The Human Right to Non-Discrimination in Same-Sex Relationships

Submission to the Human Rights and Equal Opportunity Commission National Inquiry into Discrimination against People in Same-Sex Relationships: Financial and Work-Related Entitlements and Benefits

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1. Introduction

1.1 Overview of Submission

This submission is made by the Human Rights Law Resource Centre Ltd ('HRLRC'). The HRLRC aims to bring the influence of international human rights norms and principles to bear on domestic law and policy.

The submission considers a range of domestic laws governing financial and work-related entitlements and benefits to examine the extent to which they are consistent with Australia's international human rights obligations. This submission considers particularly those obligations under:

(a) the *International Covenant on Civil and Political Rights* ('*ICCPR*');[1]

(b) the *Convention on the Rights of the Child* ('*CRC*');[2]

(c) the *Discrimination (Employment and Occupation) Convention* of the International Labor Organisation ('*ILO 111*');[3] and

(d) the *International Covenant on Economic, Social and Cultural Rights* ('*ICESCR*').[4]

Australia has ratified all of these conventions. Accordingly, the terms of the conventions are binding across all levels and arms of Australian government.

The focus on this submission is to provide authoritative jurisprudence on the content of the human right to non-discrimination contained in these human rights instruments, but particularly the *ICCPR*. Accordingly, more consideration in this submission is devoted to elucidating the content of that right, rather than identifying specific federal and state laws that are in breach of it.

Part 2 of the submission provides an overview of the human right to non-discrimination and the jurisprudence in connection with it that relates to same-sex relationships. This Part considers such rights under the *ICCPR*, the *CRC*, *ILO 111* and the *ICESCR*.

Part 3 of the submission considers some domestic legislation concerning financial and work-related entitlements and benefits that, in the light of the jurisprudence outlined in Part 2, risks breaching Australia's human rights obligations.

Part 4 of the submission concludes that a range of domestic laws considered below are inconsistent with international human rights principles and standards and Australia's obligations in respect of those norms. The submission therefore recommends that the laws considered in this submission are amended to be aligned

[1] Opened for signature 19 December 1966, 999 UNTS 171 (entered into force generally 23 March 1976 and for Australia 13 August 1980).

[2] Opened for signature 20 November 1989, 1577 UNTS 3 (entered into force generally 2 September 1990 and for Australia 17 December 1990).

[3] Opened for signature 5 July 1958, 362 UNTS 31 (entered into force generally 15 June 1960 and for Australia 15 June 1973).

[4] Opened for signature 16 December 1966, 993 UNTS 2 (entered into force generally 3 January 1976 and for Australia 10 March 1976).

with those obligations, and suggests in general terms, some ways in which this may be achieved.

1.2 About the Human Rights Law Resource Centre Ltd

The Human Rights Law Resource Centre Ltd, a joint initiative of the Public Interest Law Clearing House (Vic) and Liberty Victoria, is an independent community legal centre.

The HRLRC aims to:

1. Contribute to the harmonisation of Australian law and policy with international human rights norms;
2. Support and enhance the capacity of the legal profession, judiciary, government and community sector to develop Australian law and policy consistently with international human rights standards; and
3. Empower people that are disadvantaged or living in poverty by operating within a human rights framework.

The HRLRC achieves these aims by conducting and supporting human rights legal services, litigation, education, training, research, policy analysis and advocacy.

The HRLRC undertakes these activities through partnerships and collaboration with the community legal sector and legal aid, human rights organisations, pro bono lawyers, legal professional associations and university law schools.

The HRLRC is the first specialist human rights law resource centre in Australia. It is also the first centre to pilot an innovative service delivery model to promote human rights. The model draws together and coordinates the capacity and resources of pro bono lawyers and legal professional associations, the human rights law expertise of university law schools, and the networks, grass root connections and community development focus of community legal centres and human rights organisations.

The HRLRC was formally incorporated in January 2006 with the Public Interest Law Clearing House (Vic) Inc ('PILCH') and the Victorian Council for Civil Liberties Inc ('Liberty Victoria') as the initial members. PILCH is an independent community legal centre that facilitates the provision of pro bono legal services to marginalised and disadvantaged individuals, groups and communities. Liberty Victoria is an incorporated association whose activities include human rights-focused community and professional legal education, law reform, lobbying and advocacy.

2. The Human Right to Non-Discrimination

2.1 Content of the Human Right to Non-Discrimination

The right to equality and freedom from discrimination is an integral component of the international human rights normative framework and is entrenched in both the *ICCPR* and *ICESCR*.[5]

Article 2(1) of the *ICCPR* and art 2(2) of *ICESCR* provide that:

> The States Parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

Together, these articles require Australia, as a State party to both covenants, to respect and ensure the rights contained in the *ICCPR* and the *ICESCR* to all individuals within its territory, and subject to its jurisdiction. Such rights are to be respected and ensured without distinction of any kind on the basis of a person's status. The operation of art 2(1) of the *ICCPR* and art 2(2) of the *ICESCR* is limited to the rights contained in the *ICCPR* and *ICESCR* respectively. That is, arts 2(1) and 2(2) require non-discrimination in the provision of the rights specified in the *ICCPR* and the *ICESCR*.

Article 26 of the *ICCPR*, however, is of broader application. It provides that all persons are equal before the law and entitled to equal protection of the law without any discrimination on the basis of any ground, including 'race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status'. In *Broeks v The Netherlands*,[6] the HRC held that art 26 of the *ICCPR*, unlike art 2(1), was not constrained in scope by the rights specified in the *ICCPR*. The HRC subsequently reiterated this position in General Comment 18, in which it held that art 26 of the *ICCPR* "does not merely duplicate the guarantee already provided for in article 2 but provides in itself an autonomous right. It prohibits discrimination in law or in fact in any field regulated and protected by public authorities."

The HRC continued in this General Comment to observe that "discrimination" should be understood to encompass any distinction, exclusion, restriction or preference based on any identified ground that has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise by all persons, on an equal footing of all rights and freedoms.

Read together, arts 2(1) and 26 of the *ICCPR* and art 2(2) of the *ICESCR* prohibit unfair, unjust or less favourable treatment in law, in fact, or in the realisation of rights in the political, economic, social, cultural, civil or any other field. It is a norm that is immediately realisable, which means it is not subject to progressive realisation with respect to economic, social and cultural rights.

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[5] CESCR, *Substantive Issues Arising in the Implementation of the International Covenant in Economic, Social and Cultural Rights: Poverty and the International Covenant on Economic, Social and Cultural Rights*, 3, UN Doc E/C.12/2001/10 (2001). See also *ICCPR* arts 2(1), 26; *ICESCR* art 2(2).

[6] Communication No. 172/1984.

2.2 Implementation of the Human Right to Non-Discrimination

As discussed at Part 1.1 above, Australia has ratified and is therefore bound by the *ICESCR*, the *ICCPR*, the *CRC* and *ILO 111*.

In addition to enshrining human rights, each of these instruments also imposes responsibilities and obligations of realisation in relation to those rights; namely obligations to *respect*, *protect* and *fulfil* human rights.[7]

The obligation to *respect* human rights requires that States parties refrain from interfering, directly or indirectly, with enjoyment of human rights.

The obligation to *protect* human rights requires that States parties prevent third parties, including organisations and individuals, from interfering in any way with the enjoyment of human rights.

The obligation to *fulfil* human rights requires that States parties take positive steps to promote and support the realisation of human rights and, where necessary, to provide for the realisation of human rights for marginalised or disadvantaged groups. In relation to the fulfilment of civil and political rights, such as the right to vote or the right to privacy, the positive action required pursuant to art 2(2) of the *ICCPR* is that Australian governments take all necessary steps to immediately implement such rights. In relation to economic, social and cultural rights, such as the right to health and the right to social security, the positive action required pursuant to art 2(1) of the *ICESCR* is that Australian governments take concrete steps, using the maximum available resources, to progressively realise such rights. The steps taken must be targeted and directed towards the most expeditious, effective and full realisation of human rights possible. They should include legislative, financial, social, educational and administrative measures. Retrogressive measures are generally prohibited by international law. Further, even while Australian governments are developing and implementing measures and progressing towards full realisation of economic, social and cultural rights, they are under a 'core obligation' to ensure that certain non-derogable 'minimum essential standards' relating to fundamental human rights are met, including in relation to the provision of basic housing, nutrition and health care for marginalised or disadvantaged people.[8]

The international human rights framework makes it explicitly clear that both federal and state governments have responsibilities in relation to the realisation of human rights. Article 28 of the *ICESCR* and art 50 of the *ICCPR* expressly provide that, in federations such as Australia, the obligations of the Covenants are binding on the federation as a whole and must extend across all parts of that federation, without any

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[7] See, eg, CESCR, *General Comment 15: The Right to Water*, [17]–[29], UN Doc E/C.12/2002/11 (2002). See also CESCR, *General Comment 12: The Right to Adequate Food*, 69, [15], UN Doc HRI/GEN/1/Rev.5 (2001); and CESCR, *General Comment 13: The Right to Education*, 84, [47], UN Doc HRI/GEN/1/Rev.5 (2001).

[8] CESCR, *General Comment 3: The Nature of States Parties' Obligations*, 18, UN Doc HRI/GEN/1/Rev.5 (2001); CESCR, *Substantive Issues Arising in the Implementation of the International Covenant in Economic, Social and Cultural Rights: Poverty and the International Covenant on Economic, Social and Cultural Rights*, [15]–[18], UN Doc E/C.12/2001/10 (2001).

limitations or exceptions. This means that, in Australia, all branches of government (legislative, executive and judicial) and other public or governmental authorities, at whatever level – national or state – must act to respect, protect and fulfil human rights.[9]

2.3 Application of the Human Right to Non-Discrimination to Same-Sex Relationships

In *Toonen v Australia*,[10] the HRC considered the specific issue of discrimination on the basis of sexual orientation. The HRC considered sexual orientation to be a prohibited ground of discrimination within arts 2(1) and 26 of the *ICCPR* because it fell within the field of discrimination on the basis of "sex". The HRC confirmed the prohibition of discrimination on the ground of sexual orientation in *Young v Australia*.[11] The HRLRC submits that such discrimination could also be considered to be on the ground of "other status" within the meaning of these articles.

It follows from this jurisprudence that involvement in a same-sex relationship is also a prohibited ground for discrimination under the *ICCPR*, whether as discrimination on the ground of "sex" or "other status".

The HRLRC acknowledges that, in accordance with the HRC's findings in both *Broeks v The Netherlands* and General Comment 18, not every differentiation of treatment will constitute discrimination. Specifically, differentiation is permissible where based on "reasonable and objective" criteria, and where the aim is to achieve a purpose which is legitimate under the Covenant.

Accordingly, where access to financial and work-related entitlements and benefits are concerned, any differential treatment for those in same-sex relationships will be a form of prohibited non-discrimination under the *ICCPR* unless "reasonable and objective" criteria, within the meaning of the international jurisprudence, can be demonstrated for the differentiation.

This is precisely the question the HRC considered in *Young v Australia*. That case involved the same-sex partner of a war veteran who applied for a pension as a veteran's dependant. The *Veteran's Entitlement Act* provided for pensions to a veteran's partner only if that person was in a marital or *de facto* relationship with the relevant veteran. The definitions of these relationships were such that the partners in them had to be of opposite sex. The complainant argued that this violated art 26 of the *ICCPR* because it discriminated against him on the grounds of his sexuality.

The HRC agreed with the complainant. At paragraph 10.4, it said:

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[9] HRC, *General Comment 31: Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, [4], UN Doc CCPR/C/21/Rev.1/Add13 (2004). See also art 27 of the *Vienna Convention on the Law of Treaties* which provides that a State party 'may not invoke the provisions of its internal law as justification for its failure to perform a treaty': *Vienna Convention on the Law of Treaties*, GA Res A/41, UN GAOR, 41st sess, 95th plen mtg, Supp 53, art 27, UN Doc A/DEC/41/420 (1986).

[10] Communication No. 488/1992.

[11] Communication No. 941/2000.

> [I]n previous communications the Committee found that differences in the receipt of benefits between married couples and heterosexual unmarried couples were reasonable and objective, as the couples in question had the choice to marry with all the entailing consequences. It transpires from the contested sections of the [*Veteran's Entitlement Act*] that individuals who are part of a married couple or of a hetereosexual cohabiting couple (who can prove that they are in a 'marriage-like' relationship) fulfil the definition of 'member of a couple' and therefore a 'dependent', for the purpose of receiving pension benefits. In the instant case, it is clear that the author, as a same sex partner, did not have the possibility of entering into marriage. Neither was he recognized as a cohabiting partner of Mr C, for the purpose of receiving the pension benefits, because of his sex or sexual orientation…The State party provides no arguments on how this distinction between same-sex partners, who are excluded from pension benefits under law, and unmarried heterosexual partners, who are granted such benefits, is reasonable and objective, and no evidence which would point to the existence of factors justifying such a distinction has been advanced. In this context, the Committee finds that the State party has violated article 26 of the Covenant by denying the author a pension on the basis of his sex or sexual orientation.

The HRC in that case found that Australia was under an obligation to remedy this discrimination through an amendment of the law if necessary. Australia has not made such an amendment.

The HRC's finding in *Young v Australia* affirms that art 26 of the *ICCPR* will, prima facie, be breached where financial entitlements flow to members of *de facto* relationships that are not available to members of same-sex relationships. Here, there is no difference between the two relationships except that one involves members of the opposite sex, while the other involves members of the same sex.

However, the jurisprudence is more complicated where financial benefits flow only to those in a marital relationship. Differential treatment between married couples and unmarried couples has, on occasion, been held by the HRC to be consistent with the provisions of the *ICCPR*. However, presently, under Australian law, marriage is confined to couples containing members of the opposite sex, such that same-sex couples do not "have the choice to marry with all the entailing consequences". This raises the question about whether or not differentiation between married heterosexual couples, and unmarried same-sex couples could be reasonable and objective for the purposes of human rights jurisprudence.

In *Joslin et al v New Zealand*,[12] the HRC considered an argument that New Zealand's marriage law, which like Australia's, only permits of marriage between people of opposite sex, violates the *ICCPR*. Principally, this concerned the right to marry under art 23(2) of the *ICCPR*, and the application of the non-discrimination provision in art

[12] Communication No. 902/1999.

2(1) of the *ICCPR* to it. However, the claim also included an allegation of a breach of art 26 of the *ICCPR*.

The HRC found no breach of the *ICCPR*, saying at paragraphs 8.2 and 8.3:

> Article 23, paragraph 2, of the Covenant is the only substantive provision in the Covenant which defines a right by using the term 'men and women', rather than 'every human being', 'everyone' and 'all persons'. Use of the term 'men and women', rather than the general terms used elsewhere in Part III of the Covenant, has been consistently and uniformly understood as indicating that the treaty obligation of States parties stemming from article 23, paragraph 2, of the Covenant is to recognize as marriage only the union between a man and a woman wishing to marry each other.
>
> In light of the scope of the right to marry under article 23, paragraph 2, of the Covenant, the Committee cannot find that by mere refusal to provide for marriage between homosexual couples, the State party has violated the rights of the authors under articles 16, 17, 23, paragraphs 1 and 2, or 26 of the Covenant.

The HRLRC acknowledges that the principle that international human rights instruments should be given an interpretation that provides for different portions of the instrument to have consistent meanings. In that context it is possible to argue that arts 2(1) and 26 which provide the human right to non-discrimination should be influenced by the fact that there is no right to same-sex marriage under art 23(2) of the *ICCPR*. Specifically, this argument would be that if it is lawful to discriminate between heterosexual and homosexual relationships for the purpose of the right to marry, it cannot be unlawful to discriminate between married heterosexual couples and unmarried same-sex couples for the purposes of entitlements and benefits.

The HRLRC submits that such an argument would be erroneous for three reasons.

First, the relevant passage in *Joslin et al v New Zealand* is that there is no breach of the right to non-discrimination in the *ICCPR* "by *mere* refusal to provide for marriage between homosexual couples" (emphasis added). In the case where benefits and entitlements are provided to members of heterosexual marriages only, it is not the mere refusal to provide for same-sex marriage that is in issue. It is this refusal, *coupled with the provision of entitlements exclusively to married heterosexual couples*, that is in issue.

Second, in *Joslin et al v New Zealand*, the HRC relied on the interpretive maxim, *generalia specialibus non derogant*, that general provisions should not detract from the meaning of specific provisions. Art 23(2) was therefore treated as a specific provision, which could be treated in a manner different to the general rule established by other provisions. If the HRC's approach is correct, it follows that the right to marry, as a specific provision, should not be generalised beyond the scope of its terms. It confers only the right to marry and nothing more. Thus, any differential treatment that flows from this right must satisfy reasonable and objective criteria in accordance with arts 2(1) and 26 of the *ICCPR*.

Third, as the HRC noted in *Young v Australia*, the jurisprudence considers differentiation between married and *de facto* heterosexual couples to be lawful because heterosexual *de facto* couples "had the choice to marry with all the entailing consequences". The lawfulness of the differential treatment rests upon the presence of choice. However, where marital status is denied to same-sex couples, no such choice exists. Accordingly, the very foundation on which the reasonable and objective criteria that justify differentiation is based do not apply where the differential treatment is between married couples and same-sex couples.

Accordingly, it is the view of the HRLRC that in the absence of the State demonstrating the reasonableness and objectivity of the criteria on which it differentiates between members of heterosexual and same-sex relationships in conferring benefits and entitlements, any such differentiation will be in breach of art 26 of the *ICCPR*, and where enjoyment of a particular right within the *ICCPR* is concerned, art 2(1) as well. This is true of differential treatment as between:

- members of same-sex couples and *de facto* heterosexual couples; and
- members of same-sex couples and married heterosexual couples.

The HRLRC notes that no Australian legislature has put forward any reasonable or objective grounds for such differentiation.

2.4 Rights Specific to Children

Children, like adults, are protected directly by the human right to non-discrimination contained in the *ICCPR*. However, children have concurrent and additional rights in the *CRC*.

Article 2(2) of the *CRC* requires signatories to "take all appropriate measures to ensure that the child is protected against all forms of discrimination or punishment on the basis of the status, activities, expressed opinions, or beliefs of the child's parents, legal guardians, or family members."

Given the above discussion to the effect that the *ICCPR* prohibits discrimination on the basis of sexual orientation or membership of a same-sex relationship, it follows that art 2(2) of the *CRC* prohibits any such discrimination which impacts upon the children of any such people.

The HRLRC also notes art 24 of the *CRC*, which concerns the right of the child to the highest attainable standard of health. This mirrors art 12 of the *ICESCR*, which is discussed below.

2.5 Rights Specifically in Employment

Australia has additional human rights obligations under *ILO 111* in the context of employment and occupation. Article 2 requires signatories to "declare and pursue a national policy designed to promote, by methods appropriate to national conditions and practice, equality of opportunity and treatment in respect of employment and occupation, with a view to eliminating any discrimination in respect thereof."

Article 1(1) defines discrimination for the purposes of *ILO 111* as follows:

> (a) Any distinction, exclusion or preference made on the basis of race, colour, sex, religion, political opinion, national extraction or social origin, which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation;
>
> (b) Such other distinction, exclusion or preference which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation as may be determined by the Member concerned after consultation with representative employers' and workers' organisations, where such exist, and with other appropriate bodies.

The HRLRC submits that this definition of discrimination encompasses discrimination on the basis of sexual orientation. This is because, in accordance with *Toonen v Australia*, it is a kind of discrimination on the basis of "sex", which is specifically mentioned in paragraph (a) of the definition. However, even if the HRC's classification is rejected, the HRLRC notes that the definition is *inclusive*, and not exhaustive. There would clearly be scope for the definition of discrimination to include discrimination on the basis of sexual orientation and involvement in a same-sex relationship.

2.6 Discrimination and the Right to Health

Article 12 of the *ICESCR* provides a right to the highest attainable standard of health. This requires States to take progressive steps for the full realisation of "the right of everyone to the enjoyment of the highest attainable standard of physical and mental health." The Committee on Economic, Social and Cultural rights ('CESCR') has described the right to the highest attainable of health as "a fundamental human right indispensable for the exercise of other human rights."[13]

In General Comment 14, the CESCR elucidated that the right to health entails more than the right to health care. At paragraph 4, the CESCR said "the right to health embraces a wide range of socio-economic factors that promote conditions in which people can lead a healthy life, and extends to the underlying determinants of health, such as food and nutrition, housing, access to safe and potable water and adequate sanitation, safe and healthy working conditions, and a healthy environment."

Accordingly, the right to health is "understood as a right to the enjoyment of a variety of facilities, goods, services and conditions necessary for the realization of the highest attainable standard of health."[14]

Article 2(2) of the *ICESCR* addresses the right to non-discrimination in the context of that covenant. It provides that the enjoyment of the rights in the *ICESCR*, including the right to health, must be "exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin,

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[13] CESCR, *General Comment 14: Article 12*, UN Doc HRI/GEN/1/Rev.7 [1] (11 August 2000).

[14] Ibid [9].

property, birth or other status." By the jurisprudence referenced under the *ICCPR*, this right to non-discrimination extends to people in same-sex relationships.

3. Domestic Legislation

3.1 Discrimination between Members of Same-Sex and *De Facto* Relationships

(a) Parental Leave

The *Workplace Relations Act 1996* (Cth) discriminates between people in same-sex and *de facto* heterosexual relationships.

Specifically, on leave entitlements, section 282 of the Act guarantees paternity leave to a "male employee" who is the "spouse" of a woman giving birth. It does not, therefore, provide any such entitlement to a woman who is in a same-sex relationship of a woman giving birth. By the definition of spouse in section 240 of the Act, such a person is not a spouse, and in any event, is not a "male employee". She is therefore the subject of discrimination on two bases: firstly of being female, rather than male; and secondly, of being a member of a same-sex relationship rather than a heterosexual one.

Such discrimination may find further expression where certain industry awards apply, depending on how those awards handle carer's and bereavement leave, rights to simultaneous leave with a "spouse", insurance and other financial benefits available to employees and their "spouses" including travel allowances and staff discounts.

This appears to be a breach of art 26 of the *ICCPR*. However, because it has the potential to impact directly on the ability of a person to care for a child, it may also constitute a breach of art 2(2) of the *CRC*.

Because this specifically concerns employment, it is also a potential breach of art 2 *ILO 111*.

(b) Workers' Compensation

Under the *Safety, Rehabilitation and Compensation Act 1988* (Cth), Commonwealth employees are entitled to certain workers' compensation benefits. For example, where a Commonwealth employee dies of a work-related injury, a "dependent" is entitled to certain benefits. The definition of "dependent" includes a "spouse" and various relatives, but does not encompass same-sex partners. Accordingly, people in same-sex relationships are subject to differential treatment.

This is a possible breach of art 26 of the *ICCPR*, and where a same-sex partner has responsibility for children and relies on such benefits for the children's wellbeing, it may also constitute a breach of art 2(2) of the *CRC*. Moreover, because this is a matter relating to employment, it is also a potential breach of *ILO 111*.

(c) Social Security

The *Social Security Act 1991* (Cth) provides for a range of benefits, which are subject to specified eligibility criteria. Several of these benefits are dependent upon a person's relationship to another as a "partner", "member of a couple", or "widow".

Each of these definitions discriminates between people in heterosexual and same-sex relationships. Under section 4(1), a "partner" is the other "member of a couple". A "member of a couple", under section 4(2)(b)(i) must be of the opposite sex to his or her "partner". A "widow", who under section 408BA is entitled to a widow allowance, is a woman of a former "partner". Accordingly, it is impossible for a person in a same-sex relationship to be considered a "partner", a "member of a couple" or a "widow" for the purposes of the *Social Security Act 1991*.

In such cases, the law violates art 26 of the *ICCPR*.

It may, in extreme circumstances also violate the right to health under art 12 of the *ICESCR*, where the denial of certain social security benefits on prohibited grounds of discrimination prevents a person from enjoying the highest attainable standard of health. Because such denial is on the basis of discrimination, it would also constitute a breach of art 2(2) of the *ICESCR*.

Moreover, where this affects children, there is similar danger of a breach of arts 2(2) and 24 of the *CRC*.

(d) Taxation Benefits

Similar discrimination arises under the *Income Tax Assessment Act 1936* (Cth) owing to the definition of "spouse" in section 6 as "another person who, although not legally married to the person, lives with the person on a *bona fide* domestic basis as the husband or wife of the person". The reference to "husband or wife" excludes people in same-sex relationships from being classified as a "spouse" for the purposes of this Act. That, in turn, may exclude them from being defined as a "relative", a "resident", or a "dependent", all of which rely upon the definition of "spouse" for their meaning, at least partially.

A range of tax benefits are available to people that fit within these classifications. The exclusion of people in same-sex relationships from these definitions denies them access to such tax benefits, and is therefore a violation of art 26 of the *ICCPR*. A similar analysis applies to differential Medicare levies under the *Medicare Levy Act 1986* (Cth) and the *A New Tax System (Medicare Levy Surcharge – Fringe Benefits) Act 1999* (Cth), which provides in section 7 that *de facto* couples are treated as if married if, and only if, they consist of a man and a woman.

Special mention should be made of the child care rebate under the *A New Tax System (Family Assistance) Act 1999* (Cth). In addition to art 26 of the *ICCPR*, this also risks breaching art 2(2) of the *CRC* because it impacts upon children.

(e) Health Care

Under the *National Health Act 1953* (Cth), certain medicines are subsidised for individuals, couples and families who meet certain criteria. A family is defined to include a person's "spouse" and children. "Spouse", in turn, is defined to include a "*de facto* spouse", but such a person must be of the opposite sex.

Similar barriers exist concerning the Medicare safety-net under the *Health Insurance Act 1973* (Cth). Section 10ACA of that Act provides for an "extended safety-net" for families that have spent a certain amount in a year on medical expenses. A family, however, must be made up of a person, their "spouse", and their children under section 10AA(1). Once again, the definition of spouse excludes those in same-sex relationships.

The HRLRC submits this breaches art 26 of the *ICCPR*, and because of the potential impact on children, it potentially breaches art 2(2) of the *CRC*. Furthermore, because these rebates clearly impact upon the field of health, Australia is in danger of being in breach of its obligations under arts 2(2) and 12 of the *ICESCR*.

(f) Superannuation

The *Superannuation Act 1976* (Cth) provides for superannuation entitlements of employees of the Commonwealth. Specifically, sections 81, 89 and 93 provide that, upon the death of an eligible Commonwealth employee, his or her "spouse" is entitled to a lump sum or pension benefit. The definition of "spouse" is a person who had a "marital relationship" with the employee, where a "marital relationship" is one where "the person ordinarily lived with that other person as that other person's husband or wife". It therefore extends to members of *de facto* heterosexual relationships, but not to people in same-sex relationships. A similar analysis applies to a superannuation entitlements of spouses under the *Superannuation Act 1990* (Cth), or to spouses of parliamentarians under the *Parliamentary Contributory Superannuation Act 1948* (Cth).

These provisions appear to breach art 26 of the *ICCPR*.

The HRLRC notes with interest the provisions of the *Superannuation Industry (Supervision) Act 1993* (Cth), which contains a range of superannuation entitlements and was amended in 2004 in such a way to broaden the availability of certain superannuation entitlements to people in same-sex relationships. Sections 10 and 10A of that Act defines "dependents" to include people in "interdependency relationships". An "interdependency relationship" is defined in section 10A, and refers only to "2 persons (whether or not related by family)". This does not require that the relationship be one akin to a *de facto* relationship at all, and certainly encompasses same-sex relationships. This Act, therefore provides a model for ways in which other discriminatory legislation could be amended.

However, the HRLRC notes that when read in conjunction with the other legislation governing superannuation of Commonwealth employees and parliamentarians, the *Superannuation Industry (Supervision) Act 1993* creates a further kind of discrimination. People in same-sex relationships with Commonwealth employees or

parliamentarians are subject to more discriminatory legislation, and therefore face differential treatment on the basis of their partner's employer or profession.

(g) Veterans' Entitlements

The case of veterans' entitlements was considered explicitly in *Young v Australia*, as discussed above. The legislation that constituted a breach of art 26 of the *ICCPR* in that case remains in force, and accordingly, remains in breach. Such legislation includes the *Veterans' Entitlements Act 1986* (Cth) and the *Military Rehabilitation and Compensation Act 2004* (Cth).

(h) Property Entitlements and Settlements

In Victoria, a *de facto* couple whose relationship breaks down may take a dispute over property distribution to the court under the *Property Law Act 1958* (Vic). That Act provides a legislative regime for the distribution of property which takes into account certain factors, including financial and non-financial contributions to the relationship and the asset pool, in determining how the property should be shared.

These provisions of the *Property Law Act* do not apply to people in same-sex relationships. Upon the breakdown of such relationships, people must settle any property disputes through the common law or equity. There is no legislative scheme designed specifically to consider an appropriate property division.

This causes differential treatment of those in *de facto* heterosexual relationships and those in same-sex relationships before the courts. As such, the present legislative arrangements may constitute a breach of art 26 of the *ICCPR*. Additionally, because the division of property is likely to have an impact upon any children, it may also breach art 2(2) of the *CRC*.

3.2 Discrimination between Members of Same-Sex Relationships and Married People

(a) Defence Force Pensions and Benefits

Sections 38 and 39 of the *Defence Force Retirement and Death Benefits Act 1973* (Cth) provides for a "spouse" to receive pensions on the death of a contributing member or a recipient member. Sections 6A and 6B define a "spouse" to have been in a "marital relationship" at the time of the relevant death, and a "marital relationship" is confined to "husband" and "wife".

Such pensions are therefore not available to people in *de facto* relationships or same-sex relationships. This raises discrimination at two levels.

The first is between married and *de facto* heterosexual couples. As noted in *Young v Australia*, this is probably not a prohibited form of discrimination under art 26 of the *ICCPR* at present, although as Mrs Evatt noted in *Hoofdman v The Netherlands*,[15] and as was illustrated in *Broeks v The Netherlands*, what is considered a

[15] Communication No. 602/1994.

"reasonable" differentiation can become unreasonable over time. Evatt warned specifically that discrimination against *de facto* couples in 1990s Dutch welfare law was falling out of step with Dutch social mores, and was therefore verging on impermissible discrimination. Accordingly, it is possible that this level of discrimination will be impermissible in the near future given prevailing Australian attitudes.

The second level of discrimination is between people in married heterosexual couples and same-sex couples. As discussed earlier in this submission, the HRLRC's view is that this also constitutes unlawful discrimination, and a violation of art 26 of the *ICCPR*.

(b) Property Entitlements and Settlements

The *Family Law Act 1975* (Cth) applies only to people in legally recognised marriages. In the case of divorce, a legislative regime for property division applies. People in *de facto* relationships however, are subject to State property legislation, for example the *Property Law Act 1958* (Vic) in Victoria. The regime for property distribution in that Act is different to that in the *Family Law Act 1975*, and takes into account fewer factors. In particular, the *Family Law Act 1975* takes into account the respective needs of the parties, where the *Property Law Act 1975* does not. The *Family Law Act 1975* therefore has a more comprehensive regime.

People in same-sex relationships are not within the jurisdiction of such Acts, and upon the breakdown of their relationships have no legislative framework to govern property distribution. They are left only with the common law and equity.

This creates discrimination at the two levels mentioned above in the context of the *Defence Force Retirement and Death Benefits Act 1973*, and a similar analysis applies. However, because property distribution regimes clearly affect children where they exist in a relationship (a fact demonstrated by the relevance of dependents in considering an appropriate property distribution under the *Family Law Act 1975*), there is also the potential that such a legislative regime, taken together, will breach art 2(2) of the *CRC*.

4. Conclusion and Recommendations

This submission has detailed the international human rights jurisprudence surrounding the human right to non-discrimination and other human rights. It has then identified certain provisions of the domestic law relating to financial and work-related benefits and entitlements where such human rights are, or may be breached, in violation of Australia's international obligations.

The HRLRC recommends that changes are made to the relevant domestic laws to harmonise them with Australia's international obligations. The nature of the necessary amendments will depend on the nature of the breach.

The HRLRC notes that most potential breaches are the result of legislative definitions of terms such as “partner”, “spouse”, “dependent”, “widow”, “widower”, “family” and “dependent”. Such definitions are simple to amend so they are neutral as to gender and sexual orientation.

Where legislative differentiations are made between people in *de facto* heterosexual relationships and people in same-sex relationships, such amendment will be simple and sufficient.

However, where the differentiation is between those who are legally married, and those who are not (whether in *de facto* heterosexual relationships or same-sex relationships), harmonisation can be achieved in two ways:

1. By amending legislation so the relevant benefit or entitlement is also available to people in *de facto* heterosexual relationships and same-sex relationships; or

2. By allowing for people of the same sex to become legally married, so that while a distinction between married and *de facto* relationships can be maintained (which is arguably presently permissible in human rights jurisprudence), such a distinction will not discriminate on the grounds of sexual orientation or involvement in a same-sex relationship (which, prima facie, is not permissible under international human rights law).

More complex remedies are required where the discrimination in question arises from the interaction of various pieces of legislation. In such cases, the HRLRC submits that definitions used in related Acts should be inclusive of parties to same-sex relationships and standardised across related legislation.

The greatest difficulty arises in the case of legislation governing property division in the aftermath of a relationship because the discrimination arises under a mixture of state and federal laws. It may be difficult to obtain the co-ordination of different legislatures. One way this may be alleviated is through the amendment of state legislation so the division of property is subject to an identical regime to that used in the *Family Law Act 1975*, and the relevant legislative definitions are amended to include same-sex relationships.