

*'All human beings are born free and equal in dignity and rights'*  
*Universal Declaration of Human Rights, Article 1*

# 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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# The Public Interest Advocacy Centre

The Public Interest Advocacy Centre (PIAC) is an independent, non-profit law and policy organisation that identifies public interest issues and works co-operatively with other organisations to advocate for individuals and groups affected.

PIAC seeks to promote a just and democratic society by making strategic interventions on public interest issues.

In making strategic interventions on public interest issues PIAC seeks to:

- expose unjust or unsafe practices, deficient laws or policies;
- promote accountable, transparent and responsive government;
- encourage, influence and inform public debate;
- promote the development of law—both statutory and common—that reflects the public interest; and
- develop community organisations to pursue the interests of the communities they represent.

Established in July 1982 as an initiative of the Law Foundation of New South Wales, with support from the NSW Legal Aid Commission, PIAC was the first, and remains the only, broadly-based public interest legal centre in Australia. Financial support for PIAC comes primarily from the NSW Public Purpose Fund and the Commonwealth and State Community Legal Centre Funding Program. PIAC generates approximately forty per cent of its income from project and case grants, seminars, consultancy fees, donations and recovery of costs in legal actions.

PIAC provides legal advice and representation, public policy programs and advocacy training to promote the rights of disadvantaged and marginalised people and enhance accountability, fairness and transparency in government decision-making.

PIAC's work extends beyond the interests and rights of individuals; it specialises in working on issues that have systemic impact at both a NSW and National level. PIAC's clients and constituencies are primarily those with least access to economic, social and legal resources and opportunities. PIAC provides its services for free or at minimal cost to individuals.

Wherever possible, PIAC works co-operatively with other public interest groups, community and consumer organisations, Community Legal Centres, private law firms, professional associations, academics, experts, industry and unions to achieve its goals.

## Scope of this Submission

This submission is focused on where Australia sits globally in relation to discrimination against same-sex couples in the areas of financial and workplace entitlements.

It will address the following, limited issues:

- International human rights law relating to discrimination against same sex couples.
- International human rights law in Australia.
- International best practice.
- Recommendations.

Included at Appendix Two is a summary of one of PIAC's cases in this area, which is indicative of the gaps in Australian law in relation to same-sex couples.

PIAC welcomes any request for further submissions in relation to these or other issues PIAC's expertise.

## International human rights law

### ***International Covenant on Civil and Political Rights***

The *International Covenant on Civil and Political Rights (ICCPR)* affirms the equality of all people before the law and the right to freedom from discrimination in articles 2 and 26. Article 26 of the ICCPR states that:

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.

The prohibition against discrimination on grounds including race, color, sex, religion, political opinion, and national or social origin can also be said to be a core human rights norm considered to be *ius cogens*.<sup>1</sup> Therefore States must respect it in all circumstances.

While Article 2 confines the rights protected against discrimination to those under the ICCPR, the Human Rights Committee, which monitors compliance with and adjudicates violations under the ICCPR, has found that 'the application of the principle of non-discrimination contained in Article 26 is not limited'.<sup>2</sup> According to the Human Rights Committee, Article 26 provides an 'autonomous right' that prohibits discrimination in 'law or in fact in *any field* regulated and protected by public authorities' (*emphasis added*).<sup>3</sup>

Australia ratified the ICCPR on 18 December 1972, and it came into force on 13 August 1980.

In 1994, the Human Rights Committee found in *Nicholas Toonen v Australia* that laws punishing consensual, sexual conduct between adult males violated protections against discrimination under the ICCPR.<sup>4</sup> It held that such laws violated Article 17 of the ICCPR, which states

No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.

The Human Rights Committee held that 'sexual orientation' was a status protected from discrimination under the ICCPR, specifically finding that the 'the reference to "sex" in articles 2,

<sup>1</sup> *Retreat from Injustice* (2004) 76.

<sup>2</sup> General Comment No 18: Non-discrimination (10/11/89) CCPR General Comment No 18, para 12.

<sup>3</sup> *Ibid.*

<sup>4</sup> *Nicholas Toonen v Australia*, Human Rights Committee, Case no 488/1992, UN Doc CCPR/c/50/D/488/1992.

paragraph 1, and 26 [of the ICCPR] is to be taken as including sexual orientation'.<sup>5</sup> Thus States could not abridge the enjoyment of human rights on the basis of sexual orientation.

The Human Rights Committee reaffirmed its findings in *Edward Young v Australia* (2003) where it found that Australia had 'violated article 26 of the ICCPR by denying the author a pension on the basis on his sex or sexual orientation'. The individual opinion signed by two of the Human Rights Committee members points out that:

... under Covenant jurisprudence, a state party must offer 'reasonable and objective criteria' for making any distinction on grounds of sex or on grounds of sexual orientation.

Thus any distinction on the enumerated grounds that cannot be reasonably and objectively justified will be in breach of the ICCPR.

### ***Convention on the Rights of the Child***

The *Convention on the Rights of the Child (CRoC)*, to which Australia is a State Party<sup>6</sup>, is guided by four fundamental principles: the best interest of the child is the primary consideration in all actions concerning children<sup>7</sup>; that children have the right to survival and development; and the right to express their own views and have such views taken into account in all matters that affect them.<sup>8</sup>

The final fundamental principle of the CRoC is non-discrimination.<sup>9</sup> Article 2 states that:

States Parties shall respect and ensure the rights set forth in the present Convention to each child within their jurisdiction without discrimination of any kind, irrespective of the child's or his or her parent's or legal guardian's race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status.

States Parties shall 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.

Clearly the rights enumerated under the CRoC must be applied equally to all children. However, the protection goes further, in that it is a general protection against all forms of discrimination including on the basis of the type of family a child comes from.

The Committee on the Rights of the Child has stated that in 'considering the family environment', it should reflect 'different family structures arising from various cultural patterns and emerging family relationships'.<sup>10</sup> The Human Rights Committee has found that 'the concept of the family may differ in some respects from state to state, and even from region to region within a state, and it is therefore not possible to give the concept a standard definition'.<sup>11</sup>

Arguably it is a breach of CRoC if children of same-sex partners are denied equal access to the flow-on benefits of workplace or financial entitlements by virtue of the fact that their parents' relationship is not recognised in domestic law.

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<sup>5</sup> *Ibid*, 8.7.

<sup>6</sup> Australia signed the CRC in 1990 and it entered into force for Australia in 1990.

<sup>7</sup> *The Convention on the Rights of the Child*, Article 3.

<sup>8</sup> *The Convention on the Rights of the Child*, Article 6 and 12.

<sup>9</sup> *The Convention on the Rights of the Child*, Article 2.

<sup>10</sup> Report on the Fifth Session, Committee on the Rights of the Child, UN Doc CREC/C/24, Annex V.

<sup>11</sup> General Comment 19: Protection of the family, the right to marriage and equality of the spouses," Human Rights Committee, UN Doc HRI/GEN/1/Rev.2 (1990), 2.

## ***Convention on the Elimination of all forms of discrimination against Women***<sup>12</sup>

Article 1 of the *Convention on the Elimination of all forms of discrimination against Women* (CEDAW) defines discrimination against women as:

... any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.

In its General Recommendation on equality in marriage and family relations the Committee on the Elimination of Discrimination against Women argues that whatever the form of family the treatment of women in the family ‘both at law and in private must accord with the principles of equality and justice for all people, as article 2 of the Convention requires’.<sup>13</sup>

Seeking to assist in the full implementation of CEDAW, the Beijing Platform for Action affirmed that “The human rights of women include their right to have control over and decide freely and responsibly on matters related to their sexuality ... free of coercion, discrimination and violence.”<sup>14</sup> This notion was reaffirmed in paragraph 72k at the Five- Year Review of the Implementation of the Beijing Platform for Action (Beijing Plus Five), and in paragraph 59 in the 2001 Declaration of Commitment on HIV/AIDS.

An argument can be made that the prohibition against discrimination in CEDAW includes discrimination on the basis of a female’s sexuality.

## **Human Rights in Australian Law**

Australia has formally acknowledged its obligations to protect human rights<sup>15</sup> through its ratification of key international human rights treaties including the:

- *International Covenant on Economic Social and Cultural Rights (ICESCR)*, in 1975;<sup>16</sup>
- *International Covenant on Civil and Political Rights*, in 1980;<sup>17</sup>
- *Optional Protocol to the International Covenant on Civil and Political Rights*, in 1991;
- *Second Optional Protocol to the International Covenant on Civil and Political Rights, aiming at the abolition of the death penalty* in 1990;
- *International Convention on the Elimination of all forms of Discrimination against Women*, in 1980;<sup>18</sup> and
- *International Convention on the Rights of the Child*, in 1990.<sup>19</sup>

Certain provisions of CEDAW have been given force in domestic law, through the *Sex Discrimination Act 1984* (Cth) (SDA). Section 6 of the SDA prohibits discrimination on the basis of

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<sup>12</sup> Australia signed the CEDAW in 1980 and it entered into force for Australia in 1983.

<sup>13</sup> General Recommendation No. 21 (13th session, 1994) para 13.

<sup>14</sup> Beijing Declaration and Platform for Action, Fourth World Conference on Women, 15 September 1995, A/CONF.177/20 (1995) and A/CONF.177/20/Add.1 (1995) at para 97.

<sup>15</sup> Australia was a leading member of the UN General Assembly that adopted and proclaimed the *Universal Declaration of Human Rights (UDHR)* on 10 December 1948.

<sup>16</sup> Australia signed the ICESCR on 18 December 1972 and it entered into force for Australia on 10 March 1976.

<sup>17</sup> Australia signed the ICCPR on 18 December 1972 and it entered into force (except Article 41) for Australia on 13 November 1980.

<sup>18</sup> Australia signed the CEDAW in 1980 and it entered into force for Australia in 1983.

<sup>19</sup> Australia signed the CRC in 1990 and it entered into force for Australia in 1990.

marital status, including discrimination against a *de facto* spouse. However, section 4 of the SDA defines *de facto* spouse as a person of the opposite sex. Accordingly, people in same-sex relationships are not protected against discrimination on the basis of their relationship. Arguably, Australia is not meeting its international obligations under the CEDAW.

Whilst the ICCPR and CRoC have not been fully implemented in Australian domestic law, both treaties are scheduled to the *Human Rights and Equal Opportunity Commission Act 1986* (Cth) (**the HREOC Act**). The High Court has stated that this falls short of domestic incorporation.<sup>20</sup> However, these treaties may have some, albeit limited, effect in Australian law. The Full Court of the Family Court held, in *B & B v Minister for Immigration & Multicultural & Indigenous Affairs*<sup>21</sup>, that scheduling a treaty (in that case the CroC) to the HREOC Act afforded the treaty ‘special significance’ in Australian law. The issue was left unresolved by the High Court in its consideration of the appeal from the Family Court decision.<sup>22</sup> Also unresolved because of the continuing unease it has generated amongst government, is the High Court decision in *Minister for Immigration and Ethnic Affairs v Teoh*.<sup>23</sup> The High Court found that ratification of a treaty, without implementation into domestic law, and in the absence of domestic law to the contrary, gives rise to a legitimate expectation that an administrative decision maker will act in conformity with a ratified treaty.

Australia’s international obligations may also find force through the process of statutory interpretation. When legislation is unclear or ambiguous, courts will look at other material to assist in interpretation, including international human rights standards.<sup>24</sup> As noted by O’Neill, Rice, and Douglas<sup>25</sup>, international human rights standards have been given increasing importance in Australian jurisprudence through the process of statutory interpretation, by virtue of Australia’s ratification of international human rights treaties over the past thirty years. However, Australia is still in the early stages of developing its jurisprudence in this area, and some judges are more open to looking towards international human rights law than others.<sup>26</sup>

Significantly, in a recent decision, *Royal Women’s Hospital v Medical Practitioners Board of Victoria*, the Victorian Supreme Court was prepared to place significant value on international law in interpreting domestic law relating to the disclosure of medical records. President Maxwell said that statutes should be interpreted and applied, as far as language permits, in conformity with international human rights treaties; that human rights law may be used as a legitimate guide to the development of the common law; and that the provisions of an international human rights treaty to which Australia is a party may serve as an indicator of contemporary values and the public interest.<sup>27</sup>

## International best practice

At Appendix One, PIAC has provided a summary of various international jurisdictional approaches to addressing discrimination against same-sex couples. An analysis of the summary indicates that the general approach of most states has been a progressive implementation of measures to address equality for same-sex couples, from the enactment of anti-discrimination legislation right through to

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<sup>20</sup> *Dietrich v The Queen* (1992) 177 CLR 292, 305-306; *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273.

<sup>21</sup> [2003] FamCA 451

<sup>22</sup> *Minister for Immigration Multicultural and Indigenous Affairs v B and Anor* (2004) 206 ALR 130.

<sup>23</sup> (1995) 183 CLR 273.

<sup>24</sup> *Minister for Immigration Multicultural and Indigenous Affairs v B and Anor* (2004) 206 ALR 130. S157/2002v Commonwealth [2003] HCA 2 [29].

<sup>25</sup> Nick O’Neill, Simon Rice and Roger Douglas, *Retreat from Injustice* (2004) 207.

<sup>26</sup> See, for example, *R v Hollingshed* (1993) 112 FLR 109, 115 in which Miles CJ was prepared to look to international human rights standards in relation to sentencing obligations as opposed to *R v Smith* (1998) 98 A Crim.

<sup>27</sup> [2006] VSCA 85.

full legal recognition of same-sex unions and, in some cases, marriage. Australia clearly sits on the bottom of this spectrum, not even having legislative protection against discrimination on the grounds of sexual orientation at a Federal level.

## Conclusion

It is clear that international human rights laws and standards require non-discrimination on the grounds of sexuality. These laws and standards are increasingly influential in Australian law, in particular when a statute is unclear or ambiguous.

Further, as is demonstrated in Appendix One detailing international best practice, Australia is behind other developed countries in not guaranteeing equality of treatment regardless of sexuality. PIAC notes that most other developed countries guarantee fundamental human rights through the adoption of legislative or constitutional protection of human rights and/or through recognising civil unions and/or marriages between same-sex couples.

At the very least, state, territory and federal legislation should ensure equal entitlement to financial and workplace benefits. Ultimately, Australia should look to the recognition of civil unions, marriage and the passage of legislation prohibiting discrimination in order to ensure that same-sex couples have an equal place in Australian society.

### ***Recommendations***

PIAC recommends that state, territory and federal legislation governing financial and workplace entitlements be amended to ensure that these entitlements are applied equally to same-sex and heterosexual couples.

PIAC recommends that the Federal Government fulfill its international obligations in their entirety so as to ensure that same-sex couples achieve full equality through:

1. The passage of federal anti-discrimination legislation rendering unlawful discrimination on the grounds of sexuality.
2. The amendment of the definition of *de facto* couple as contained in part 4 of the *Sex Discrimination Act 1984* (Cth) so that protection against discrimination on the basis of marital status will cover discrimination against same-sex couples.
3. The amendment of the *Marriage Act 1961* (Cth) so that the definition of marriage contained in section 5 of the Act includes same-sex partners.
4. The passage of legislation so that civil unions are recognised at a Federal level.

# Appendix One: International Best Practice

## Brazil

In Brazil civil unions for same-sex couples are recognised in some regions only. The state constitutions of Mato Grosso and of Sergipe explicitly prohibit discrimination based on sexual orientation. As of 2003, discrimination on the basis of sexual orientation was prohibited in 73 municipal statutes, including Sao Paulo and Rio de Janeiro.

The Brazilian state of Rio Grando do Sul legalised civil unions after a court decision in March 2004. Same-sex couples in committed relationships can register at any notary public office. Although it does not affect federal rights, it gives same-sex couples more equality in many areas. Same-sex couples who register have the right to jointly own property, establish custody of children, and claim the right to pensions and property when one partner dies.

## Canada

The *Civil Marriages Act*, which was enacted in Canada in 2005, legalised same-sex marriage across Canada. Within existing laws, the approach of same-sex partners and couples of the opposite sex to protecting the financial interests and well-being of their partners are much the same.

Section 15 of the *Canadian Charter of Rights and Freedoms 1982 (the Charter)* guarantees every person equal benefit and protection of the law without discrimination. In particular, the Charter prohibits discrimination on such grounds as race, national or ethnic origin, colour, religion, sex, age or mental or physical disability. The Supreme Court of Canada has held that sexual orientation is an additional ground of discrimination prohibited by the Charter.

The Charter's protection of freedom of religion grants religious institutions the right to choose not to perform the marriage ceremonies of same-sex couples if they see fit.

Canadian federal and provincial anti-discrimination legislation also prohibits discrimination on the basis of sexual orientation. In *Haig v Canada*<sup>28</sup> and *Vriend v Alberta*<sup>29</sup> it was held that failure to prohibit discrimination on the grounds of sexual orientation in the *Canadian Human Rights Act 1985* and the *Individual's Rights Protection Act 1980* (Alberta) violated section 15 of the Charter by denying homosexual people the formal equality and protection from discrimination given to other disadvantaged groups.

The Ontario Court of Appeal recently held that 'spouse' as defined in the *Income Tax Act 1985* (Ontario) to exclude same-sex couples, was contrary to section 15 of the Charter and not justified by section 1.<sup>30</sup>

In *M v H* a majority of the Supreme Court found the exclusion of same-sex couples from the definition of 'spouse' in section 29 of the *Family Law Act 1990* (Ontario)<sup>31</sup> was discriminatory and not justified under the Charter.<sup>32</sup>

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<sup>28</sup> *Haig v Canada* (1992) 94 DLR (4th) 1 (Ontario Court of Appeal).

<sup>29</sup> *Vriend v Alberta* (1998) 156 DLR (4th) (Supreme Court of Canada).

<sup>30</sup> *Rosenberg v Canada (Attorney General)* (1998) 158 DLR (4th) 664.

<sup>31</sup> Section 29 - Spousal support for married and opposite-sex *de facto* couples.

<sup>32</sup> *M. v. H.*, [1999] 2 SCR 3.

Other significant developments include extending some spousal benefits to the same-sex partners of Federal Government employees in 1997. Provincial governments have also recognised same-sex couples for the purpose of certain spousal benefits to the partners of Government employees. In January 1999, the Canadian Minister of Immigration announced new directions in immigration policy, including a proposal to expand the definition of spouse in immigration law and policy to cover opposite-sex *de facto* couples and same-sex couples.

In Canada, 'common-law partners' now covers couples of the opposite or same sex. Same-sex couples now follow the tax rules of common-law couples, including the opportunities to:

- make contributions to a spousal Registered Retirement Savings Plans on behalf of their partner;
- claim the spousal personal tax credit; and
- transfer certain personal tax credits, including the dividend tax credit, age and pension income amount, disability amount, and tuition and education amounts.

Among the recent key changes to rules governing pension plans is the entitlement of same-sex partners to survivor pension benefits. Nova Scotia was one of the first provinces to extend pension plan benefits to same-sex couples in 1998 and, in jurisdictions across Canada, a number of trade unions have lobbied successfully to update employer pension plans similarly. In 2000, the Government agreed to allow same-sex survivors eligibility to survivor's pensions under the Canada Pension Plan.

## Europe

The European Court of Human Rights has established that discrimination against same sex couples is contrary to article 8 of the *Convention for the Protection of Human Rights and Fundamental Freedoms* (ECHR)<sup>33</sup>, which states that

Everyone has the right to respect for his private and family life, his home and his correspondence.

The jurisprudence is not solely based upon the right to privacy however. It also includes a decision of the European Commission on Human Rights that differing age of consent laws were contrary to article 14 of the ECHR (in respect of the enjoyment of the right to privacy), which states

The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

In the case of *Salgueiro da Silva Mouta v Portugal*<sup>34</sup>, the Court held that article 14 of the ECHR included sexual orientation as a ground.

The European Union has a number of laws that prohibit discrimination based upon sexual orientation. The *Treaty establishing the European Community* was amended to explicitly mention and protect sexual orientation:

Without prejudice to the other provisions of this Treaty and within the limits of the powers conferred by it upon the Community, the Council, acting unanimously on a proposal from the Commission and after consulting the European Parliament, may take appropriate action to

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<sup>33</sup> The cases are primarily in relation to criminal laws regarding consenting relations between adults in private. See generally *Dudgeon v UK* A.45 (1981) 4 EHRR 149, *Norris v Ireland* 10581/83 [1988] ECHR 22 and *Modinos v Cyprus*, 15070/89 [1993] ECHR 19.

<sup>34</sup> 33290/96 [1999] ECHR 176.

combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation.

The Parliamentary Assembly of the Council of Europe has adopted various non-binding resolutions and recommendations regarding sexual orientation. For example the Council of Europe's landmark Recommendation 924/1981 on discrimination against homosexuals called on Committee Ministers to, amongst other things:

... to assure equality of treatment, no more no less, for homosexuals with regard to employment, pay and job security, particularly in the public sector...

... to ensure that custody, visiting rights and accommodation of children by their parents should not be restricted on the sole grounds of the homosexual tendencies of one of them...

This resolution was followed by resolutions calling upon Member States to also guarantee asylum related rights to those prosecuted on the basis of their sexual orientation, grant residence and immigration rights to bi-national same-sex couples, and same-sex registered partnership rights.<sup>35</sup>

In 2000, the Council of Europe adopted a *Framework Directive on Equal Treatment in Employment* prohibiting direct and indirect discrimination on the grounds of religion or belief, age, disability or sexual orientation.<sup>36</sup> Though discrimination in the field of employment and occupation is outlawed in member states, the scope of the protection varies across countries. The Directive applies both to the public sector and the private sector including paid and unpaid work and covers:

- conditions of access to employed or self-employed activities, including promotion;
- vocational training;
- employment and working conditions (including pay and dismissals); and
- membership of and involvement in an organisation of employers or workers or any other organisation whose members carry on a particular profession.

The Framework Directive is binding upon the current member states and acceding states are required to have implemented the framework before joining the EU.

The *Charter of Fundamental Rights of the European Union* was proclaimed in 2000. Although it is non-binding it is important since it expresses the EU vision on human rights. Article 21(1) states:

Any discrimination based on any ground such as sex, race, color, ethnic or social origin, genetic features, language, religion or belief, political or other opinion, membership of a national minority, property, birth, disability, age or sexual orientation shall be prohibited.

## Denmark

Registered partnerships were introduced in Denmark under the *Registered Partnership Act* in 1989. This means that same-sex couples have access to the legal and social benefits of traditional marriage. All legal and fiscal rights and obligations are like those of opposite-sex marriage, with four exceptions:

1. Registered partners cannot adopt, with the exception that one party can adopt the biological children of the other.
2. Registered partners cannot have joint custody of a child, except by adoption.

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<sup>35</sup> Recommendation 1470 (2000) 'Situation of gays and lesbians and their partners in respect of asylum and immigration in the member states of the Council of Europe' and Recommendation 1474 (2000) 'Situation of lesbians and gays in Council of Europe member states'.

<sup>36</sup> Council Directive of 27 November 2000, establishing a general framework for equal treatment in employment and occupation.

3. Laws making explicit reference to the sexes of a married couple do not apply to registered partnerships.
4. Regulations by international treaties do not apply unless all signatories agree.

## Finland

In 2002, Finland recognised civil unions in the form of registered partnerships, which grant similar rights and responsibilities as married partners. The registration and dissolution processes are similar to marriage.

Under the *Constitution of Finland* (chp 2, s 6):

Everyone is equal before the law.

No one shall, without an acceptable reason, be treated differently from other persons on the ground of sex, age, origin, language, religion, conviction, opinion, health, disability or other reason that concerns his or her person.

Children shall be treated equally and as individuals and they shall be allowed to influence matters pertaining to themselves to a degree corresponding to their level of development.

Equality of the sexes is promoted in societal activity and working life, especially in the determination of pay and the other terms of employment, as provided in more detail by an Act.

## France

In France, same-sex couples may register their 'life partnership' in order to provide it legal status.

In 1998, the French government approved the *Pacte Civil De Solidarite (PACS)*, which allows cohabiting couples to:

- receive certain tax exemptions;
- make gifts to each other without tax consequences (after 2 years);
- receive joint taxation benefits (after 3 years);
- receive health benefits through his or her partner; and
- make contracts regarding financial and property arrangements in the event of death or break-up.

Initially, PACS offered the right to file joint income taxes only after three years. As of 2005 all PACS couples file joint taxes, in the same manner as married couples. Due to the way that the progressive tax is applied in France, a couple filing joint income taxes, pays less tax than they would filing separately if one of the partners earns substantially more than the other.

## Iceland

Iceland's *Registered Partnership Act of 1996* grants the full range of protections, responsibilities and benefits as marriage to same-sex couples.

## The Netherlands

The Netherlands *Registered Partnership Act 1998* grants the full range of protections, responsibilities and benefits as marriage to same-sex couples. Certain laws were also amended to remedy inequalities with respect to inheritance. In 2001, same-sex couples were also given the right to marry. The only restriction to this relates to the adoption of children.

## Spain

In 2004, the Government of Spain began a process to legalise same-sex marriage in Spain, in addition to adoption by same-sex couples. It was passed by the Cortes (the legislature of Spain) and became legal in 2005. Therefore same-sex couples now enjoy all the rights and responsibilities of marriage. In addition, married gay couples are also entitled to draw a pension after a partner's death, and to divorce.

## Sweden

The Swedish Constitution does not ban discrimination on grounds of 'sexual orientation'. However, in 1987 discrimination against gay men and lesbians was included in the section of the penal code that dealt with discrimination.

Since 1995 it has been possible for same-sex people to register their partnership under the *Registered Partnership Act*. This grants a full range of protections, responsibilities and benefits as marriage, including arrangements for the breakdown of the relationship.

## Norway

Norway's *Registered Partnership Act of 1993* grants the full range of protections, responsibilities and benefits as marriage, including in the event of a breakdown of the relationship.

## Fiji

In 1997, Fiji became the second country in the world to explicitly protect against discrimination based on sexual orientation in its constitution. Article 38(2) of the *Constitution of the Republic of Fiji* bars discrimination based on any 'actual or supposed personal characteristics or circumstances, including ... sexual orientation'.

However, Article 175 of Fiji's *Penal Code* provides for up to 14 years' imprisonment, 'with or without corporal punishment', for 'any person who has carnal knowledge of any person against the order of nature'. Article 177 allows up to five years' imprisonment for 'any male person who, whether in public or private, commits any act of gross indecency with another male person'.

These penal laws are contrary to Fiji's constitution. Existing legislation, both penal and civil, has yet to be revised to conform to Article 38(2) of the *Constitution*. Earlier this year, the Fiji Law Reform Commission declared that it would review the current Penal Code this year.

## New Zealand

In 2004, the New Zealand Parliament passed the *Civil Union Act* to establish the institution of same-sex union for same-sex couples. Civil unions provide virtually the same rights and responsibilities as marriage.

A companion bill, the Relationship (Statutory References) Bill, was passed in 2005, which removed discriminatory provisions on the basis of relationship status from a range of statutes and regulations. As a result of these bills, all couples in New Zealand whether married, in a civil union, or in a *de facto* relationship, now generally enjoy the same rights and undertake the same obligations. These rights extend to social welfare and matrimonial property.

## South Africa

In 1996, South Africa became the first country to include sexual orientation in its Constitution as a status protected from discrimination:

The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin,

colour,<sup>37</sup> sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.<sup>37</sup>

Significant legal progress has followed, including five decisions of the Constitutional Court to set the status of civil unions. Among other things, one of the decisions granted same-sex couples the same financial status to married heterosexual couples and another decision entitled same-sex couples to the same financial benefits as unmarried cohabiting heterosexual couples.<sup>38</sup>

In 2004, the Supreme Court of Appeal obliged the South African Government to extend full civil marriage for same-sex couples. In 2005, after rejecting an appeal by the Department of Home Affairs, the Constitutional Court gave Parliament one year to amend the *Marriage Act* to include same-sex couples.<sup>39</sup>

## United States of America

There are seventeen states of the United States of America along with the District of Columbia that have laws protecting gay and lesbian employees from discrimination. Only five states also prohibit discrimination based on gender identity. There have also been several municipalities across the country that have adopted civil rights ordinances to cover lesbians and gay men in areas such as employment, public accommodations, housing, credit, union practices and education

In terms of same sex financial and workplace entitlements, the critical area in US politics has been the issue of marriage. As of June 2006, 39 states have laws modeled on the federal *Defense of Marriage Act*. The Act defines marriage as an act between heterosexuals and allows a state not to honor a same-sex marriage conducted in another state.

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<sup>37</sup> *Constitution of the Republic of South Africa*, Chp 2, s 9(3).

<sup>38</sup> *Satchwell v. President of Republic of South Africa and another* (July 25, 2002) (6) SA 1 (CC) (re Same-Sex Couple Financial Status); *Satchwell v. President of the Republic of South Africa and another* (March 17, 2003 - re Domestic Partner Benefits).

<sup>39</sup> *Minister of Home Affairs and Another v Fourie and Another*, 1 December 2005, CCT 60/04.

<b>State</b>	<b>Legal Status</b>	<b>Constitutional Amendment</b>
Alabama	Federal Defense of Marriage Act (DOMA) adopted as state law.	No
Alaska	State constitutional amendment to ban gay marriage modeled on DOMA; favorable Court ruling.	Yes
Arkansas	Constitutional amendment to ban gay marriage, civil unions, and partnership benefits.	Yes
Arizona	On 2006 ballot: a constitutional amendment to ban gay marriage, civil unions, and partnership benefits.	No
California	State law banning same-sex marriage on appeal to State Supreme Court.	No
Colorado	Federal DOMA adopted as state law	No
Connecticut	Civil unions put into law in 2005.	No
Delaware	Federal DOMA adopted as state law.	No
Florida	Federal DOMA adopted as state law.	No
Georgia	Constitutional amendment to ban gay marriage, civil unions, and partnership benefits.	Yes
Hawaii	State constitutional amendment, but state also provides some benefits to same-sex partners.	Yes
Idaho	Federal DOMA adopted as state law.	No
Illinois	Federal DOMA adopted as state law.	No
Indiana	Federal DOMA adopted as state law.	No
Iowa	Federal DOMA adopted as state law.	No
Kansas	Federal DOMA adopted as constitutional amendment.	Yes
Kentucky	Constitutional amendment to ban gay marriage, civil unions, and partnership benefits.	Yes
Louisiana	Federal DOMA adopted as state law and constitutional amendment.	Yes
Maine	Federal DOMA adopted as state law.	No
Maryland	In 1973, became the first state to define marriage as being between a man and a woman.	No
Massachusetts	Same-sex marriage upheld by State Supreme Court in November 2003; marriage amendment proposed.	No
Michigan	Constitutional amendment to ban gay marriage, civil unions, and partnership benefits.	Yes
Minnesota	Federal DOMA adopted as state law.	No
Mississippi	Constitutional amendment to ban gay marriage.	Yes
Missouri	Federal DOMA written into constitution in 2004.	Yes
Montana	Constitutional amendment to ban gay marriage.	Yes
Nebraska	Federal DOMA adopted as constitutional amendment.	Yes
Nevada	Federal DOMA adopted as constitutional amendment.	Yes
New Hampshire	State law predates DOMA.	No
New Jersey	State law provides for domestic partner registry.	No
New Mexico	No legislative public policy - 2004 Attorney General ruling defines marriage as being heterosexual.	No
New York	No legislative public policy.	No
North Carolina	Federal DOMA adopted as state law.	No
North Dakota	Constitutional amendment to ban gay marriage, civil unions, and partnership benefits.	Yes
Ohio	Constitutional amendment to ban gay marriage, civil unions, and partnership benefits.	Yes
Oklahoma	Constitutional amendment to ban gay marriage, civil unions, and partnership benefits.	Yes
Oregon	Constitutional amendment to ban gay marriage.	Yes
Pennsylvania	Federal DOMA adopted as state law.	No

Rhode Island	No legislative public policy.	No
South Carolina	Federal DOMA adopted as state law.	No
South Dakota	Federal DOMA adopted as state law.	No
Tennessee	Federal DOMA adopted as state law; state constitutional amendment on track to be ratified by voters in 2006.	No
Texas	Federal DOMA adopted as state law; constitutional amendment in 2005.	Yes
Utah	Voters have ratified state constitutional amendment to ban gay marriage, civil unions, and partnership benefits.	Yes
Vermont	High court allowed the Legislature to ban same-sex marriage as long as it provided for civil unions (2000).	No
Virginia	Federal DOMA adopted as state law.	No
Washington	Marriage is a civil contract between a male and a female who have each attained the age of eighteen years. Two legal challenges.	No
West Virginia	Federal DOMA adopted as state law.	No
Wisconsin	No DOMA but courts have ruled marriage can only occur between a man and a woman. Constitutional Amendment pending.	No
Wyoming	State law prohibiting same-sex marriage pre-dates DOMA.	No

# Appendix Two - Case Summary

PIAC was approached by a client wishing to register her family pursuant to section 10AC of the *Health Insurance Act 1973* (Cth) (***Health Insurance Act***).

Section 10AC provides for the new 'Medicare Safety Net' for registered families, which has been designed to provide an additional rebate over and above the normal Medicare rebate for medical expenses incurred out of hospital, once a threshold amount has been reached. Medicare has always paid an 85% rebate on the schedule fee for treatments out of hospital. However, it has not always covered the amounts over and above the Medicare rebate, ie, out-of-pocket costs. The new safety net system provides that Medicare will continue to pay the 85% rebate on a scheduled fee. In addition, once a registered family spends a threshold amount on out-of-pocket expenses in a calendar year, Medicare will cover 80% of all out-of-pocket costs over and above the rebate, for the rest of that year.

If a family qualifies for family tax benefit part A or is covered by a range of Commonwealth concession cards, the threshold amount is \$300. For all other families, the threshold is \$700 each year.

In section, 10AA members of a family are defined as spouse and children of the person. Spouse is not defined.

PIAC sought Counsel's advice on behalf of its client in relation to the prospects of success of a discrimination complaint under the *Anti Discrimination Act 1977* (NSW), should its client apply to have her same sex partner and her child recognised as a family under the *Health Insurance Act* and be rejected.

Counsel's advice was that as Australian law currently stands:

- The *Health Insurance Act 1973* (Cth) does not permit registration of same-sex partners as a family. This is because registration is available to 'spouses'. 'Spouse' is not defined in the Act. A court or tribunal would most likely interpret 'spouse' to mean a person's husband or wife, or someone of the opposite sex living with a person in a heterosexual relationship.
- Although the *Anti Discrimination Act 1977* (NSW) prohibits discrimination on the ground of homosexuality, its provisions are overridden in this case by the Health Insurance Act. This is because of section 109 of the Constitution, which provides that a federal law overrides a state law to the extent of any inconsistency.

Accordingly, PIAC's client was left without recourse under Australian law.