

## Same-sex relationships legislation

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17 December 2008

**The Same-Sex Relationships (Equal Treatment in Commonwealth Laws – Superannuation) Act 2008 (Cth) received Royal Assent on 4 December 2008.**

The Same-Sex Relationships Act is the Commonwealth Government's response to the perceived discrimination against same-sex partners and the children of same-sex couples in the laws which govern superannuation funds. The Act has changed the rules in those laws that prescribe the availability and tax treatment of superannuation death benefits to same-sex partners and the children of same-sex couples.

Of particular interest are the amendments to the *Superannuation Industry (Supervision) Act 1993 (Cth)* (the SIS Act).

### *SIS Act amendments*

The Act has amended the SIS Act in the following key respects:

The definition of "spouse" has been expanded as follows:

"**spouse** of a person includes:

- a. another person (whether of the same sex or a different sex) with whom the person is in a relationship that is registered under a law of a State or Territory prescribed for the purposes of section 22B of the Acts Interpretation Act 1901 as a kind of relationship prescribed for the purposes of that section; and
- b. another person who, although not legally married to the person, lives with the person on a genuine domestic basis in a relationship as a couple."

The new concept of living with a person on a genuine domestic basis "in a relationship as a couple" (in paragraph (b)) has replaced the previous, narrower concept of living with a person on a genuine domestic basis "as the husband or wife of the person". This expanded definition of "spouse" means that partners in same-sex relationships (within the definition) are now included as part of the object of the operation of a superannuation fund.

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The definition of "child" has also been expanded as follows:

"child, in relation to a person, includes:

- a. an adopted child, a step-child or an ex-nuptial child of the person; and
- b. a child of the person's spouse; and
- c. someone who is a child of the person within the meaning of the Family Law Act 1975."

The expanded definitions of "spouse" and "child" affect the operation of other provisions in the SIS Regulations, such as the cashing of a member's benefits in relation to a child.

In summary, the Act has abolished the previous gender-based definition of "spouse" so that same sex couples are now treated in the same way as married couples and opposite-sex de facto couples. A superannuation fund trustee can now make death benefit payments to same-sex partners and the children of same-sex couples in the same way as such payments can be made to couples of different sexes and their children.

### *Superannuation splitting*

In related reform, the *Family Law Act 1975* (Cth) has been amended by the *Family Law Amendment (De Facto Financial Matters and Other Measures) Act 2008* (Cth) to give de facto couples – both opposite-sex and same sex – access to the federal family law property settlement and spouse maintenance regime.

This amending Act received Royal Assent on 21 November 2008 and generally commenced on that date. Among other things, the amending Act has extended superannuation splitting arrangements under Part VIII B of the *Family Law Act* to parties to a de facto relationship.

*Source:* Deacons website, Superannuation and same-sex relationships, December 2008. <http://www.deacons.com.au/legal-services/financial-investment-services/legal-updates/legal-update.cfm?objid=6771>

However, please note that superannuation splitting for de facto couples now applies in all States and Territories with the exceptions of South Australia (SA) and Western Australia (WA).

Under the Constitution, the Federal Government has the power to legislate in respect of marriages but not de facto relationships. The States and Territories had to refer their powers to legislate regarding de facto couples to the Commonwealth and SA and WA have not yet done so.

*Source:* Association of Superannuation Funds of Australia, Superfunds, issue 333, March 2009.

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