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**Submission to the
Senate Legal and Constitutional Affairs Committee
Inquiry into the
Same-Sex Relationships (Equal Treatment in
Commonwealth Laws–General Law Reform) Bill 2008**

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Human Rights Law Resource Centre Ltd
Level 1, 550 Lonsdale Street
Melbourne VIC 3000
www.hrlrc.org.au
ABN 31 117 719 267

Contact:

Melanie Schleiger, Phil Lynch & Ben Schokman
Human Rights Law Resource Centre Ltd
Level 1, 550 Lonsdale Street
Melbourne VIC 3000

T: + 61 3 9225 6641
F: + 61 3 9225 6686
E: rights@vicbar.com.au
W: www.hrlrc.org.au

About the Human Rights Law Resource Centre

The Human Rights Law Resource Centre ('HRLRC') is the first national specialist human rights law HRLRC in Australia. It aims to promote human rights in Australia – particularly the human rights of people who are disadvantaged or living in poverty – through the practice of law.

The HRLRC provides and supports human rights litigation, education, training, research and advocacy services to:

- (a) contribute to the harmonisation of law, policy and practice in Victoria and Australia with international human rights norms and standards;
- (b) 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
- (c) empower people who are disadvantaged or living in poverty by operating within a human rights framework.

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1. Introduction

1.1 Scope of the Submission

2. This submission is made by the Human Rights Law Resource Centre Ltd ('HRLRC'). The HRLRC aims to ensure the compliance of Australian domestic law and policy with international human rights norms and principles.
3. The submission considers the extent to which the *Same-Sex Relationships (Equal Treatment in Commonwealth Laws–General Law Reform) Bill 2008* is 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
4. Australia has ratified all of these conventions. Accordingly, the terms of the conventions are binding across all levels and arms of Australian government.
5. The focus of 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*. Due to the short time-frame for preparing submissions and the vast scope and size of the Bill, more consideration in this submission is devoted to elucidating the content of the right to non-discrimination, rather than identifying specific aspects of the Bill that may give, or fail to give, full effect to that right.

1.2 Executive Summary and Recommendations

6. By statutorily sanctioning discrimination against individuals in same-sex relationships, Australia breaches its obligation to protect individuals from discrimination and promote the right to equality. Commenting on current discrimination against same-sex couples, their

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).

families and their children, Commissioner Innes of the Australian Human Rights Commission has stated that he is “still incredulous that there could be such blatant and widespread discrimination against an entire sector of our community in such fundamental areas of life.”⁵ The Bill will address and reduce this discrimination, and the Federal Government is to be commended on its introduction of the Bill.

7. However, the Bill does not fully eliminate discrimination against individuals who are in same-sex relationships because it does not enable same-sex couples to marry and it does not prohibit discrimination on the grounds of sexual orientation and status as a same-sex couple. It is incongruous to have a Bill purporting to ensure the equal treatment of individuals in same-sex relationships without clearly protecting the fundamental right of same-sex couples to non-discrimination. While the HRLRC is encouraged by the amendments that the Bill proposes, the HRLRC recommends that further steps be taken to ensure that discrimination against individuals on the grounds of their sexual orientation and status as a same-sex couple be eliminated entirely.
8. Where it is not possible to utilise the Bill as a vehicle to eliminate all forms of discrimination against individuals in same-sex relationships, the HRLRC submits that the Committee should engage government at the federal and state level to draft new legislation and amend existing legislation and protect the human right to non-discrimination.

Recommendation 1: Formal recognition of same-sex relationships

People of the same-sex should be able to legally marry. Alternatively, a national registration scheme should be established to enable same-sex and heterosexual couples to formally register their relationships and all legislation should be amended to ensure that benefits afforded to married couples are extended to individuals in registered civil partnerships.

Recommendation 2: Protection from discrimination on the grounds of sexual orientation and couple status

Australians should be afforded protection from discrimination on the ground of sexual orientation and individuals in same-sex relationships should be protected from discrimination on the basis of their couple status.

⁵ *Entitled to Equality*, Parliamentary Inquiry into the Provisions of the Same-Sex: Same Entitlements Bill 2007 (September 2007).

Recommendation 3: Continued action

Where it is not possible to utilise the Bill as a vehicle to eliminate all forms of discrimination against individuals in same-sex relationships, the Committee should engage government at the federal and state levels to draft new legislation and amend existing legislation and protect the human right to non-discrimination.

2. The Human Right to Non-Discrimination

2.1 Content of the Human Right to Non-Discrimination

9. 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*.⁶
10. Equality is the most important principle that inspires the concept of human rights.⁷ The right to equality and freedom from discrimination is a norm of international human rights law. The fundamental nature of the principle of equality of treatment is not only recognised in international law, but also fundamentally underpins the common law and is enshrined in the constitutions of many common law jurisdictions.⁸
11. Both the *ICCPR* and the *ICESCR* contain comprehensive prohibitions on discrimination. Article 2(1) of the *ICCPR* provides:
- Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.
- Article 2(2) of the *ICESCR* provides:
- 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.
12. Article 26 of the *ICCPR* provides:
- All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.
13. Article 2(1) of the *ICCPR* prohibits discrimination on certain grounds in the exercise of the Covenant's enumerated rights. However, article 26 of the *ICCPR* extends considerably

⁶ 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).

⁷ M Nowak, *CCPR Commentary* (2nd ed, 2005), 598.

⁸ Lord A Lester and D Pannick QC, *Human Rights Law and Practice* (2nd ed, 2004), 414.

further than article 2(1). Article 26 is a free-standing non-discrimination clause that is not confined to the enjoyment of the rights enumerated in the ICCPR but prohibits discrimination – in fact or in law – in all aspects of public life.

14. The term 'discrimination' has been authoritatively stated by the Human Rights Committee ('HRC') to encompass any distinction, exclusion, restriction or preference which is based on any ground identified in the Covenant and which 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.⁹
15. Read together, Articles 2(1) and 26 of the *ICCPR* and Article 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.

2.2 Implementation of the Human Right to Non-Discrimination

16. As discussed at Part 1.1 above, Australia has ratified and is therefore bound by the *ICESCR*, the *ICCPR*, the *CRC* and *ILO 111*.
17. 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.¹⁰
18. The obligation to *respect* human rights requires that States parties refrain from interfering, directly or indirectly, with enjoyment of human rights.
19. 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.
20. 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 Article 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

⁹ UN Human Rights Committee, *General Comment 18: Non-Discrimination* (Thirty-seventh session, 1989), [7].

¹⁰ 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).

security, the positive action required pursuant to Article 2(1) of the *ICESCR* is that Australian governments take concrete steps, using the maximum available resources, to progressively realise such rights.

21. The steps taken to realise human rights 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.¹¹
22. 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 Article 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 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.¹²

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

23. In *Toonen v Australia*,¹³ 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 Articles 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*.¹⁴ The HRLRC

¹¹ 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).

¹² 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/Add.13 (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).

¹³ Communication No. 488/1992.

¹⁴ Communication No. 941/2000.

submits that such discrimination could also be considered to be on the ground of “other status” within the meaning of these Articles.

24. 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”.
25. 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.
26. Accordingly, where access to statutory entitlements and benefits is concerned, any differential treatment for those in same-sex relationships will be a form of prohibited discrimination under the *ICCPR* unless “reasonable and objective” criteria, within the meaning of the international jurisprudence, can be demonstrated for the differentiation.
(a) Equality of entitlements available to de facto couples
27. In *Young v Australia* the HRC considered whether denying an individual access to statutory entitlements on the basis of their sexuality was reasonable. 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 Article 26 of the *ICCPR* because it discriminated against him on the grounds of his sexuality.
28. The HRC agreed with the complainant. At paragraph 10.4, it said:

[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 heterosexual 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.

29. 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.
30. The HRC's finding in *Young v Australia* affirms that Article 26 of the *ICCPR* will, prima facie, be breached where financial entitlements flow to members of heterosexual *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.

(b) *Equality of entitlements available to married couples*

31. However, the jurisprudence is more complicated where 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.
32. In *Joslin et al v New Zealand*,¹⁵ the HRC considered an argument that New Zealand's marriage law, which like Australia's, only permits marriage between people of opposite sex, violates the *ICCPR*. Principally, this concerned the right to marry under Article 23(2) of the *ICCPR*, and the application of the non-discrimination provision in Article 2(1) of the *ICCPR* to it. However, the claim also included an allegation of a breach of Article 26 of the *ICCPR*.
33. 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

¹⁵ Communication No. 902/1999.

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.

34. 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 Articles 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 Article 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.
35. The HRLRC submits that such an argument would be erroneous for three reasons.
36. 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.
37. 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 Articles 2(1) and 26 of the *ICCPR*.
38. 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.
39. 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 Article 26 of the *ICCPR*, and where enjoyment of a particular right within the *ICCPR* is concerned, Article 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.

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

2.4 Rights Specific to Children

41. 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*.
42. 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.”
43. 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 Article 2(2) of the *CRC* prohibits any such discrimination which impacts upon the children of any such people.
44. The HRLRC also notes Article 24 of the *CRC*, which concerns the right of the child to the highest attainable standard of health. This mirrors Article 12 of the *ICESCR*, which is discussed below.

2.5 Rights Specifically in Employment

45. 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.”
46. 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.

47. 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

48. 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."¹⁶
49. 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."
50. 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."¹⁷
51. 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, property, birth or other status." By the jurisprudence referenced under the *ICCPR*, this right to non-discrimination extends to people in same-sex relationships.

¹⁶ CESCR, *General Comment 14: Article 12*, UN Doc HRI/GEN/1/Rev.7 [1] (11 August 2000).

¹⁷ *Ibid* [9].

3. Issues not Adequately Addressed by the Bill

3.1 Introduction

52. The HRLRC commends the Australian Government for introducing this Bill, which will largely remedy statutory discrimination against same-sex couples, their families and their children. However, the HRLRC remains concerned about a number of issues that are not adequately addressed by the Bill, including the inability of same-sex couples across Australia to formally register their relationship and the lack of protection against discrimination of same-sex couples on the basis of their *de facto* status and sexual orientation.

3.2 Recognition of Same-Sex Relationships

53. The Bill does not afford same-sex couples the right to legally marry or register their relationship as a civil partnership. This prevents same-sex couples from being afforded the same right as heterosexual couples to immediately formalise the status of their relationship. This, in turn, prevents same-sex couples from enjoying immediate access to certain benefits that married couples may enjoy, including public affirmation of their relationship and commitment for one another.
54. Currently, same-sex couples may register their relationships in certain states and territories of Australia, namely Victoria, Tasmania and the ACT, thereby entitling those couples to a degree of security. The definition of a “de facto partner” under the Bill will recognise prescribed relationships that have been registered under those state and territory relationship registration schemes. While the Australian government is to be commended for proposing to recognise those relationships, same-sex couples living in states and territories that do not have a civil partnership registration scheme in place are unfairly disenfranchised. All Australians should enjoy the full protection available against discrimination regardless of their location within Australia.
55. The Federal Government cannot limit its obligation to protect individuals from discrimination based on the federal system of government or domestic state powers, particularly given that the Federal Government has power to give national effect to treaty obligations by legislating under its external affairs jurisdiction.¹⁸
56. While the HRC has indicated that the *ICCPR* does not require States parties to enable same-sex couples to marry, Article 26 of the *ICCPR* does require equality before the law.

¹⁸ Committee on the Elimination of Discrimination against Women, *Concluding Comments of the Committee on the Elimination of Discrimination against Women: Australia*, Thirty-fourth Session, 16 January – 3 February 2006, CEDAW/C/AUL/CO/5. See also *ICCPR* Article 50 and *ICESCR* Article 28 which provide that the human rights obligations in those covenants must be implemented across all parts of federal states without limitation or exception.

The HRLRC submits that in order not to discriminate against individuals in same-sex relationships Australia must enable same-sex couples to have their relationships publicly affirmed and protected in the same way that heterosexual relationships are publicly affirmed and protected upon marriage.

57. People of the same sex should be able to legally marry, 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).
58. Alternatively, a national registration scheme should be established to enable same-sex and heterosexual couples to formally register their relationship and all legislation should be amended to ensure that benefits afforded to married couples are extended to individuals in registered civil partnerships. Compliance with the *ICCPR* would require that individuals in same-sex relationships enjoy the right to have their relationship publicly affirmed and protected *and* to immediately enjoy the same rights that married heterosexual couples enjoy upon registering their relationship.

Recommendation 1: Formal recognition of same-sex relationships

People of the same-sex should be able to legally marry. Alternatively, a national registration scheme should be established to enable same-sex and heterosexual couples to formally register their relationships and all legislation should be amended to ensure that benefits afforded to married couples are extended to individuals in registered civil partnerships.

3.3 Discrimination against Same-Sex Couples

59. The HRLRC is concerned that the proposed amendment to the *Sex Discrimination Act 1984* (Cth) only removes discrimination against same-sex couples on the ground of family responsibilities and not on the grounds of marital status or sexuality. This failure to protect individuals from discrimination is incompatible with Australia's obligations under both Articles 2 and 26 of the *ICCPR*, which require States parties to ensure that all people can enjoy their *ICCPR* rights without discrimination, that the content of legislation is not discriminatory and that legislation is not applied in a discriminatory way.¹⁹
60. Of particular concern is the Federal government's failure to protect Australians from discrimination in employment based on their sexuality. This failure is out of step with anti-discrimination legislation in Australian states and territories. Most state and territory

¹⁹ UN Human Rights Committee, *General Comment 18: Non-discrimination*, CCPR 10/11/89 (1989).

governments have amended their anti-discrimination legislation to prohibit direct and indirect discrimination on the grounds of sexual orientation and gender identity.²⁰

61. In its report of May 2007 entitled *Same-Sex: Same Entitlements* ('AHRC Report'),²¹ the Human Rights and Equal Opportunity Commission (now Australian Human Rights Commission) recommended the enactment of "sexuality discrimination" legislation along the lines of the *Sex Discrimination Act 1984* (Cth) to help protect the rights of gay and lesbian individuals, couples and families in Australia. The AHRC Report also makes a specific recommendation for the introduction of legislation to protect against discrimination in employment on the grounds of sexual orientation. This recommendation is consistent with the meaning of "discrimination" in Article 1 of the *ILO 111* and the harmonisation of our laws with the *ILO 111*.
62. In order to comply with its human rights obligations, Australia must take positive steps to ensure the human right to non-discrimination. To this end, the HRLRC recommends that the Bill be amended to protect people from discrimination on the grounds of sexual orientation and same-sex couple status. If it is not possible to amend the Bill so as to eliminate all forms of discrimination against individuals in same-sex relationships, the HRLRC recommends that the Committee engage government to draft new legislation to protect the right to freedom from discrimination.

Recommendation 2: Protection from discrimination on the grounds of sexual orientation and couple status

Australians should be afforded protection from discrimination on the ground of sexual orientation and individuals in same-sex relationships should be protected from discrimination on the basis of their couple status.

Recommendation 3: Continued action

Where it is not possible to utilise the Bill as a vehicle to eliminate all forms of discrimination against individuals in same-sex relationships, the Committee should engage government at the federal and state levels to draft new legislation and amend existing legislation and protect the human right to non-discrimination.

²⁰ All states and territories have prohibited discrimination on grounds of sexual orientation, though in NSW this is limited to homosexuality. All states and territories have prohibited discrimination on grounds of gender identity.

²¹ Human Rights and Equal Opportunity Commission, *Same-Sex: Same Entitlements – National Inquiry into Discrimination against People in Same-Sex Relationships: Financial and Work-Related Entitlements and Benefits* (May 2007).

