



CHAPTER 3:

Human Rights Protections for Same-Sex Couples and their Children

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3.1 What is this chapter about?

This chapter explains how the provisions of international human rights treaties protect same-sex couples and their children, in the context of accessing financial and work-related entitlements.

In particular, this chapter focuses on the right to non-discrimination on the grounds of sexual orientation. It also describes how the breach of that right can interfere with a range of other basic human rights, for example, the right to social security.

The chapter also explains how discrimination against parents on the grounds of sexual orientation can impact on the rights of their children. In particular, discrimination against same-sex parents can compromise the protection of the best interests of the child. It can also result in a breach of Australia's obligation to assist both parents in the performance of their common responsibilities.

More specifically, this chapter addresses the following questions:

- Which human rights treaties are relevant to this Inquiry?
- Does the right to non-discrimination protect same-sex couples?
- Can discrimination against same-sex parents interfere with the right to protection of family?
- Can discrimination against same-sex parents interfere with the rights of the child?
- Can discrimination against same-sex parents interfere with the right to social security?
- Can discrimination against same-sex couples interfere with the right to health?
- How are these human rights principles applied in this report?

3.2 Which human rights treaties are relevant to this Inquiry?

Australia is a party to the following major international human rights treaties relevant to this Inquiry:

- *International Covenant on Civil and Political Rights* (ICCPR)
- *Convention on the Rights of the Child* (CRC)
- *International Covenant on Economic, Social and Cultural Rights* (ICESCR)
- International Labour Organisation *Discrimination (Employment and Occupation) Convention 1958* (ILO 111)

Australia has voluntarily agreed to comply with the provisions of all of these treaties. However, a treaty only becomes legally binding in Australia when it is directly incorporated by domestic legislation. A range of Australian laws have sought to incorporate aspects of the ICCPR, CRC, ILO 111 and ICESCR, but none of the treaties have been incorporated in their entirety.

However, the Commonwealth Parliament has enacted the *Human Rights and Equal Opportunity Commission Act 1986* (Cth) (HREOC Act), which empowers the Human Rights and Equal Opportunity Commission (HREOC) to examine whether Australia is complying with its obligations under the ICCPR, the CRC and ILO 111. HREOC also has a statutory responsibility to promote public understanding and acceptance of human rights in Australia.

This Inquiry examines whether Australia's laws relating to financial and work-related entitlements comply with the ICCPR, the CRC and ILO 111 when applied to same-sex couples and their children. The Inquiry also considers the impact of discriminatory laws on the ability of same-sex couples and their children to realise their rights under the ICESCR.

3.2.1 International Covenant on Civil and Political Rights

The ICCPR protects the fundamental civil and political rights of all people. The provisions of the ICCPR which are relevant to this Inquiry are:

- right to non-discrimination (article 2(1))
- right to an effective remedy for a breach of human rights (article 2(3))
- right to the protection of the law without discrimination (article 26)
- right to privacy (article 17)
- right to family (article 23)
- rights of the child (article 24).

The United Nations Human Rights Committee (the Human Rights Committee), is responsible for monitoring compliance with the ICCPR and providing guidance about how to interpret ICCPR rights. HREOC also monitors Australia's compliance with the ICCPR.¹

3.2.2 Convention on the Rights of the Child

The CRC adapts the rights set out in the ICCPR and the ICESCR to the needs of children. It also creates specific rights that recognise children's unique needs. The provisions of the CRC which are relevant to this Inquiry are:

- right to non-discrimination (article 2)
- best interests of the child must be a primary consideration in all decisions about children (article 3)
- right to know and be cared for by parents (article 7)
- right to identity (article 8)
- right to privacy (article 16)
- recognition of parents' joint responsibilities (to be assisted by the state) (article 18)
- best interests of child must be the paramount consideration in adoption (article 21)
- right to the highest attainable standard of health (article 24)

- right to benefit from social security (article 26)
- right to an adequate standard of living (article 27).

The United Nations Committee on the Rights of the Child (the Children's Rights Committee), is responsible for monitoring compliance with the CRC and providing guidance on the interpretation of the CRC. HREOC also monitors Australia's compliance with the CRC.²

The CRC also recognises the special competence of the United Nations Children's Fund (UNICEF) to provide expert advice about the implementation of the CRC.³ The UNICEF *Implementation Handbook for the Convention on the Rights of the Child* (UNICEF Implementation Handbook) helps explain how the CRC's provisions should be interpreted.

3.2.3 International Covenant on Economic, Social and Cultural Rights

The ICESCR is the main treaty dealing with the economic, social and cultural rights of all people. Article 2(1) of the ICESCR requires State Parties to take steps, especially legislative measures, to achieve the progressive realisation of ICESCR rights.

While the ICESCR acknowledges that the obligations of State Parties are subject to 'progressive realisation' and available resources, the obligation of State Parties to undertake to guarantee ICESCR rights without discrimination (article 2(2)) is of immediate effect.⁴

The rights in ICESCR which are relevant to this Inquiry include:

- right to non-discrimination (article 2(2))
- right to just and favourable conditions of work (article 7)
- right to social security (article 9)
- right to protection and assistance for the family (article 10)
- right to an adequate standard of living (article 11)
- the right to health (article 12).

The United Nations Committee on Economic Social and Cultural Rights (the ESCR Committee) monitors compliance with the ICESCR and provides guidance on how countries should interpret the ICESCR.

3.2.4 Discrimination (Employment and Occupation) Convention (ILO 111)

The ILO 111 requires Australia to take all appropriate steps to eliminate discrimination on a range of grounds and ensure equality of opportunity and treatment in employment.

The ILO 111 provides that countries can add to the list of grounds on which discrimination is prohibited. In 1989, Australia added discrimination on the grounds of sexual preference to that list.⁵

Part II, Division 4 of the HREOC Act provides for a range of functions to be exercised by HREOC in relation to ILO 111 discrimination. Those functions include inquiring into acts

or practices that may constitute discrimination in the workplace on the grounds of sexual orientation.⁶

However, while HREOC is empowered to make recommendations to remedy discrimination, including for payment of compensation, these recommendations are not enforceable.⁷

3.3 Does the right to non-discrimination protect same-sex couples?

The right to non-discrimination and the right to equality before the law are fundamental principles of international human rights law.

Laws which have the purpose or effect of denying same-sex couples financial benefits and entitlements available to opposite-sex couples will be discriminatory, unless they serve a legitimate purpose and can be justified on reasonable and objective grounds.

Many of Australia's laws exclude same-sex couples from financial and work-related entitlements and benefits that are enjoyed by opposite-sex couples, for no readily apparent reason.

For example, same-sex couples are not eligible for a range of rebates and tax concessions that are available to opposite-sex couples. There is no justifiable reason for this discrimination.

Discriminatory laws not only interfere with the rights of same-sex couples to enjoy equal protection of the law, they can interfere with the ability of same-sex couples to enjoy many other rights set out in international human rights treaties. These 'flow-on' effects are discussed throughout this chapter.

3.3.1 The umbrella non-discrimination rights in human rights treaties

All of the major human rights treaties begin by stating that all people should enjoy all the rights set out in the treaty without discrimination of any kind. For example, article 2(1) of the ICCPR states that:

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*. (emphasis added)

Similarly, article 2(2) of ICESCR says that all people should enjoy the rights set out in ICESCR without discrimination.

Article 2(1) of the CRC says that all children should enjoy the rights in the CRC 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.

These articles are described as 'umbrella clauses' because they apply to all of the other rights set out in the relevant treaty.⁸ In other words, they require Australia to guarantee all the 'stand alone' rights within a treaty without discrimination.

Where there is discrimination in relation to the recognition or enjoyment of a ‘stand alone’ right, there will be a breach of that stand alone right *in conjunction with* the right to non-discrimination.

For example, if a law denies protection to a same-sex family which is available to an opposite-sex family, this will be a breach of the right to the protection of the family (article 23(1), ICCPR) in conjunction with the right to non-discrimination (article 2(1), ICCPR).

3.3.2 The right to equal protection of the law without any discrimination

In addition to article 2(1) in the ICCPR, article 26 of the ICCPR protects the right to equality before the law and the right to the equal protection of the law without any discrimination.

The right to equality before the law guarantees equality with regard to the enforcement of the law. The right to the equal protection of the law without discrimination is directed at the legislature and requires State Parties to prohibit discrimination.⁹

Article 26 states:

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*. (emphasis added)

Article 26 is broader than article 2(1) because it is a stand alone right which forbids discrimination in *any law* and in *any field regulated by public authorities*, even if those laws do not relate to a right specifically mentioned in the ICCPR.¹⁰

For example, if social security legislation discriminates against same-sex couples it will breach Australia’s obligations under article 26 of the ICCPR even though the legislation relates to social security (which is a right otherwise protected by ICESCR).

3.3.3 Non-discrimination protections for children

Article 2(1) of the CRC provides that Australia must ensure children can enjoy their CRC rights without discrimination. Article 2(2) of the CRC goes a step further and requires Australia to ensure that a child is protected against ‘all forms of discrimination’ based on the status or activities of their parents.

In other words, article 2(2) of the CRC creates a stand alone right which protects children from suffering any discrimination on the basis of the status of their parents – including the sexual orientation of their parents. This is discussed further below in section 3.5.

3.3.4 Non-discrimination protections in the workplace

(a) *Protection from discrimination under ILO 111*

The protection provided by ILO 111 against discrimination is different to the protections in the ICCPR, CRC and ICESCR. This is because ILO 111 focuses purely on non-discrimination in employment and occupation.

Article 1(a) of ILO 111 defines discrimination as:

...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...

Australia has specifically added 'sexual preference' to the grounds of discrimination prohibited under ILO 111.

Article 2 of ILO 111 requires Australia 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 discrimination in respect thereof.

Article 3(b) of ILO 111 requires Australia to enact legislation which reflects this policy of non-discrimination and equal opportunity, while article 3(c) requires Australia to repeal any statutory provisions which are inconsistent with the policy.

(b) Protection from discrimination under ICESCR

Article 7 of ICESCR also specifically protects against non-discrimination in the workplace, by setting out 'the right to fair wages and equal remuneration for work of equal value without distinction of any kind' and providing for 'equal opportunity for everyone to be promoted in employment, subject to no considerations other than those of seniority and competence'.

3.3.5 Protection against discrimination on the grounds of sexual orientation

None of the non-discrimination articles in any of the ICCPR, CRC or ICESCR treaties specifically mention 'sexual orientation' or 'sexuality' in the prohibited grounds of discrimination. However, all of those articles forbid discrimination on the basis of 'sex' or 'other status'. And it appears that the UN treaty bodies interpreting those provisions agree that the right to non-discrimination includes protection from discrimination on the grounds of sexual orientation.

The Human Rights Committee has considered two cases from Australia (*Toonen v Australia* and *Young v Australia*) which make it clear that one or the other of these categories ('sex' or 'other status') protects people from discrimination on the basis of sexual orientation under the ICCPR. These cases are discussed further below.

The *Young* case is particularly relevant to this Inquiry because it is authority for the proposition that a law differentiating between same-sex and opposite-sex de facto couples in accessing financial entitlements will generally be discrimination for the purposes of article 26 of the ICCPR.¹¹

The Human Rights Committee has also emphasised the obligation of all parties to the ICCPR to provide 'effective protection' against discrimination based on sexual orientation.¹²

Further, the ESCR Committee has explicitly stated that discrimination on the grounds of sexual orientation is prohibited under article 2(2) of the ICESCR.¹³ The Committee on the Rights of the Child has also indicated that the CRC prohibits discrimination on the grounds of sexual orientation.¹⁴

3.3.6 ‘Sex’ discrimination vs discrimination on the grounds of an ‘other status’

The cases of *Toonen* and *Young* are authority for the statement that the ICCPR prohibits discrimination on the grounds of sexual orientation. However, neither case clarifies whether the prohibited discrimination is on the basis of ‘sex’ or an ‘other status’.

(a) *Toonen v Australia*

In 1991 Mr Toonen challenged Tasmanian laws which criminalised consensual homosexual acts, even when they occurred in a private home.¹⁵ The Human Rights Committee found that the laws breached the right to privacy (article 17(1) of the ICCPR) and the right to non-discrimination (article 2(1)) of the ICCPR.

The Committee did not make a finding about whether the Tasmanian laws breached the right to equal protection under the law (article 26), since it had already found that there was discrimination in the application of the right to privacy (articles 2(1), 17(1) of the ICCPR).

The Committee found that the reference to ‘sex’ in articles 2(1) and 26 of the ICCPR, includes sexual orientation.¹⁶ However, the Committee did not address whether discrimination on the grounds of sexual orientation might also fall under the ‘other status’ category – despite a specific request by Australia to do so.¹⁷

The Human Rights Committee’s recommendation that the Tasmanian laws be repealed was implemented through the introduction of the *Human Rights (Sexual Conduct) Act 1994* (Cth). This Act was introduced after a constitutional legal battle between Mr Toonen’s partner, Mr Rodney Croome, and the then Tasmanian government.¹⁸

(b) *Young v Australia*

In 1999, Mr Young challenged Commonwealth laws that denied him the right to receive a veterans’ pension because he was gay.¹⁹

Mr Young was in a 38 year relationship with his partner, Mr C, who was a war veteran. When Mr C died, Mr Young applied for a veterans’ pension under the *Veterans’ Entitlements Act 1986* (Cth) (Veterans’ Entitlements Act). The Department of Veterans’ Affairs denied his pension application because a same-sex partner does not qualify as a veteran’s ‘dependant’, even though an opposite-sex de facto partner does qualify.

The Human Rights Committee found no reasonable or objective reasons for denying Mr Young the pension. It concluded that the distinction between the treatment of opposite-sex couples and same-sex couples under the Veterans’ Entitlement Act was discrimination in breach of article 26 of the ICCPR.²⁰

As in the *Toonen* case, the Human Rights Committee did not clarify whether the discrimination in Mr Young’s case was on the basis of ‘sex’ or ‘other status’. The Committee said the following in this regard:

The Committee recalls its earlier jurisprudence that *the prohibition against discrimination under article 26 comprises also discrimination based on sexual orientation...* the Committee finds that [Australia] has violated article 26 of the Covenant by denying [Mr Young] a pension on the basis of his *sex or sexual orientation*.²¹ (emphasis added)

One way of reading this passage is that the Human Rights Committee is suggesting that 'sexual orientation' is a subset of 'sex' discrimination. Another way of reading the passage is that 'sexual orientation' is *either* a subset of 'sex' *or* it is something in addition to 'sex' discrimination, namely discrimination on the grounds of any 'other status'. It is unclear which interpretation was intended by the Committee.

To date, the Committee's recommendation that the Australian government amend the veterans' entitlements law to give Mr Young access to a pension has not been adopted.

(c) 'Other status' is the better approach

Some academics suggest that sexual orientation 'seems more properly classified as an 'other status', rather than as an aspect of one's gender.'²²

In practice it may not matter whether discrimination on the grounds of sexual orientation is included in the 'sex' category or the 'other status' category.

However, in the Inquiry's view, it is preferable to distinguish discrimination on the grounds of sexual orientation from discrimination on the grounds of 'sex'. This is because 'sex' discrimination is more about a person's gender than a person's sexuality.

Confusing discrimination on the basis of 'sexual orientation' with discrimination on the grounds of 'sex' minimises the importance of two very different motivations for discrimination.

For example, if a law provides that gay men can access a veterans' pension but lesbian women cannot, then that law would discriminate against lesbian women because they are *women* in a same-sex relationship, not because they are in a same-sex relationship. This would amount to discrimination on the grounds of their 'sex' not their 'sexual orientation'.

On the other hand, if a law provides that a man in an opposite-sex couple can access the veterans' pension but a man in a same-sex couple cannot, then the discrimination is based on the 'sexual orientation' of the men, not their 'sex'.

Distinguishing between 'sex' discrimination and discrimination on the grounds of 'sexuality' is consistent with the treatment of 'sex' discrimination under Australia's *Sex Discrimination Act 1984* (Cth) (Sex Discrimination Act). The Sex Discrimination Act separates the concept of 'sex' discrimination from the concept of 'marital status' discrimination.²³ However, it must be noted that discrimination on the grounds of 'marital status' under the Sex Discrimination Act does not include discrimination against same-sex couples.

3.3.7 Different treatment is not always discriminatory treatment

Different treatment does not always amount to discriminatory treatment.

The Human Rights Committee's General Comment 18 states that for the purposes of interpreting the scope of both article 2(1) and article 26 of the ICCPR, the term 'discrimination':

...should be understood to imply any distinction, exclusion, restriction or preference which is based on any ground such as race, colour, sex, language, religion, political or other opinion,

national or social origin, property, birth or other status, 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.²⁴ (emphasis added)

This means that different treatment will only be discrimination if its purpose or effect is to harm or deny a person's rights and freedoms.

The Human Rights Committee has also stated if the grounds for treating one group of people differently to another group are:

- reasonable and objective, and
- the aim is to achieve a purpose which is legitimate under the ICCPR

then there may not be any discrimination.²⁵ This reasoning also applies to the CRC, ICESCR and ILO 111.

Therefore, where there is a difference in treatment between same-sex and opposite-sex couples, it is relevant to consider whether:

- the purpose of the different treatment is legitimate under the relevant treaty
- the differentiation is a reasonable and objective way of achieving that purpose
- the differentiation has, or intends, a negative consequence, namely impairing or nullifying a person's rights and freedoms.

(a) *Different treatment of same-sex and opposite-sex de facto couples is discrimination*

The Inquiry has not been presented with any arguments which suggest that the sexual orientation of a couple is a reasonable and objective justification for differential treatment in the area of financial and work-related entitlements.

The Human Rights Committee, the ESCR Committee, the Children's Rights Committee and the European Court of Human Rights have consistently found that discrimination between people on the grounds of sexuality breaches the relevant human rights treaties.²⁶

Thus, the Inquiry has concluded that Australia's obligations under the ICCPR require Australia to remove all distinctions between same-sex couples and opposite-sex couples in the area of accessing financial and work-related entitlements.

(b) *Different treatment of same-sex and married couples may be discrimination*

The Human Rights Committee has considered the issue of same-sex marriage only once.

In the case of *Joslin v New Zealand* the Committee found that 'a mere refusal to provide for marriage between homosexual couples' does not violate the State Party's obligations under the ICCPR.²⁷

However, if denying the right to marry results in discrimination in the area of financial and work-related entitlements then there may still be a breach of international law.²⁸

Discrimination could occur if financial entitlements and benefits are only available to married couples (and not to de facto opposite-sex couples or same-sex couples). This is

because same-sex couples are unable to meet the threshold requirement (marriage) of accessing the benefits, if same-sex couples cannot marry.

For example, if financial entitlements are only available to a married couple, an opposite-sex couple has the option to marry and therefore obtain those benefits. But a same-sex couple can never obtain those entitlements because they can not meet the 'marriage' requirement.²⁹ This is a form of 'indirect discrimination'.³⁰

In practice, most Australian laws treat married and de facto couples in the same way. Thus this form of discrimination does not frequently arise. However, in those areas where married and de facto couples do have different access to financial entitlements, there will be discrimination against same-sex couples.

3.3.8 The right to a remedy when there is discrimination

Article 2(3) of the ICCPR requires Australia to ensure that same-sex couples can access 'effective remedies' to address human rights violations.³¹

An 'effective remedy' must be enforceable and requires 'reparation to individuals whose Covenant rights have been violated'.³² A failure to investigate allegations of violations can in itself give rise to a separate breach of the ICCPR.³³

A number of submissions to the Inquiry observed there are no effective federal remedies available to people who experience discrimination on the grounds of sexual orientation.³⁴

In particular, discrimination on the grounds of sexual orientation is not unlawful discrimination under federal discrimination law.³⁵

The *Workplace Relations Act 1996* (Cth) makes it unlawful to dismiss someone because of their sexual preference, or for reasons which include their sexual preference.³⁶ While this provides effective remedy for a person who is dismissed on the grounds of their sexual orientation, the remedy is limited to discrimination in the context of dismissal from employment.³⁷

HREOC can investigate discrimination on the grounds of sexual orientation under its statutory powers to:

- investigate complaints of breaches of 'human rights'³⁸ or ILO 111 discrimination³⁹
- determine if laws are inconsistent with human rights⁴⁰ or equal opportunity and treatment in employment⁴¹
- report to the Minister about any action needed to comply with human rights obligations⁴² or ensure equal treatment and opportunity in employment.⁴³

However, HREOC cannot enforce any recommended remedies. The Human Rights Committee has confirmed that this means complaints to HREOC can not be characterised as effective remedies as defined by article 2(3) of the ICCPR.⁴⁴

Where a same-sex couple experiences discrimination and there is no effective remedy for that discrimination, there will be a breach of article 2(3) of the ICCPR.

3.4 Can discrimination against same-sex parents interfere with the right to protection of family?

Some of the laws examined by this Inquiry reflect a narrow view about what constitutes a legitimate family. The failure to include same-sex couples and their children within the definitions of ‘spouse’, ‘member of a couple’, ‘child’, ‘dependant’ and so on, means that that same-sex families miss out on tax, social security, superannuation, Medicare, aged care and other federal financial benefits which are designed to assist members of the legally defined ‘family’, and are available to opposite-sex parents and their children.

The failure to recognise the lesbian co-mother or gay co-father is particularly problematic for same-sex couples who face confusion and uncertainty when attempting to access the financial entitlements available to parents in an opposite-sex couple.

3.4.1 Same-sex families are protected by human rights law

The ICCPR, the CRC and the ICESCR all place a positive obligation on Australia to protect the rights of the family.

The concept of family means different things to different people. But the Human Rights Committee takes the view that the term ‘family’ is not confined by the concept of marriage⁴⁵ and should be interpreted broadly to include a wide variety of living arrangements.⁴⁶

The Human Rights Committee has also stated that when a group of persons is regarded as a family under the legislation and practises of a particular country, that family must be protected under the ICCPR.⁴⁷ A country’s laws cannot:

- Limit the definition of ‘family’ by applying structures or values which breach international human rights standards; nor
- Prescribe a narrower definition of ‘family’ than that adopted within that country’s society.⁴⁸

The Human Rights Committee has set out some minimal requirements for the existence of family including ‘life together, economic ties, [and] a regular and intense relationship’ however it has not sought to impose any strict definitional criteria on the concept of family.⁴⁹

The Committee on the Rights of the Child has also emphasised that the definition of ‘family’ is flexible, stating:

When considering the family environment, the Convention reflects different family structures arising from various cultural patterns and emerging familial relationships. In this regard, the Convention refers to the extended family and the community and applies in situations of nuclear family, separated parents, single-parent family, common-law family and adoptive family.⁵⁰

While none of these statements explicitly include same-sex families, this Inquiry takes the view that same-sex couples and their children are families in the same way as opposite-sex couples and their children are families. This view reflects both the social reality of Australian society (around 20% of lesbians and 5% of gay men in Australia have children)⁵¹ and the broad and flexible definition of family adopted by United Nations treaty bodies.

The Inquiry has received submissions suggesting that same-sex couples and their children should not be recognised as families. The Inquiry rejects this view as contrary both to human rights principles and the reality of modern Australian society.

3.4.2 Discrimination against same-sex couples and parents can interfere with the right to protection of family

Where there is discrimination against same-sex couples or same-sex parents, this may impact on the right to protection of the family as a whole.

Failing to provide protection to a family on the basis of the sexual orientation of one or both parents may result in a breach of article 23(1) of the ICCPR in conjunction with article 2(1).

Further, the ICESCR requires Australia to provide ‘the widest possible protection and assistance’ to the family, ‘particularly for its establishment and while it is responsible for the care and education of dependent children’ (ICESCR, article 10). This includes taking ‘special measures of protection and assistance on behalf of all children and young persons without any discrimination for reasons of parentage or other conditions’.

Denying protection and assistance to same-sex families which is available to opposite-sex families, will breach article 10 in conjunction with article 2(2).

3.4.3 Discrimination against same-sex couples and parents can interfere with the right to privacy, family and home

Laws which interfere with the privacy, family life or home life of same-sex couples or their children, on the basis of the sexual orientation of one or both of the parents, may give rise to a breach of the ICCPR (articles 2(1) and 17) or the CRC (articles 2 and 16).

The ICCPR protects against certain types of interference with a person’s privacy, family and home. Specifically, article 17(1) of the ICCPR states that:

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. (emphasis added)

Article 16(1) of the CRC uses the same language to protect children from arbitrary or unlawful interference with their privacy, family and home.

As noted earlier, the term ‘family’ has been interpreted broadly to ‘include all those comprising the family as understood in the society of the State party concerned.’⁵²

Further, the concept of ‘arbitrary’ interference protects against situations where ‘lawful’ interference contravenes the provisions of the ICCPR.⁵³ In other words, it contemplates a situation where the law itself is the problem.

(a) Examples of the breach of the right to privacy

As noted in section 3.3.6, in the *Toonen* case the Human Rights Committee found that Tasmanian laws criminalising consensual homosexual activity breached the right to privacy

under article 17(1) of the ICCPR. The Committee rejected the argument that the laws were justified on the grounds of public health and morals.⁵⁴

The European Court of Human Rights has also held that laws setting a different age of sexual consent for homosexual activity than heterosexual activity violate the right to privacy (article 8) and the non-discrimination provision of the *European Convention on Human Rights* (ECHR) (article 14).⁵⁵ Article 8 and article 14 of the ECHR substantially reflect articles 2 and 17 of the ICCPR.

(b) Example of the breach of the right to family life

In 1999 the European Court of Human Rights held that a court's decision to deny a gay man custody of his child on the basis of his sexual orientation constituted an interference with the man's family life contrary to article 8 of the ECHR in conjunction with the non-discrimination provision of the ECHR (article 14).⁵⁶

(c) Example of the breach of the right to home life

In 2003 the European Court of Human Rights held the decision to deny a gay man the right to continue occupying his deceased partner's flat (a right available to opposite-sex de facto partners) violated article 8 (respect for home life) and article 14 (non-discrimination) of the ECHR.⁵⁷

3.5 Can discrimination against same-sex parents interfere with the rights of the child?

The lives of children are inextricably bound up with the lives of their parents. The Committee on the Rights of the Child has recognised that 'the human rights of children cannot be realized independently from the human rights of their parents, or in isolation from society at large'.⁵⁸

The exclusion of certain same-sex parents from financial benefits and entitlements may have a negative impact on that family's capacity to protect the best interests of the child.

For example, a child born to a lesbian couple through assisted reproductive technology will not be recognised as the child of the lesbian co-mother under income tax law. This may mean that the lesbian parents will miss out on tax benefits intended to help families support their children.

3.5.1 Discrimination against same-sex parents can amount to discrimination against a child

The CRC requires Australia to ensure that all children can enjoy their rights without discrimination. In particular, Australian children should not suffer any discrimination on the basis of the 'status' of their parents or legal guardians. Article 2(2) of the CRC reads as follows:

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.

The scope of article 2(2) is very broad and requires State Parties to protect the child from discrimination *regardless* of whether such discrimination is related to a right under the CRC.⁵⁹

The Committee on the Rights of the Child has expressly stated that:

- Discrimination on the basis of sexual orientation is discrimination for the purpose of article 2.⁶⁰
- Direct and indirect discrimination against children, their parents, or legal guardians will breach article 2 of the CRC.⁶¹

The Committee on the Rights of the Child has expressed concern that:

[Y]oung children may...suffer the consequences of discrimination against their parents, for example if children have been born out of wedlock or in other circumstances that deviate from traditional values, or if their parents are refugees or asylum seekers.⁶²

In evidence to the Inquiry, Mr Philip Lynch, Director and Principal Solicitor of the Human Rights Resource Law Centre argued:

...discrimination against the same-sex parents or guardians of a child which has an adverse impact on the child (eg, parents unable to access a particular financial entitlement which would have been of benefit to the parents and, by extension, the child) directly engages and violates art 2(2) of the CRC.⁶³

In this Inquiry's view, when laws relating to financial and work-related entitlements of same-sex couples disadvantage the children of those couples, when compared with children of opposite-sex couples, those laws may breach article 2(2) of the CRC.

3.5.2 Discrimination against same-sex parents can interfere with the best interests of the child

The best interests principle set out in article 3(1) is one of the core principles of the CRC.⁶⁴ It provides that:

In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, *the best interests of the child shall be a primary consideration.* (emphasis added)

The best interests principle requires parliament, the executive (including private institutions acting on their behalf) and the judiciary to ensure that the best interests of the child are a primary consideration in all actions concerning children.

Laws which discriminate against same-sex parents may have a negative impact on that couple's child. If such a negative impact is a reasonably foreseeable outcome of a particular law it suggests that the best interests of the child were not a primary consideration in the decision to enact such legislation.

For example, minimum workplace entitlements for Australian employees include parental leave. However, parental leave is only guaranteed to the male partner of a woman who has just given birth. This means that there is no guarantee that a lesbian co-mother can take leave to help her partner through the birth of her child and the first weeks of the child's life.

Given that the purpose of parental leave is to enable a parent to care for a newly born child, and to assist his or her partner in this task, the decision to deny leave to a parent in a same-sex couple does not appear to take into account the best interests of the child as a primary consideration. Such laws are in breach of article 3(1) in conjunction with article 2 of the CRC.

3.5.3 Discrimination against same-sex parents can interfere with the performance of their common responsibilities

Under the CRC Australia is obliged to respect and assist the role of a child's parents in protecting the best interests of the child.

Article 18(1) of the CRC expands on the concept of the responsibilities of parents and requires State Parties to:

...use their best efforts to ensure recognition of the principle that both parents have common responsibilities for the upbringing and development of the child. Parents or, as the case may be, legal guardians, have the primary responsibility for the upbringing and development of the child. The best interests of the child will be their basic concern. (emphasis added)

Article 18(2) goes a step further and imposes an obligation on State Parties to provide appropriate assistance to parents and legal guardians in the performance of their child-rearing responsibilities. The purpose of this assistance is to guarantee and promote all the rights set out in the CRC. Relevantly, article 18(2) states:

For the purpose of guaranteeing and promoting the rights set forth in the present Convention, States Parties shall render appropriate assistance to parents and legal guardians in the performance of their child-rearing responsibilities and shall ensure the development of institutions, facilities and services for the care of children. (emphasis added)

While the UNICEF Implementation Handbook does not specifically refer to the responsibilities and rights of parents in a same-sex couple, it states:

Under the terms of article 18, the law must recognise the principle that **both** parents have **common** responsibility... Government measures should be directed at supporting and promoting the viability of joint parenting. (emphasis in original)⁶⁵

Laws denying benefits and entitlements to a same-sex parent, which are otherwise available to an opposite-sex parent, will breach article 18, in conjunction with article 2 of the CRC.

Further, laws which fail to recognise the lesbian co-mother or gay co-father of a child may breach the obligation to recognise the 'common responsibilities' of 'both parents' under article 18(1).

3.5.4 Discrimination against same-sex parents can interfere with a child's right to identity

The CRC recognises the importance of family relations in forming and preserving the identity of the child.

(a) *A child's right to know and be cared for by his parents*

Under article 7(1) of the CRC a child has a right to be:

...registered immediately after birth and shall have the right from birth to a name, the right to acquire a nationality and, *as far as possible, the right to know and be cared for by his or her parents.* (emphasis added)

Article 7(1) of the CRC reflects the text of article 24(2) of the ICCPR which provides that 'every child shall be registered immediately after birth and shall have a name'. The Human Rights Committee has stated article 24(2) 'is designed to promote the child's legal personality'.⁶⁶

Part of the registration process is to note the parents of the child. This ensures that parents take responsibility for the child and recognises the importance of parents in the development, well-being and maintenance of the child.⁶⁷

There are some Australian states which allow the registration of a lesbian couple on a child's birth certificate and other states which do not. Those states which do not recognise both same-sex parents of a child, in circumstances where both of the heterosexual parents would be recognised, may be in breach of article 7 of the CRC, either independently or in conjunction with article 2. This is discussed further in Chapter 5 on Recognising Children.

(b) *A child's right to preserve his or her identity*

Article 8(1) of the CRC reads as follows:

States Parties undertake to respect the right of the child to preserve his or her identity, including nationality, name and family relations as recognized by law without unlawful interference.

While the UNICEF Implementation Handbook observes the legal meaning of the phrase 'family relations recognised by law' is unclear, it recognises that a child's sense of identity depends on more than just knowing his or her biological parents.⁶⁸

In terms of a child's right to know his or her parents under article 7 and the child's right to preserve his or her identity under article 8, the definition of 'parents' has been interpreted broadly to include, genetic parents, birth parents and psychological parents.⁶⁹

The UNICEF Implementation Handbook states that:

...psychological parents – those who cared for the child for significant periods during infancy and childhood – should also logically be included [in the definition of parents] since these persons too are intimately bound up in children's identity and thus their rights under article 8.⁷⁰

Thus, in the Inquiry's view, the lesbian co-mother or gay co-father of a child should be included under the CRC definition of 'parents'. If an Australian law fails to recognise the

potential significance of such a person it may deny the child's right to know his or her 'psychological parent' or interfere with a child's sense of identity.

For example, the lesbian co-mother of a child born through assisted reproductive technology is not automatically recognised as a parent under the *Family Law Act 1975* (Cth). If the parents separate, the legal rights of the lesbian co-mother may not be recognised. To the extent that this failure to recognise parental status may lead to interference with a child's sense of identity, article 8 may be breached in conjunction with article 2 of the CRC.

3.5.5 Discrimination against same-sex couples in adoption can interfere with the best interests of the child

Article 21 of the CRC requires countries which permit adoption to make sure that the best interests of the child are 'the paramount consideration' in the adoption process. This requirement is even stronger than the principle in article 3(1) of the CRC which requires a child's best interests to be 'a primary consideration'.

The UNICEF Handbook states that article 21 of the CRC establishes that 'no other interests, whether economic, political, state security or those of the adopters, should take precedence over, or be considered equal to, the child's'. This means that 'any regulation [that] fetters the principle could lead to a breach of the Convention – for example inflexible rules about the adopters, such as the setting of age limits...'⁷¹

Australian laws restricting adoption rights to heterosexual individuals or couples may breach article 21 of the CRC in conjunction with article 2. This is because a blanket ban on adoption by same-sex couples prevents an objective case-by-case assessment of what is in an individual child's best interests.

As discussed further in Chapter 5 on Recognising Children, discrimination against same-sex couples in adoption may also lead to discrimination in access to financial entitlements for the benefit of the family. This is because some financial benefits are only available to the birth parents or adoptive parents.

3.6 Can discrimination against same-sex couples interfere with the right to social security?

Most federal social security laws in Australia do not recognise same-sex couples as a genuine relationship.⁷² In some circumstances, this can result in a financial disadvantage for same-sex couples. In other circumstances same-sex couples may receive a financial advantage.

3.6.1 Social security has a broad definition in human rights law

Article 9 of the ICESCR recognises the 'right of everyone to social security, including social insurance'.

According to the ESCR Committee and the ILO, social security includes:

- medical care
- sickness benefits
- unemployment benefits
- old-age benefits
- employment injury benefits
- family benefits
- maternity benefits
- invalidity benefits
- survivors benefits.⁷³

The ESCR Committee draft General Comment on social security confirms the broad scope of the right to social security, stating:

The right to social security covers the right to access benefits, through a system of social security, in order to secure (i) income security in time of economic or social distress; (ii) access to health care and (iii) family support, particularly for children and adult dependants. Economic and social distress includes the interruption of earnings through sickness, maternity, employment injury, old age, invalidity or disability, death or other factor that is either beyond the person's control or would be otherwise inconsistent with the principle of human dignity.⁷⁴

Consistent with the broad scope right to social security, this Inquiry considers the right to social security without discrimination is relevant to the discussions in the following chapters:

- Chapter 8 on Tax
- Chapter 9 on Social Security
- Chapter 10 on Veterans' Entitlements
- Chapter 12 on Health Care
- Chapter 13 on Superannuation.

3.6.2 Discrimination against same-sex couples can interfere with the right to social security

The ESCR Committee's draft General Comment on the interpretation of the right to social security states that the ICESCR:

...prohibits any discrimination on the grounds of race, colour, sex...*sexual orientation* and civil, political, social or *other status*, which has the intention or effect of nullifying or impairing the equal enjoyment or exercise of the right to social security (emphasis added).⁷⁵

The ESCR Committee has also recognised the importance of social security benefits to families, stating that 'family benefits should be provided to families, without discrimination on prohibited grounds.'⁷⁶

The ESCR Committee has urged State Parties to actively take steps to remove discrimination on prohibited grounds, stating '[r]estrictions on access to social security schemes, particularly benefits, should also be reviewed to ensure that they do not discriminate in law or in fact'.⁷⁷

Therefore, excluding same-sex couples from social security benefits may breach the right to social security in article 9 of the ICESCR in conjunction with article 2(2).

3.6.3 Discrimination against same-sex parents can impact on a child's right to benefit from social security

Article 26(1) of the CRC reads as follows:

States Parties shall recognize for every child the right to benefit from social security, including social insurance, and shall take the necessary measures to achieve the full realization of this right in accordance with their national law.

The right of a child to *benefit from* social security under article 26 can be distinguished from article 9 of ICESCR, which recognises a right *to* social security. This distinction 'reflects the fact that children's economic security is generally bound up with that of their adult caregivers'.⁷⁸

As noted above, Australian social security laws do not generally recognise same-sex couples. Given that a child's right to benefit from social security is often inextricable from the rights of his or her parents, legislation which discriminates against same-sex couples or parents, generally also discriminates against a child of the couple. On this basis, Australia may be in breach of article 26 in conjunction with article 2(1) of the CRC.

3.7 Can discrimination against same-sex couples interfere with the right to health?

Australian laws which provide health care and medicine subsidies currently discriminate against same-sex couples. This can have a negative impact on the ability of same-sex couples and families to access health care and medicines.

3.7.1 Discrimination against same-sex couples can interfere with the right to health

Article 12 of ICESCR 'recognises the right of everyone to the enjoyment of the highest attainable standard of physical and mental health'.

The right to health is 'understood as the right to the enjoyment of a variety of facilities, goods, services and conditions necessary for the highest attainable standard of health'.⁷⁹

Article 2 of ICESCR requires that the enjoyment of the rights set out in the ICESCR, including the right to health, must occur without discrimination. The ECSR Committee has expressly stated that the ICESCR:

Proscribes any discrimination in access to health care and underlying determinants of health, as well as to means and entitlements for their procurement, on the grounds of race, colour, sex...sexual orientation... which has the intention or effect of nullifying or impairing the equal enjoyment or exercise of the right to health.⁸⁰

Australian laws denying equal access to financial entitlements which help cover the cost of health care may act as a financial barrier to same-sex couples accessing health care.

This may contravene the right of people in same-sex families to enjoy 'the highest attainable standard of physical and mental health' without discrimination (article 2).

3.7.2 Discrimination against same-sex parents can interfere with a child's right to health

Like article 12 of ICESCR, article 24(1) of the CRC protects the rights of the child to access the highest attainable standard of health.

The Committee on the Rights of the Child has expressed concern about the impact that discrimination, including discrimination on the grounds of sexual orientation, can have on the physical and mental health of the child.⁸¹

The CRC requires Australia to ensure that no child suffers discrimination in the provision of health care as a result of the sexual orientation of the child's parents or legal guardian, or indeed the sexual orientation of the child.

This means that if a same-sex couple is discriminated against in the provision of health services and this discriminatory treatment has a negative impact on the child's capacity to enjoy the 'highest attainable standard of health', there may be a breach of article 24(1) in conjunction with article 2(1).

3.8 How are these human rights principles applied in this report?

This chapter explains the human rights principles applied in the remainder of this report.

The emphasis of this report is on the right to non-discrimination because, as one commentator observed, 'discrimination is at the root of virtually all human rights abuses.'⁸²

Therefore, each of the following chapters identifies whether and how the specific laws breach the right to protection of the law without discrimination on the grounds of sexual orientation. If such discrimination is identified, the Inquiry then examines the impact of that discrimination on other rights protected by the ICCPR, the CRC and the ICESCR.

The findings in each chapter are summarised in the final Chapter 18.

Endnotes

- 1 Since 1986, HREOC has had the powers to investigate alleged violations of the ICCPR, although it has no power of penalty or enforcement. HREOC also has other powers to monitor Australia's compliance with the ICCPR, including the power to examine where federal legislation complies with Australia's obligations under the ICCPR. See *Human Rights and Equal Opportunity Commission Act 1986* (Cth), s 11(1)(e), s 11(1)(f).
- 2 Since 1986, HREOC has had the powers to investigate alleged violations of the CRC, although it has no power of penalty or enforcement. HREOC also has other powers to monitor Australia's compliance with the CRC, including the power to examine where federal legislation complies with Australia's obligations under the CRC. See *Human Rights and Equal Opportunity Commission Act 1986* (Cth), s 11(1)(e), s 11(1)(f).
- 3 *Convention on the Rights of the Child*, article 45.
- 4 ESCR Committee, General Comment 3, (1990), para 1, in *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, UN Doc HRI/GEN/1/Rev.8 (2006) at 15.
- 5 The Human Rights and Equal Opportunity Regulations specifically state that for the purposes of the *Human Rights and Equal Opportunity Commission Act*, 'discrimination' includes discrimination on the grounds of sexual preference. See Human Rights and Equal Opportunity Commission Regulations 1989 (Cth), No 407 4(a)(ix).
- 6 *Human Rights and Equal Opportunity Commission Act 1986* (Cth), s 31(b), 32(1).
- 7 *Human Rights and Equal Opportunity Commission Act 1986* (Cth), s 35(2).
- 8 Manfred Nowak, *UN Covenant on Civil and Political Rights: CCPR Commentary*, N.P. Engel, Strasbourg, 1993, p28.
- 9 Manfred Nowak, *UN Covenant on Civil and Political Rights: CCPR Commentary*, N.P. Engel, Strasbourg, 1993, p473; See also S Joseph, M Castan and J Schultz, *The International Covenant on Civil and Political Rights: Cases, Materials and Commentary*, 2nd ed, Oxford University Press, 2004, p686, para [23.11].
- 10 Human Rights Committee, General Comment 18, (1989), para 12, in *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, UN Doc HRI/GEN/1/Rev.8 (2006) at 185. See also *Broeks v Netherlands*, Communication No 172/1984, UN Doc CCPR/C/OP/2 at 196 (1990).
- 11 See also Human Rights Law Resource Centre, Submission 160.
- 12 Concluding observations of the Human Rights Committee: *El Salvador*, CCPR/CO/78/SLV (2003) at para 16; Concluding observations of the Human Rights Committee: *Philippines*, CCPR/CO/79/PHL (2003) at para 18; Concluding observations of the Human Rights Committee: *United Kingdom of Great Britain and Northern Ireland (Hong Kong)*, CCPR/C/79/Add.57 (1995) at para 13; Concluding observations of the Human Rights Committee: *Poland*, CCPR/C/79/Add.110 (1999) at para 23.
- 13 ESCR Committee, General Comment 18, (2005), para 12(b)(i), in *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, UN Doc HRI/GEN/1/Rev.8 (2006) at 151. See also ESCR Committee, General Comment 14, (2000), para 18, in *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, UN Doc HRI/GEN/1/Rev.8 (2006) at 91.
- 14 Committee on the Rights of the Child, General Comment 3, (2003), para 6, in *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, UN Doc HRI/GEN/1/Rev.8 (2006) at 365.
- 15 *Toonen v Australia*, (488/92) UN Doc. CCPR/C/50/D/488/92, para 2.1.
- 16 *Toonen v Australia*, (488/92) UN Doc. CCPR/C/50/D/488/92, para 8.7.
- 17 *Toonen v Australia*, (488/92) UN Doc. CCPR/C/50/D/488/92, para 8.7.
- 18 *Croome v Tasmania* (1997) 191 CLR 119.
- 19 *Young v Australia*, (941/2000) UN Doc. CCPR/C/78/D/941/2000, para 10.4.
- 20 *Young v Australia*, (941/2000) UN Doc. CCPR/C/78/D/941/2000, para 10.4.
- 21 *Young v Australia*, (941/2000) UN Doc. CCPR/C/78/D/941/2000, para 10.4.

- 22 S Joseph, M Castan and J Schultz, *The International Covenant on Civil and Political Rights: Cases, Materials and Commentary*, 2nd ed, Oxford University Press, 2004, p691, para [23.25]. See also, Castan Centre for Human Rights Law, Submission 126.
- 23 *Sex Discrimination Act 1984* (Cth), ss 5-6.
- 24 Human Rights Committee, General Comment 18, (1989), para 7, in *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, UN Doc. HRI/GEN/1/Rev.8 (2006) at 187.
- 25 Human Rights Committee, General Comment 18, (1989), para 13, in *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, UN Doc. HRI/GEN/1/Rev.8 (2006) at 188. See also *Young v Australia*, (941/2000) UN Doc. CCPR/C/78/D/941/2000, para 10.4.
- 26 The European Court of Human Rights has held that differential treatment based on sexual orientation requires 'particularly serious reasons by way of justification' and must respect the principle of proportionality. See *Karner v Austria* [2003] ECHR 395, 37, 40.
- 27 *Joslin v New Zealand*, (902/1999) UN Doc. CCPR/C/75/D/902/1999.
- 28 In *Joslin*, the separate but concurring opinion of Messrs Lallah and Scheinin noted that 'a denial of certain rights or benefits to same-sex couples that are available to married couples may amount to discrimination prohibited under article 26, unless otherwise justified on reasonable and objective criteria'. See *Joslin v New Zealand*, (902/1999) UN Doc. CCPR/C/75/D/902/1999.
- 29 The Human Rights Committee has held that differential access to benefits available to a married couple and an opposite-sex de facto couple may be reasonable and objective because the opposite-sex de facto couple has the *choice* to marry and access the benefits. See *Young v Australia*, (941/2000) UN Doc. CCPR/C/78/D/941/2000, para 10.4.
- 30 Indirect discrimination occurs when there is a requirement or condition or practice that is the same for everyone but has an unfair effect on a particular group of people. Direct and indirect discrimination are prohibited by the ICCPR.
- 31 Human Rights Committee, General Comment 31, (2004), para 15 in *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, UN Doc HRI/GEN/1/Rev.8 (2006) at 237.
- 32 Human Rights Committee, General Comment 31, (2004), para 16 in *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, UN Doc HRI/GEN/1/Rev.8 (2006) at 237.
- 33 Human Rights Committee, General Comment 31, (2004), para 15 in *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, UN Doc HRI/GEN/1/Rev.8 (2006) at 237.
- 34 See for example Equal Opportunity Commission of Western Australia, Submission 342; Equal Opportunity Commission of Victoria, Submission 327.
- 35 Both the *Charter of Human Rights and Responsibilities Act 2006* (Vic) and the *Human Rights Act 2004* (ACT) prohibit discrimination on the grounds of sexual orientation: see *Charter of Human Rights and Responsibilities Act 2006* (Vic), s 3; *Human Rights Act 2004* (ACT), s 8.
- 36 *Workplace Relations Act 1996* (Cth), s 659.
- 37 The *Workplace Relations Act 1996* (Cth) also directs the Australian Industrial Relations Commission, the Australian Fair Pay Commission and the Office of the Employment Advocate to take into account the need to prevent and eliminate discrimination on a range of grounds, including 'sexual preference': *Workplace Relations Act 1996* (Cth), ss 104(b), 222(1)(e), 151(3)(b), 568(2)(e). The *Workplace Relations Act 1996* (Cth) also provides that awards or award-related orders also must not discriminate on the grounds of 'sexual preference'.
- 38 *Human Rights and Equal Opportunity Commission Act 1986* (Cth), s 11(1)(f).
- 39 *Human Rights and Equal Opportunity Commission Act 1986* (Cth), ss 31(b), 32(1).
- 40 *Human Rights and Equal Opportunity Commission Act 1986* (Cth), s 11(1)(e).
- 41 *Human Rights and Equal Opportunity Commission Act 1986* (Cth), s 31(a).
- 42 *Human Rights and Equal Opportunity Commission Act 1986* (Cth), s 11(1)(j).
- 43 *Human Rights and Equal Opportunity Commission Act 1986* (Cth), s 31(f).

- 44 *C. v Australia*, (900/1999) UN Doc. CCPR/C/76/D/900/1999, para 7.3.
- 45 *Hendriks v Netherlands*, (201/85) UN Doc. CCPR/C/33/D/201/1985, para 10.3. See also S Joseph, J Schultz and M Castan, *The International Covenant on Civil and Political Rights: Cases, Materials and Commentary*, Oxford University Press (2004), p588.
- 46 Human Rights Committee, General Comment 16, (1988), para 5, in *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, UN Doc. HRI/GEN/1/Rev.8 (2006), at 182.
- 47 Human Rights Committee, General Comment 19, (1990), para 2 in *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, UN Doc. HRI/GEN/1/Rev.8 (2006) at 188.
- 48 S Joseph, M Castan and J Schultz, *The International Covenant on Civil and Political Rights: Cases, Materials and Commentary*, 2nd ed, Oxford University Press, 2004, p587, para [20.06].
- 49 *Balaguer Santacana v Spain*,(417/90) UN Doc. CCPR/C/51/D/417/1990, para 10.2.
- 50 Committee on the Rights of the Child, *Report on the fifth session, January 1994*, UN Doc. CRC/C/24/Annex V, p 63. See also discussion in R Hodgkin and P Newell, *Implementation Handbook for the Convention on the Rights of the Child*, UNICEF (2002), p88.
- 51 Australian Bureau of Statistics, *Year Book Australia*, 'Same-Sex Couple Families', p142 (2005).
- 52 Human Rights Committee, General Comment 16, (1988), para 5, in *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, UN Doc. HRI/GEN/1/Rev.8 (2006) at 182.
- 53 Human Rights Committee, General Comment 16, (1988), para 4, in *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, UN Doc. HRI/GEN/1/Rev.8 (2006) at 182.
- 54 *Toonen v Australia*, (488/92) UN Doc. CCPR/C/50/D/488/92, paras 8.4 - 8.6.
- 55 *BB v The United Kingdom* [2004] ECHR 65.
- 56 *Salgueiro da Silva Mouta v Portugal* [1999] ECHR 176
- 57 *Karner v Austria* [2003] ECHR 395.
- 58 Concluding Observations of the Committee on the Rights of the Child: *Uzbekistan*, CRC, CRC/C/111 (2001) 117, para 558.
- 59 R Hodgkin and P Newell, *Implementation Handbook for the Convention on the Rights of the Child*, UNICEF (2002), p35.
- 60 Committee on the Rights of the Child, General Comment 3, (2003), in *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, UN Doc HRI/GEN/1/Rev.8 (2006), at 363; Committee on the Rights of the Child, General Comment 4 (2003), in *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, UN Doc HRI/GEN/1/Rev.8 (2006) at 376.
- 61 Concluding Observations of the Committee on the Rights of the Child: *Libyan Arab Jamahiriya*, CRC, CRC/C/132 (2003) 100 at para 368; Concluding Observations of the Committee on the Rights of the Child: *Morocco*, CRC, CRC/C/132 (2003) 100 at para 479.
- 62 Committee on the Rights of the Child, General Comment 7, (2003), para 12, in *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, UN Doc HRI/GEN/1/Rev.8 (2006), at 437.
- 63 Phillip Lynch, Melbourne Hearing, 27 September 2006.
- 64 R Hodgkin and P Newell, *Implementation Handbook for the Convention on the Rights of the Child*, UNICEF (2002), p39.
- 65 R Hodgkin and P Newell, *Implementation Handbook for the Convention on the Rights of the Child*, UNICEF (2002), p249.
- 66 Human Rights Committee, General Comment 17, (1989), para 7, in *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, UN Doc. HRI/GEN/1/Rev.8 (2006) at 185.
- 67 R Hodgkin and P Newell, *Implementation Handbook for the Convention on the Rights of the Child*, UNICEF (2002), p112.

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- 68 R Hodgkin and P Newell, *Implementation Handbook for the Convention on the Rights of the Child*, UNICEF (2002), p125.
- 69 R Hodgkin and P Newell, *Implementation Handbook for the Convention on the Rights of the Child*, UNICEF (2002), p117.
- 70 R Hodgkin and P Newell, *Implementation Handbook for the Convention on the Rights of the Child*, UNICEF (2002), p117.
- 71 R Hodgkin and P Newell, *Implementation Handbook for the Convention on the Rights of the Child*, UNICEF (2002), p296.
- 72 *Social Security Act 1991* (Cth), s 4(2).
- 73 For the purpose of monitoring State Parties' compliance with article 9 of the ICESCR, the ESCR Committee has adopted the same categories of social security set out in the ILO Social Security (Minimum Standards) Convention 1952 (No.102) (ILO 102).
- 74 ESCR Committee, *Draft General Comment 20*, (2006) UN Doc. E/C.12/GC/20/CRP.1, p1.
- 75 ESCR Committee, *Draft General Comment 20*, (2006) UN Doc. E/C.12/GC/20/CRP.1, p5.
- 76 ESCR Committee, *Draft General Comment 20*, (2006) UN Doc. E/C.12/GC/20/CRP.1, p8.
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