's name. The assets are valued at \$200 000, which is lower than the assets test threshold for homeowners who are a member of a couple (\$229 000). Richard is therefore eligible for the full Age Pension, under the assets test.

Keith is applying for the Age Pension. He lives with his partner, Tom. They are homeowners. The couple own a number of assets which are in Keith's name. The assets are valued at \$200 000, which is higher than the threshold for a single person homeowner (\$161 500). Keith cannot claim the full Age Pension under the assets test.⁶⁰

9.5 How do partnered payment rates impact on same-sex couples?

Sometimes people who qualify for a benefit will receive a lower rate because they are in a couple and can therefore combine expenses.⁶¹ This lower rate is known as a 'partnered' rate.

9.5.1 The partnered rate does not apply to a same-sex couple

Generally speaking a same-sex couple will be better off than an opposite-sex couple where there is a provision for 'partnered' rates. This is because the same-sex couple is treated as

two individuals, not a couple. Therefore each member of a same-sex couple will be entitled to the individual rate.

9.5.2 Positive financial impact for same-sex couples

For example, a member of a same-sex couple who qualifies for the full Age Pension will receive the individual rate of \$512.10 per fortnight. A member of an opposite-sex couple will receive the partnered rate of \$427.70 per fortnight.⁶² This is a difference of \$84.40 per fortnight.⁶³

If both members of a same-sex couple qualify for a full Age Pension, they may legitimately claim two times \$512.20 (\$1024.40). An opposite-sex couple in the same situation can only claim two times \$427.70 (\$855.40). This is a difference of \$168.80 per couple per fortnight.

The Australian Federation of AIDS Organisations illustrates with another example:

Greg was making \$45,000 a year from his job in sales. His partner Vince worked in the public service for several years but was eventually forced to give up work because of poor health. Vince then received the Disability Support Pension. Vince claimed the Disability Support Pension at the single rate of \$499.70 a fortnight, with a pharmaceutical allowance of \$5.80 a fortnight. In fact this gave him a larger payment than it would have if he and Greg were assessed as a couple. Most of Vince's medical expenses were covered by his Pensioner Health Care Card.⁶⁴

9.6 Can a young same-sex couple access Youth Allowance?

The rate of, and eligibility for, Youth Allowance varies according to whether a young person is assessed as independent and he or she passes an activity test.⁶⁵

One of the criteria for 'independence' is that a person is or has been a 'member of a Youth Allowance couple'.⁶⁶ Another criterion for independence is that a young person is a parent of a natural or adoptive child.⁶⁷ There is discrimination against same-sex couples in both definitions.

Further, the activity test has exemptions for a person caring for a partner. These exemptions are not available to a same-sex partner.

9.6.1 A member of a same-sex couple is not a 'member of a Youth Allowance Couple'

A person is a 'member of a Youth Allowance couple' if he or she is aged 15–24 and is either married or in a marriage-like relationship with a person of the *opposite sex* for at least 12 months.⁶⁸

A member of a same-sex couple will never qualify as 'independent' under this criterion. An opposite-sex couple will almost always qualify.

9.6.2 A lesbian co-mother or gay co-father is not a parent for Youth Allowance purposes

Another way a person may be deemed 'independent' for Youth Allowance purposes is if he or she is the parent of a child.⁶⁹ A person can only be a parent of a 'natural child' or adoptive child. This will exclude the lesbian co-mother or gay co-father from qualifying as 'independent' for the purposes of Youth Allowance.

9.6.3 A young same-sex couple will have to pass more rigorous income tests

A person who is 'independent' will qualify for the Youth Allowance, subject to meeting an activity and a personal income test.⁷⁰

A person who is not 'independent' will have to pass a parental income test, family assets test, family means test and personal income test.⁷¹

It is far less likely that a same-sex couple will qualify for Youth Allowance if the income and assets of their parents are taken into account.

9.6.4 A young same-sex couple is more likely to fail the activity test

Whether or not a member of a couple is considered 'independent' a person must fulfil certain activity requirements to collect Youth Allowance.⁷²

Effectively a young person must be studying or seeking work.⁷³ But there are some exceptions to this rule.

One member of a couple will be exempt if they are unable to accept an offer of work if:

- his or her 'partner's' medical condition means he or she must stay home
- a 'partner' is pregnant
- accepting employment would jeopardise the current employment of a 'partner'.⁷⁴

However, a member of a same-sex couple will not qualify for these exemptions because his or her partner is not recognised under the legislation.

9.6.5 A young same-sex couple will be paid a lower rate of Youth Allowance

Even if a member of a same-sex couple passes the more stringent family means and assets test and the activity test, he or she will only be eligible for the 'dependent' Youth Allowance rate.

The 'dependent' rate is the 'independent' rate of \$348.10 per fortnight (for a person without a child) reduced according to how that person's parent(s) fare under the parental income test, family assets test, family actual means test and personal income test.⁷⁵

9.6.6 Negative impact on young same-sex couples seeking Youth Allowance

ACON states that the Youth Allowance criteria means that:

...many young GLBT people face a significant disadvantage in gaining government financial assistance when studying, undertaking an apprenticeship or seeking employment.⁷⁶

One person told the Inquiry of their experience as a young person:

At 19 years of age I was a university student. I had been living with my girlfriend for over a year. Youth allowance was my primary source of income. Because I was in a same sex relationship rather than in a heterosexual relationship I was unable to get the full amount of youth allowance.

A person has to qualify as independent by Centrelink standards if they are to be eligible for the full rate of youth allowance before they are twenty one. One way to qualify as independent is to have been living with your partner for over a year - (i.e legally a defacto relationship). But same sex relationships don't count.⁷⁷

9.7 How does the calculation of family payments impact on same-sex families?

The federal government funds a number of payments to families to alleviate the cost of raising and caring for children. These payments are based on the taxable income of the family. They are widely viewed as welfare payments even though they are governed by an act called the *A New Tax System (Family Assistance) Act 1999* (Cth) (the Family Assistance Act).⁷⁸ To qualify for these payments, a parent or family must care for an 'FTB child'.⁷⁹ There are three types of payments:

Family Tax Benefit A (FTB A) is an income-tested payment for recognised couples or sole parents who care for an 'FTB child' under 21 years, or a full-time student aged 21-24 years.⁸⁰

Family Tax Benefit B (FTB B) is an additional payment for families where there is one primary income earner. FTB B is paid to qualifying families who have an 'FTB child' under 16 years and/or a full-time student child under 18 years.⁸¹

Single parents automatically receive the maximum rate of FTB B.⁸² A two parent family where only one parent receives an income will receive FTB B at a rate determined by the age(s) of their FTB children. If both parents earn an income, only the lower income will be tested for the FTB B payment.⁸³

The **Child Care Benefit** aims to assist parents with the cost of child care. The rate at which the benefit is paid is determined by an income test and the type of child care a child receives. The benefit is available for either approved or registered child care.⁸⁴

Rent assistance and concession cards are also available in respect of an FTB child.⁸⁵

9.7.1 'Partner' excludes a same-sex partner

The Family Assistance Act uses the same definitions of 'member of a couple' and 'partner' as the Social Security Act, both of which exclude a same-sex partner.⁸⁶

9.7.2 'FTB child' may include the child of a lesbian co-mother or gay co-father

FTB A, FTB B and the Child Care Benefit are only available to an adult caring for an 'FTB child'.⁸⁷

The definition of 'FTB child' is similar to the definition of 'dependent child' in the Social Security Act, except that it explicitly recognises a parenting order from the Family Court of Australia. Further, a child can only ever be the 'FTB child' of one person at any time. This is to avoid more than one person making social security claims in respect of the same child.

A child who is under 18 years of age and in an adult's care will be considered an FTB child if:

- the adult is jointly or solely legally responsible for the child's day-to-day care, welfare and development⁸⁸
 - there is a family law order, a registered parenting plan or parenting plan under the *Family Law Act 1975* (Cth) in force in relation to them and they are in the care of the adult who is supposed to care for them⁸⁹
- or
- the child is in an adult's care and is not in the care of anyone else with the legal responsibility for their day-to-day care, welfare and development of the individual.⁹⁰

An individual aged 18-20 will be an 'FTB child' if he or she is in an adult's care.⁹¹ An individual aged 21-24 will be an 'FTB child' if he or she is in an adult's care and is undertaking full-time study.⁹²

A gay co-father or lesbian co-mother might be able prove legal responsibility for a child in his or her care without a parenting order. But the definition makes it clear that if he or she does have a parenting order then he or she will be considered legally responsible. Therefore, a child in the care of a gay co-father or lesbian co-mother with a parenting order will be his or her 'FTB child'.

The birth mother and birth father (or adoptive parents) will not need a parenting order to prove legal responsibility. To this extent, the female partner of a woman having an ART child is treated differently to the male partner of a woman having an ART child. This is because the male partner is presumed to be the birth father; but the female partner must get a parenting order to assert her rights (see further Chapter 5 on Recognising Children).

9.7.3 A same-sex couple may be at an advantage for FTB A

FTB A is subject to an income test. The threshold income is the same whether the child is being cared for by one or more parents. However the tested income will include the income of the person claiming the benefit and the person's 'partner'.⁹³

For example, a person claiming FTB A for one ‘FTB child’ under 18 must have an assessed income of less than \$94 718 to qualify for the benefit.⁹⁴ If the claimant is single, then his or her personal income must be less than \$94 718. If the claimant has a ‘partner’ then their combined income must be less than \$94 718.

(a) *A same-sex couple is more likely to qualify for FTB A*

A same-sex partner does not qualify as a ‘partner’. So a same-sex couple will be eligible for FTB A as long as the person claiming the benefit has a taxable income below the individual threshold.

This will be to the advantage of a double-income same-sex family where the combined income is higher than the threshold, but the individual income of the partner claiming the FTB A is below the threshold.

(b) *A same-sex couple is more likely to qualify for a higher amount of FTB A*

The amount of FTB A is progressively reduced for family income over \$40 000 and less than \$94 718.⁹⁵

In a double-income same-sex couple only the income of the claimant is assessed. So a same-sex couple is more likely to qualify for a higher benefit than an opposite-sex couple in similar financial circumstances.

9.7.4 A same-sex couple will be at an advantage for FTB B

Family Tax Benefit B (FTB B) is an additional payment made to sole parent families. It is also paid to a family where one member of the couple is earning an income and the other member of the couple is primarily a home-based carer for their children.⁹⁶

(a) *A same-sex parent is a sole parent for FTB B purposes*

A person who does not have a ‘partner’ but does have an ‘FTB child’ is a sole parent for the purposes of FTB B. Since the Social Security Act does not recognise a same-sex partner as a ‘partner’, a person in a same-sex couple will be treated as a sole parent.⁹⁷

(b) *A sole parent will qualify for FTB B regardless of income*

A sole parent will automatically receive the maximum rate of FTB B, regardless of their income.⁹⁸ A person with an ‘FTB child’ who does have a ‘partner’ must pass an income test to determine eligibility for and the amount of FTB B.⁹⁹

So a same-sex couple with an ‘FTB child’ will automatically receive the maximum FTB B rate, regardless of income. An opposite-sex couple in the same financial situation would only receive the maximum rate of FTB B if the partner who is not at home caring for the child earns less than the threshold.

The Hon Penny Sharpe MLC comments:

Because the [Family Assistance Office] treats a parent with a same-sex partner as a sole parent, they are also automatically eligible to receive the maximum rate of FTB Part B. In contrast, for

most couples with children, eligibility for FTB Part B is determined by a fairly stringent test on the income of the lower earner in the couple. Thus, in relation to FTB Part B, the benefits of non-recognition for a parent in a same-sex couple are likely to be greatest where the parent has a low income.¹⁰⁰

9.7.5 A same-sex couple may receive more Child Care Benefit

The **Child Care Benefit** aims to assist parents with the cost of child care paid for an ‘FTB child’. The rate at which the benefit is paid is determined by the type of child care a child receives, an income test and (for some benefits) an activity test.

There are two types of care approved for payment:

Approved child care is provided by a child care service that has been approved to receive Child Care Benefit payments. Most long day care, family day care, outside school hours care and vacation care are considered approved care. All families can receive the Child Care Benefit for up to 24 hours per ‘FTB child’ per week. Parents must fulfil a work/training/study test or have an approved exemption to receive the Child Care Benefit for up to 50 hours per ‘FTB child’ per week.¹⁰¹

Registered child care is provided by nannies, grandparents, relatives or friends who are registered as carers with the Family Assistance Office. A family can receive the Child Care Benefit for up to 50 hours of registered child care per ‘FTB child’ per week if parents fulfil a work/training/study test.¹⁰²

(a) *Fees paid by a same-sex partner will not qualify for Child Care Benefit*

Where a person with an ‘FTB child’ is in a couple, the Child Care Benefit is available irrespective of whether it is the claimant or his or her ‘partner’ who pays the child care fees.¹⁰³ But where a person with an ‘FTB child’ is treated as a sole parent, that sole parent must pay the fees to qualify for the benefit.

So a same-sex couple will only qualify for the Child Care Benefit if the fees are actually paid by the claimant. This may be a problem if the person with an ‘FTB child’ has a low income.

(b) *A same-sex couple will pass the income test more easily*

The following sets out the current income test for both a sole parent and a couple with one ‘FTB child’ in approved care.¹⁰⁴

Annual Income	Child Care Benefit for approved care
Up to \$34 310	Maximum rate
\$34 310-\$98 348	Progressively reduced rate
Over \$98 348	Minimum rate

The individual with an ‘FTB child’ in a same-sex couple will be treated as a sole parent for the purposes of the Child Care Benefit income test. This means that only the individual’s income will be assessed under the income test. In an opposite-sex couple, the income of the individual and his or her partner will be assessed.

Thus, a same-sex couple may receive the Child Care Benefit at a higher rate than an opposite-sex couple in similar financial circumstances.¹⁰⁵

(c) *A same-sex couple will pass the work/training/study test more easily*

A person claiming the Child Care Benefit, and his or her ‘partner’, must fulfil the work/training/study test to receive:

- Child Care Benefit for approved care for between 24 and 50 hours
- Child Care Benefit for registered care (up to 50 hours).¹⁰⁶

To fulfil the work/training/study test, the claimant and his or her ‘partner’ must:

- be working, looking for work, training, studying or doing voluntary work¹⁰⁷
- or
- be receiving a Carer Allowance or Carer Payment for a child or adult.¹⁰⁸

If the claimant is in a same-sex couple, only he or she will need to fulfil the work/training/study test because there is no recognised ‘partner’. If a claimant is in an opposite-sex couple, both members of an opposite-sex couple must fulfil the test to receive the relevant Child Care Benefit.

This could mean that a same-sex couple will receive Child Care Benefit where an opposite-sex couple will not.

9.8 What do same-sex couples say about social security law?

Many same-sex couples giving evidence to the Inquiry were acutely aware that social security laws sometimes worked in their favour. Almost all of those couples suggested that they would happily give up those advantages if they were treated equally throughout all federal laws.

9.8.1 There are advantages and disadvantages under social security law

One person talked about some of the advantages under social security laws:

Certainly there are some disadvantages to the lack of recognition of same-sex relationships by the Social Security Act: you can’t get a partner allowance in some cases. But I would guess that the current exclusion of same-sex couples from the definition of ‘partner’ and ‘member of a couple’ benefits more people than it disadvantages. Both members may qualify for the individual rate for payments such as Parenting Payment, Aged and Disability Support Pension. Similarly, the income or assets of same-sex partners are not taken into account in determining qualification and payability for Newstart, Parenting Payment, Sickness Allowance or the Health Care Concession Card.¹⁰⁹

Others suggested that the disadvantages outweigh the advantages. As one person commented at the Brisbane Forum:

There are benefits and we as a community need to acknowledge this...for example Social Security is not threatened. However, I don’t think the benefits in any way outweigh the negative aspects of being a gay or lesbian member of society and being diminished [by not having our relationships recognised].¹¹⁰

9.8.2 It is undignified to be treated as a sole parent when there are two parents

Many couples talked about how insulting it was to be treated as a 'single' or a 'sole parent' – even though it did work to their financial advantage. For example, one lesbian mother said the following:

When our child is born I will be considered to be a single mother, as same-sex partners are not recognised by the social welfare system. I have no intention of claiming a Single Parent benefit, as I will not be a single parent and don't think it is right to claim the benefit. As a good citizen I am responsibly not claiming benefits (even though Centrelink insist that I will be eligible), but I am excluded from accessing other legitimate benefits because I am in a same-sex relationship. Where is the justice in this?¹¹¹

9.8.3 Do not remove the advantages without removing the disadvantages

Many people expressed concern that the government might change social security laws to remove the benefits for same-sex couples, but leave other laws which discriminate against same-sex couples.¹¹²

At the Melbourne Public Hearing Eilis Hughes stated that:

This is the aspect of this [I]nquiry about which I had mixed feelings. I was worried about drawing attention to the apparent advantage we can enjoy in these circumstances. I know that there are people who don't want to lose these benefits, and there are cynics amongst us who think that this [I]nquiry might end up with Centrelink recognizing our relationships to reduce the welfare payments they need to make, but that other areas of disadvantage won't change as quickly.¹¹³

A number of submissions were especially concerned about the potential impact of changes to social security law on People living with HIV/AIDS (PLWHA). Geoff Holland provides an example:

Of greatest concern, however, is the financial impact on same sex couples where both are reliant on either a social security pension or benefit. For example, recognition of same sex relationships would mean that a couple, where both were living with HIV/AIDS and on a Disability Support Pension, would have their payments adjusted from receiving two payments at the rate paid to singles to payment at the rate paid to members of a couple, a reduction from \$499.70 per fortnight per person to \$417.20 per fortnight each, a loss of over \$80 per fortnight. Almost 60% of PLWHA who receive government pensions or benefits are currently living below the poverty line and financial pooling is done by over 25% PLWHA in same sex relationships as the only means of protection from extreme financial hardship.¹¹⁴

ACON reiterated this concern:

Eligibility for a number of benefits and pensions under the Social Security Act is subject to means testing. Where a person is a 'member of a couple', the income and assets of their partner may also be taken into account in determining whether an applicant can receive payment under the Act. As people in same-sex relationships do not fit within the definition of a 'member of a couple', they are advantaged by this exclusion. Removing this discrimination would have a detrimental impact on the financial situation of many low-income GLBT people. As a recent survey of PLWHA has shown that more than half of the respondents were receiving some form of social security, reform would particularly impact on the health and wellbeing of PLWHA [People living with HIV/AIDS].¹¹⁵

Several people argued that reform to social security law should be gradual so as to mitigate the negative impact on those affected:

Given that changes to social security would bring significant obligations as well as rights to people in same-sex relationships, reform in this area should not take place before rights are given in legislative areas. Further a “phase in” period should take place to allow for people who will be negatively impacted to adjust their financial situation.¹¹⁶

9.9 Does social security legislation breach human rights?

This chapter identifies the discrimination that can occur because the definitions of ‘member of couple’ and ‘partner’ in social security laws do not recognise same-sex relationships.

The chapter explains that the non-recognition of a same-sex partner can have both a positive and a negative financial impact on same-sex couples. The failure of the Social Security Act to recognise same-sex relationships can mean that a same-sex couple is denied benefits available to their opposite-sex counterpart. For example a same-sex partner cannot access the Partner Allowance, bereavement benefits, Widow Allowance and Concession Card benefits. To this extent the Inquiry finds that the Social Security Act breaches the right to non-discrimination under article 26 of the ICCPR.

Denying certain social security benefits to same-sex couples will also breach articles 9 and 2(2) of the *International Covenant on Economic, Social and Cultural Rights* (ICESCR). Together those provisions state that where Australia takes steps to provide social security benefits, it must do so without discrimination on the grounds of sexuality.

Further, to the extent that the children of a couple will be at a disadvantage because access to certain social security rights are denied, there may be a breach of articles 2 and 26(1) of the *Convention on the Rights of the Child* (CRC). Those provisions state that a child is entitled to *benefit from* social security without discrimination.

For further explanation of these principles see Chapter 3 on Human Rights Protections.

9.10 How should social security legislation be amended to avoid future breaches?

This chapter describes the treatment of same-sex couples and families regarding a range of entitlements available under the Social Security Act and the Family Assistance Act.

The narrow definitions in the Social Security Act mean that a same-sex partner is denied a range of social security entitlements. However, unlike many of the other laws discussed in this report, those definitions may also mean that a same-sex couple end up financially in front of an opposite-sex couple.

Whether same-sex couples end up financially in front or behind, it is clear that they are treated differently to opposite-sex couples.

The following sections summarise the cause of this differential treatment and how to remedy it.

9.10.1 Narrow definitions are the main cause of discrimination

Both the advantages and disadvantages flowing to a same-sex couple are connected to the fact that social security law does not recognise a same-sex partner as a 'partner'.

The child of a birth mother or birth father will almost always qualify as a 'dependent child' or 'FTB child' because the birth mother or birth father are presumed to have legal responsibility for a child. The child of a lesbian co-mother or gay co-father may also qualify as a 'dependent child' or 'FTB child', but they must find a way to prove 'legal responsibility'.

In the absence of a parenting presumption in favour of a lesbian co-mother or a successful adoption, a parenting order from the Family Court of Australia is the best way for a lesbian or gay co-parent to prove legal responsibility.

However, for many families seeking welfare support, the cost and time involved in seeking a parenting order may impose too high a burden. Thus a lesbian co-mother or gay co-father may face great uncertainty in accessing benefits which are readily available to a birth mother or birth father.

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

Chapter 4 on Recognising Relationships presents two alternative approaches to amending discriminatory definitions within federal law regarding same-sex couples.

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

- retain the current terminology used in Commonwealth legislation (for example retain the terms 'partner' and 'member of a couple' in the Social Security Act)
- redefine the terms in the legislation to include same-sex couples (for example, redefine 'partner' and 'member of a couple' to include a de facto partner)
- insert new definitions of 'de facto relationship' and 'de facto partner' which include same-sex couples.

Chapter 5 on Recognising Children sets out how to better protect the rights of both the *children of same-sex couples* and the parents of those children.

Chapter 5 recommends that the federal government implement parenting presumptions in favour of a lesbian co-mother of a child conceived through assisted reproductive technology (ART). This would mean that an ART child born to a lesbian couple would automatically be the 'dependent child' of both members of the lesbian couple (like he or she would be if born to an opposite-sex couple), without the need for parenting orders.

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

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 has already occurred in the case of the definition of 'FTB child' and should be extended to the definition

of 'dependent child'. However, the Inquiry reiterates that the cost of obtaining a parenting order may be prohibitive in the case of parents who are seeking welfare assistance.

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.

9.10.3 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' in the Social Security Act is amended)

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

'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)

Social Security Act 1991 (Cth)

'de facto partner' (insert new definition)

'de facto relationship' (insert new definition)

'dependant' (s 6A(1) – no need to amend if 'partner' and 'dependent child' are amended and 'FTB child' (in *A New Tax System (Family Assistance) Act 1999 (Cth)*) may also recognise the child of a lesbian co-mother or gay co-father through reformed parenting presumptions or adoption laws)

'dependent child' (s 5(2), (4) – amend to clarify the role of a parenting order; otherwise no need to amend if the child of a lesbian co-mother or gay co-father may also be recognised through reformed parenting presumptions or adoption laws)

'independent' (s 1067A – no need to amend if 'partner' and 'member of a Youth Allowance couple' is amended and the child of a lesbian co-mother or gay co-father may be recognised through reformed parenting presumptions or adoption laws)

'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')

'member of a Youth Allowance couple' (s 1067C – amend to include a 'de facto partner' and replace 'marriage-like relationship' with 'de facto relationship')

'parent' (s 5(1)(a) – amend to ensure that a lesbian co-mother or gay co-father may be recognised through reformed parenting presumptions or adoption laws)

'parent' (s 5(1)(b) – no need to amend if 'member of couple' is amended)

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

‘principal carer’ (s 5(15) – no need to amend if ‘dependent child’ is amended)

‘widow’ (s 23 – amend to remove a reference to partner of ‘a man’, otherwise no need to amend if ‘member of a couple’ is amended)

‘young person’ (s 5(1B) – no need to amend)

Endnotes

- 1 See also *A New Tax System (Bonuses for Older Australian) Act 1999* (Cth), which takes its definition from the *Veterans' Entitlement Act 1986* (Cth); *Farm Household Support Act 1992* (Cth); *Student Assistance Act 1973* (Cth).
- 2 *Social Security Act 1991* (Cth), s 4(1).
- 3 *Social Security Act 1991* (Cth), s 4(2)(b)(i).
- 4 See also Anti-Discrimination Commission Queensland, Submission 264; Gay and Lesbian Rights Lobby (NSW), Submission 333; Law Council of Australia, Submission 305; Media, Entertainment and Arts Alliance, Submission 289; Victorian Gay and Lesbian Rights Lobby, Submission 256; Young Lawyers Human Rights Committee, Submission 311.
- 5 *Social Security Act 1991* (Cth), s 4(2)(b)(iii).
- 6 *Social Security Act 1991* (Cth), ss 4(3), 4(3A).
- 7 Such as the Parenting Payment: *Social Security Act 1991* (Cth), s 500.
- 8 Such as Youth Allowance: *Social Security Act 1991* (Cth), ch 2, pt 2.11 and ch 3, pt 3.5; Austudy: *Social Security Act 1991* (Cth), ch 2, pt 2.11A and ch 3, pt 3.5A.
- 9 For an explanation of these terms see the Glossary of Terms.
- 10 However, this is not always the case. For example, the definition of 'parent' in s 5(1)(a) of the *Social Security Act 1991* (Cth) appears to exclude a lesbian co-mother or gay co-father. A second definition of parent in s 5(1)(b) of the *Social Security Act 1991* (Cth) applies to pt 2.11 (Youth Allowance) and s 1067G (the Youth Allowance Rate Calculator). Although this definition is broader than the definition in s 5(1)(a), it may still exclude a lesbian co-mother or gay co-father.
- 11 *Social Security Act 1991* (Cth), s 5(1B). A student may not earn more than \$6403 within the relevant financial year to be considered a 'student child': *Social Security Act 1991* (Cth), s 5(1B).
- 12 *Social Security Act 1991* (Cth), s 5(2).
- 13 Note that the Widow B Pension has been phased out since 20 March 1997, and is only available to women who were receiving the Pension before this time: *Social Security Act 1991* (Cth), s 362A(1).
- 14 Australian Government, Centrelink, *Partner Allowance*, <http://www.centrelink.gov.au/internet/internet.nsf/payments/partner.htm>, viewed 11 April 2007.
- 15 The Partner Allowance has not been granted to new applicants since 20 September 2003: *Social Security Act 1991* (Cth), s 771(1).
- 16 The person's partner must be at least 21 years old and receiving Youth Allowance, Austudy payment, Newstart Allowance, Special Benefit, Rehabilitation Allowance, Age Pension, Disability Support Pension, Mature Age Allowance, Service Pension or Income Support Supplement, or receiving assistance under a Student Financial Supplement Scheme or an income-tested living allowance under an Aboriginal study assistance scheme: *Social Security Act 1991* (Cth), s 771HA(1).
- 17 *Social Security Act 1991* (Cth), s 4. See also Gay and Lesbian Rights Lobby (NSW), Submission 333; Young Lawyers Human Rights Committee, Submission 311.
- 18 *Social Security Act 1991* (Cth), s 1066. Australian Government, Centrelink, *Bereavement Allowance Payments Rate Factsheet, 1 January - 19 March 2007*, at [http://www.centrelink.gov.au/internet/internet.nsf/filestores/co039_0701/\\$file/co039_0701en.pdf](http://www.centrelink.gov.au/internet/internet.nsf/filestores/co039_0701/$file/co039_0701en.pdf), viewed 9 March 2007. The allowance can be extended if the surviving partner is pregnant: s 315(1)(e)(ii).
- 19 To receive Bereavement Payment upon the death of his or her partner, a person's partner must have been receiving a social security pension, a service pension or income support supplement or have been a long-term social security recipient: *Social Security Act 1991* (Cth), ss 82(1)(d). See also Australian Government, Centrelink, *How much Bereavement Payment do I get?*, at http://www.centrelink.gov.au/internet/internet.nsf/payments/pay_how_bereavepay.htm, viewed 11 December 2006.
- 20 Michael Burge, Submission 134.
- 21 Australian Coalition for Equality, Submission 228.
- 22 Young Lawyers Human Rights Committee, Submission 311.

- 23 Other relevant qualifying payments include: *Social Security Act 1991* (Cth), ss 235, 236 (Carer Payment), 567G (Youth Allowance), 660M (New Start Allowance); *A New Tax System (Family Assistance) Act 1999* (Cth), s 31 (Family Tax Benefit).
- 24 *Social Security Act 1991* (Cth), s 512.
- 25 *Social Security Act 1991* (Cth), ss 5(15), 500D.
- 26 *Social Security Act 1991* (Cth), 5(15).
- 27 *Social Security Act 1991* (Cth), s 362A(1).
- 28 *Social Security Act 1991* (Cth), ss 408AA, 408BA(2). Currently the rate of Widow Allowance is \$420.90 per fortnight for a single person with no children and \$455.30 per fortnight for a single person with children: Australian Government, Centrelink, *Mature Age Payment Rates Fact Sheet*, 1 January 2007 – 19 March 2007, at [http://www.centrelink.gov.au/internet/internet.nsf/filestores/co037_0701/\\$file/co037_0701en.pdf](http://www.centrelink.gov.au/internet/internet.nsf/filestores/co037_0701/$file/co037_0701en.pdf), viewed 9 March 2007.
- 29 *Social Security Act 1991* (Cth), s 23.
- 30 ACON, Submission 281. See also Australian Coalition for Equality, Submission 228; University of Western Australia, Submission 185.
- 31 The Pensioner Concession Card is available to people receiving a social security income support payment, in the following circumstances: people receiving a social security pension (such as the Age Pension, Disability Pension, Parenting Payment (Single) and Carer Payment); people receiving Mature Age Allowance; people over 60 years who have been in continuous receipt of one (or a combination) of the following payments for nine months or more: Newstart Allowance, Sickness Allowance, Widow Allowance, Parenting Payment (Partnered), Special Benefit, Partner Allowance, a social security pension; people with a partial work capacity who are receiving Newstart Allowance or Youth Allowance as a job seeker; single principal carers of dependent child/ren who are receiving Newstart Allowance or Youth Allowance as a job seeker; and certain people who are participating in the Pensions Loan Scheme, or Community Development Employment Projects: *Social Security Act 1991* (Cth), s 1061ZA. The Health Care Card is available to people receiving a qualifying income support benefit, or receiving certain income support supplementary payments; to people in specific circumstances, such as those receiving the fortnightly maximum rate of Family Tax Benefit Part A by instalment, a parent caring for children with disabilities and receiving Carer Allowance (child), or a Mobility Allowance customer who does not qualify for a Pensioner Concession Card: *Social Security Act 1991* (Cth), s 1061ZK.
- 32 Australian Government, Centrelink, *A Guide to Centrelink Concession Cards*, [http://www.centrelink.gov.au/internet/internet.nsf/filestores/co153_0610/\\$file/co153_0610en.pdf](http://www.centrelink.gov.au/internet/internet.nsf/filestores/co153_0610/$file/co153_0610en.pdf), viewed 19 March 2007.
- 33 Australian Government, Centrelink, *A Guide to Centrelink Concession Cards*, at [http://www.centrelink.gov.au/internet/internet.nsf/filestores/co153_0610/\\$file/co153_0610en.pdf](http://www.centrelink.gov.au/internet/internet.nsf/filestores/co153_0610/$file/co153_0610en.pdf), viewed 7 February 2007.
- 34 *Social Security Act 1991* (Cth), s 6A(1).
- 35 *Social Security Act 1991* (Cth), s 4.
- 36 *Social Security Act 1991* (Cth), s 6A(1).
- 37 The Health Care Card may be available to some adults who are entitled to receive Family Tax Benefit Part A at the maximum rate. That is, if a person or family's annual income is less than \$40 000: *Social Security Act 1991* (Cth), s 1061ZK(4).
- 38 Australian Government, Centrelink, *A Guide to Centrelink Concession Cards*, at [http://www.centrelink.gov.au/internet/internet.nsf/filestores/co153_0610/\\$file/co153_0610en.pdf](http://www.centrelink.gov.au/internet/internet.nsf/filestores/co153_0610/$file/co153_0610en.pdf), viewed 7 February 2007.
- 39 Australian Government, Centrelink, *A Guide to Centrelink Concession Cards*, at [http://www.centrelink.gov.au/internet/internet.nsf/filestores/co153_0610/\\$file/co153_0610en.pdf](http://www.centrelink.gov.au/internet/internet.nsf/filestores/co153_0610/$file/co153_0610en.pdf), viewed 7 February 2007.
- 40 Australian Government, Centrelink, *A Guide to Centrelink Concession Cards*, at [http://www.centrelink.gov.au/internet/internet.nsf/filestores/co153_0610/\\$file/co153_0610en.pdf](http://www.centrelink.gov.au/internet/internet.nsf/filestores/co153_0610/$file/co153_0610en.pdf), viewed 7 February 2007.
- 41 Australian Government, Centrelink, *A Guide to Centrelink Concession Cards*, at [http://www.centrelink.gov.au/internet/internet.nsf/filestores/co153_0610/\\$file/co153_0610en.pdf](http://www.centrelink.gov.au/internet/internet.nsf/filestores/co153_0610/$file/co153_0610en.pdf), viewed 7 February 2007.

- 42 *Social Security Act 1991* (Cth), s 1159(1).
- 43 A person is partnered if the person is a member of a couple and their partner is in gaol: *Social Security Act 1991* (Cth), s 4(11)(f). The higher rate of payment for partnered persons applies to other payments, for example the Parenting Payment: *Social Security Act 1991* (Cth), s 1068B-C2, Table C, item 4.
- 44 See ACON, Submission 281; Australian Coalition for Equality, Submission 228; Gay and Lesbian Rights Lobby (NSW), Submission 333; The Hon Penny Sharpe MLC, Submission 341; University of Western Australia, Submission 185.
- 45 Applies to the following payments: Age Pension, Disability Support Pension, Wife Pension, Bereavement Allowance, Widow 'B' Pension, Carer Payment (adult), Carer Payment (child), Mature Age Allowance granted before 1 July 1996, Parenting Payment (Sole Parents): Australian Government, Centrelink, *Income Test for Pensions*, at <http://www.centrelink.gov.au/internet/internet.nsf/payments/chartc.htm>, viewed 5 February 2007. See Pension Rate Calculators A and C and Parenting Payment Calculator: *Social Security Act 1991* (Cth), ss 1064, 1066, 1068A, 1068B.
- 46 Applies to the following payments: Newstart Allowance, Partner Allowance, Sickness Allowance, Widow Allowance, Mature Age Allowance granted after 1 July 1996: Australian Government, Centrelink, *Allowances Income Test*, at <http://www.centrelink.gov.au/internet/internet.nsf/payments/chartd.htm>, viewed 5 February 2007. These payments use Benefit Rate Calculator B, *Social Security Act 1991* (Cth), s 1068. Youth Allowance, Austudy and ABSTUDY use income tests that are similar to the Allowance Income test. They are dealt with in this chapter under the Allowance Income Test, although rates of thresholds are different. See *Social Security Act 1991* (Cth), pt 3.5 (Youth Allowance Rate Calculator), pt 3.5A (Austudy Rate Calculator).
- 47 Australian Government, Centrelink, Assets Test, at <http://www.centrelink.gov.au/internet/internet.nsf/payments/chartab.htm>, viewed 5 February 2007.
- 48 Income earned above the threshold levels will reduce the amount of pension payable by 40 cents in the dollar for single people and by 20 cents in the dollar each for couples: Australian Government, Centrelink, *Income Test for Pensions*, <http://www.centrelink.gov.au/internet/internet.nsf/payments/chartc.htm>, viewed 23 March 2007.
- 49 Australian Government, Centrelink, *Income Test for Pensions*, at <http://www.centrelink.gov.au/internet/internet.nsf/payments/chartc.html>, viewed 5 February 2007: to be eligible for a part pension payment a single person must earn less than \$1422.75 per fortnight; a couple less than \$2381.00. Different thresholds apply to the single and couple rate for full and part payments if a single or couple have a child or children.
- 50 See further, Australian Government, Centrelink, *Income Test for Pensions*, at <http://www.centrelink.gov.au/internet/internet.nsf/payments/chartc.htm>, viewed 5 February 2007.
- 51 Australian Government, Centrelink, *Allowances Income Test*, at <http://www.centrelink.gov.au/internet/internet.nsf/payments/chartd.htm>, viewed 5 February 2007.
- 52 Income tests for Youth Allowance, Austudy and ABSTUDY also apply the same income threshold for full payment to single and partnered people, so they will affect same-sex and opposite-sex couples in the same way: Single or partnered, away from home, students and Australian apprentices, may earn up to \$236 per fortnight. Single or partnered, away from home, job seekers, may earn up to \$62 per fortnight: Australian Government, Centrelink, *Personal Income Test*, at <http://www.centrelink.gov.au/internet/internet.nsf/payments/chartda.htm>, viewed 5 February 2007.
- 53 Australian Government, Centrelink, *Allowances Income Test*, <http://www.centrelink.gov.au/internet/internet.nsf/payments/chartd.htm>, viewed 23 March 2007.
- 54 See steps 6 and 11 of the 'Method Statement' at *Social Security Act 1991* (Cth), s 1068-G1. See also Australian Government, Centrelink, *Allowances Income Test*, <http://www.centrelink.gov.au/internet/internet.nsf/payments/chartd.htm>, viewed 23 March 2007.
- 55 Australian Government, Centrelink, *Allowances Income Test*, at <http://www.centrelink.gov.au/internet/internet.nsf/payments/chartd.htm>, viewed 23 March 2007. The income thresholds for part allowances of Youth Allowance, Austudy and ABSTUDY are also different for single and partnered people (with or without dependants) and allow a single person to earn more than a partnered person and still qualify for a part allowance. This again would make it easier for a member of a same-sex couple to qualify under this income test for a part payment, compared to a member of an opposite-sex couple with a similar income. For Austudy Rate Calculator see *Social Security Act 1991* (Cth), pt 3.5A; for Youth Allowance Rate Calculator see *Social Security Act 1991* (Cth), pt 3.5.

- 56 *Social Security Act 1991* (Cth), s 1118(1). See further Australian Government, Centrelink, *Exempt Assets*, at http://www.centrelink.gov.au/internet/internet.nsf/factors/assets_exempt.htm, viewed 5 February 2007.
- 57 Australian Government, Centrelink, *Assets Test*, at <http://www.centrelink.gov.au/internet/internet.nsf/payments/chartab.htm#a>, viewed 1 March 2007.
- 58 Australian Government, Centrelink, *Assets Tests*, at <http://www.centrelink.gov.au/internet/internet.nsf/payments/chartab.htm#a>, viewed 6 March 2007: For homeowners, a single person can hold assets up to \$334 250, a couple up to \$516 500, and still be eligible for a part payment. For non-homeowners, a single person can hold assets up to \$451 250 and a couple up to \$633 500, for a part payment.
- 59 The Hon Penny Sharpe MLC, Submission 341. See also Australian Coalition for Equality, Submission 228.
- 60 Australian Government, Centrelink, *Assets Test*, at <http://www.centrelink.gov.au/internet/internet.nsf/payments/chartab.htm#a>, viewed 28 February 2007.
- 61 Pensions paid at a partnered rate include Age Pension, Rent Assistance, Disability Support Pension, Carer Payment, Mature Age Allowance, Pension Bonus Scheme, Veterans' Entitlements Pension Bonus Scheme.
- 62 Australian Government, Centrelink, *How much Age Pension do I get?*, at http://www.centrelink.gov.au/internet/internet.nsf/payments/pay_how_agepens.htm, viewed 9 March 2007.
- 63 Australian Government, Centrelink, *How much Age Pension do I get?*, at http://www.centrelink.gov.au/internet/internet.nsf/payments/pay_how_agepens.htm, viewed 5 February 2007: Half the couple rate is payable to one member of a couple if their partner is not receiving a pension, benefit or allowance.
- 64 Australian Federation of AIDS Organisations, Submission 285.
- 65 *Social Security Act 1991* (Cth), s 1067G.
- 66 *Social Security Act 1991* (Cth), s 1067A(2): Other criteria include persons with a dependent child, persons aged 25 years or more, orphan, if parents cannot exercise responsibilities, refugees, persons in state care, unreasonable to live at home, people who are self-supporting, people who are disadvantaged, people with a partial capacity to work.
- 67 *Social Security Act 1991* (Cth), s 1067A(3).
- 68 *Social Security Act 1991* (Cth), s 1067C(1): Those 12 months must be while the person was over the age of consent as determined in the state or territory in which they live.
- 69 *Social Security Act 1991* (Cth), s 1067A(3).
- 70 *Social Security Act 1991* (Cth), ss 541, 1067G-B1.
- 71 *Social Security Act 1991* (Cth), s 1067G. For example, no Youth Allowance payments are made if the family's assets exceed \$535 750. Australian Government, Centrelink, *Income and Assets Tests for Youth Allowance*, at <http://www.centrelink.gov.au/internet/internet.nsf/ea3b9a1335df87bcc2569890008040e/df4be2480e2aa4aaca25728e00156df2!OpenDocument>, viewed 23 March 2007.
- 72 *Social Security Act 1991* (Cth), s 540.
- 73 *Social Security Act 1991* (Cth), s 541(1).
- 74 *Social Security Act 1991* (Cth), s 541D(1A).
- 75 For an 'independent', the rate for a partnered or single person without a child is \$348.10 per fortnight. Australian Government, Centrelink, *How much Youth Allowance do I get?*, at http://www.centrelink.gov.au/internet/internet.nsf/payments/pay_how_yal.htm, viewed 6 March 2007. This payment will be reduced for a person who is considered dependent according to how that person's parent(s) qualify under the parental income test, family assets test, family actual means test and personal income test. See *Social Security Act 1991* (Cth), s 1067G for these tests.
- 76 ACON, Submission 281. See also The Hon Penny Sharpe MLC, Submission 341; National Union of Students, Submission 224; Gay and Lesbian Rights Lobby (NSW), Submission 333; University of Western Australia, Submission 185.
- 77 Farida Iqbal, Submission 282.
- 78 These payments are governed by the *A New Tax System (Family Assistance) Act 1999* (Cth).
- 79 *A New Tax System (Family Assistance) Act* (Cth), ss 21, 42.

- 80 Australian Government, Family Assistance Office, *Factsheet – Family Tax Benefit Part A*, at <http://www.familyassist.gov.au/Internet/FAO/fao1.nsf/content/publications-factsheets-ftba.htm>, viewed 4 April 2007.
- 81 Australian Government, Family Assistance Office, *Factsheet – Family Benefit Part B*, at <http://www.familyassist.gov.au/Internet/FAO/fao1.nsf/content/publications-factsheets-ftbb.htm>, viewed 4 April 2007.
- 82 Australian Government, Family Assistance Office, *Can I get Family Tax Benefit Part B?*, http://www.familyassist.gov.au/Internet/FAO/fao1.nsf/content/payments-ftbb-get_ftbb.htm#4, viewed 4 April 2007.
- 83 Australian Government, Family Assistance Office, *Two Parent Families*, at http://www.familyassist.gov.au/Internet/FAO/fao1.nsf/content/payments-ftbb-how_much_two_parents, viewed 28 February 2007: The FTB B will stop if the parent earning the lesser amount earns above \$21 572, if the youngest child is under five; and it will stop at \$16 790 if the youngest child is between five and 18.
- 84 *A New Tax System (Family Assistance) Act 1999* (Cth), ss 42, 43, 44, 45. See also Australian Government, Family Assistance Office, *Factsheet – Child Care Benefit*, at <http://www.familyassist.gov.au/Internet/FAO/fao1.nsf/content/publications-factsheets-ccb.htm>, viewed 28 February 2007.
- 85 Rent Assistance is available to eligible people who receive FTB A and pay rent over a specified amount in the private rental market. Australian Government, Family Assistance Office, *Rent Assistance*, <http://www.familyassist.gov.au/Internet/FAO/fao1.nsf/content/payments-ra>, viewed 23 March 2007. Health Concession Cards are available to people receiving FTB A at the maximum rate in fortnightly instalments. Australian Government, Family Assistance Office, *Health Care Card*, <http://www.familyassist.gov.au/Internet/FAO/fao1.nsf/content/payments-hcc>, viewed 23 March 2007. See also Victorian Gay and Lesbian Rights Lobby, Submission 256.
- 86 *A New Tax System (Family Assistance) Act 1999* (Cth), s 3; *Social Security Act 1991* (Cth), ss 4(1), 4(2).
- 87 *A New Tax System (Family Assistance) Act 1999* (Cth), ss 21, 42, 44, 45.
- 88 *A New Tax System (Family Assistance) Act 1999* (Cth), s 22(2)(b).
- 89 *A New Tax System (Family Assistance) Act 1999* (Cth), s 22(3).
- 90 *A New Tax System (Family Assistance) Act 1999* (Cth), s 22(4).
- 91 *A New Tax System (Family Assistance) Act 1999* (Cth), s 22(5).
- 92 *A New Tax System (Family Assistance) Act 1999* (Cth), s 22(6).
- 93 *A New Tax System (Family Assistance) Act 1999* (Cth), sch 1.
- 94 Individual threshold is \$40 000 for the full benefit and up to \$94 718 for a reduced rate of benefit if there is one child under 18 years: Australian Government, Centrelink, *A Guide To Australian Government Payments, 1 January – 19 March 2007*, p3, at [http://www.centrelink.gov.au/internet/internet.nsf/filestores/co029_0702/\\$file/co029_0702en.pdf](http://www.centrelink.gov.au/internet/internet.nsf/filestores/co029_0702/$file/co029_0702en.pdf), viewed 28 February 2007.
- 95 Australian Government, Centrelink, *A Guide To Australian Government Payments, 1 January – 19 March 2007*, pp2-3, at [http://www.centrelink.gov.au/internet/internet.nsf/filestores/co029_0702/\\$file/co029_0702en.pdf](http://www.centrelink.gov.au/internet/internet.nsf/filestores/co029_0702/$file/co029_0702en.pdf), viewed 28 February 2007.
- 96 See *A New Tax System (Family Assistance) Act 1999* (Cth), sch 1, pt 4, div 1, subdiv B, cl 29A(3).
- 97 *A New Tax System (Family Assistance) Act 1999* (Cth), sch 1, cl 29(1)(a): provides the rate for a person receiving FTB B, who is ‘not a member of a couple’.
- 98 *A New Tax System (Family Assistance) Act 1999* (Cth), sch 1, cl 29. Australian Government, Family Assistance Office, *Can I get Family Benefit Part B?*, at http://www.familyassist.gov.au/Internet/FAO/fao1.nsf/content/payments-ftbb-get_ftbb.htm#4, viewed 28 February 2007.
- 99 See *A New Tax System (Family Assistance) Act 1999* (Cth), sch 1, pt 4, div 1, subdiv A, cl 29(2). Australian Government, Centrelink, *A Guide To Australian Government Payments, 1 January – 19 March 2007*, p3, at [http://www.centrelink.gov.au/internet/internet.nsf/filestores/co029_0702/\\$file/co029_0702en.pdf](http://www.centrelink.gov.au/internet/internet.nsf/filestores/co029_0702/$file/co029_0702en.pdf), viewed 28 February 2007: The parent earning the lesser amount can earn up to \$4234 of the 2006–07 financial year before it affects Family Tax Benefit Part B. The amount of FTB B will reduce by 20 cents for each dollar earned above \$4234. The FTB B will stop if the parent earning the lesser amount earns above \$21 572 if the youngest child is under five; and \$16 790 if the youngest child is between five and 18.

- 100 The Hon Penny Sharpe MLC, Submission 341. See also Law Council of Australia, Submission 305.
- 101 *A New Tax System (Family Assistance) Act 1999* (Cth), ss 42, 43, pt 3, div 4, subdivs F and G. Australian Government, Centrelink, *A Guide To Australian Government Payments*, 1 January – 19 March 2007, p5, at [http://www.centrelink.gov.au/internet/internet.nsf/filestores/co029_0702/\\$file/co029_0702en.pdf](http://www.centrelink.gov.au/internet/internet.nsf/filestores/co029_0702/$file/co029_0702en.pdf), viewed 28 February 2007.
- 102 *A New Tax System (A New Tax System) 1999* (Cth), ss 45(1)(e), 84. Australian Government, Family Assistance Office, *Guide to Payments*, 1 January – 19 March 2007, pp5-6, at [http://www.centrelink.gov.au/internet/internet.nsf/filestores/co029_0702/\\$file/co029_0702en.pdf](http://www.centrelink.gov.au/internet/internet.nsf/filestores/co029_0702/$file/co029_0702en.pdf), viewed 28 February 2007.
- 103 *A New Tax System (Family Assistance) Act 1999* (Cth), ss 43-45.
- 104 The income threshold for the minimum rate increases with the number of children, so a sole parent or couple with two children in care will receive the minimum rate if their income exceeds \$106 629; for three children the minimum rate applies after income of \$121 130. Add \$20 221 for each extra child: Australian Government, Family Assistance Office, *Child Care Benefit*, at http://www.familyassist.gov.au/Internet/FAO/FAO1.nsf/content/payments-ccb-how_much-more_32485.htm, for financial year 06-07, viewed 6 March 2007.
- 105 For one child in care the maximum benefit is \$148.00 per week (50 hours care) or \$2.96 per hour. The rate increases per child if there are more children in care. The minimum rate of Child Care Benefit applies to non-schooled children and is up to \$24.85 per week or \$0.497 per hour per child: Australian Government, Family Assistance Office, *Guide to Payments, Child Care Benefit*, http://www.familyassist.gov.au/Internet/FAO/FAO1.nsf/content/payments-ccb-how_much-less_32485.htm, viewed 23 February 2007.
- 106 *A New Tax System (Family Assistance) Act 1999* (Cth), ss 45(1)(e), 54. Australian Government, Family Assistance Office, *Work/Training/Study Test*, at http://www.familyassist.gov.au/Internet/FAO/FAO1.nsf/content/-work_study_test.htm, viewed 23 February 2007.
- 107 This is implied by *A New Tax System (Family Assistance) Act 1999* (Cth), ss 14-17A. For approved care, work or work-related commitments must be carried out for at least 15 hours per week: Australian Government, Family Assistance Office, *Work/Training/Study Test*, at http://www.familyassist.gov.au/Internet/FAO/FAO1.nsf/content/-work_study_test.htm, viewed 23 February 2007.
- 108 *A New Tax System (Family Assistance)* (Cth), s 15(1)(b)-(c). Australian Government, Family Assistance Office, *Work/Training/Study Test*, at http://www.familyassist.gov.au/Internet/FAO/FAO1.nsf/content/-work_study_test.htm, viewed 23 February 2007.
- 109 Lismore Forum, 11 November 2006.
- 110 Brisbane Forum, 10 October 2006.
- 111 Name Withheld, Submission 297.
- 112 See Perth Forum, 10 August 2006; Hobart Forum, 24 September 2006; Brisbane Forum 10 October 2006; Lismore Forum, 11 November 2006; Blue Mountains Forum, 16 November 2006; Wollongong Forum, 12 October 2006.
- 113 Eilis Hughes, Opening Statement, Melbourne Hearing, 27 September 2006.
- 114 Geoff Holland, Submission 303.
- 115 ACON, Submission 281.
- 116 ACON, Submission 281.