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SUBMISSION OF THE EQUAL OPPORTUNITY COMMISSION VICTORIA

TO HREOC'S INQUIRY SAME-SEX: SAME ENTITLEMENTS

23 June 2006

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PART ONE

1.1 Introduction

Victoria has been fortunate to have undertaken significant examination of its laws that discriminate against people in same-sex relationships. This examination commenced with our own report produced in 1998, *Same Sex Relationships and the Law*. Compiled after extensive public consultation the report highlighted many ways in which the law discriminated against lesbians and gay men by denying the existence of their relationships. In response to some of the recommendations in that Report, in 2001 the current Victorian Government undertook extensive statute law amendments, amending some 57 Acts to create greater equality before the law for same-sex couples replacing the term “de facto spouse” and its gender-specific statutory definitions with the gender neutral term “domestic partner”; giving rise to the presumptive recognition of same-sex couples that satisfy the criteria of “domestic partner”. More recently a broader statutory review was conducted by the Victorian Parliamentary Scrutiny of Acts and Regulations Committee into enactments that may discriminate against people on the basis of all attributes protected under the *Equal Opportunity Act 1995* (Vic) (“the EOA”). This recent review also revealed some minor enactments that may facilitate discrimination against same-sex couples. The substance of these reviews and reforms is outlined below. This brief overview sets the scene for the approach the Equal Opportunity Commission Victoria (“the Commission”) has taken in this submission.

In approaching this submission the Commission considered where it could best add value to HREOC's Inquiry. Due to constitutional and jurisdictional constraints, the Commission has limited interaction through its complaint-handling functions with the Commonwealth legislative schemes that regulate financial and employment-related benefits and entitlements. Our ability to comment authoritatively upon such matters is limited by our lack of jurisdiction in relation to the discrimination that occurs under these legislative schemes. Therefore, we examine the effectiveness of reforms in Victoria that have sought to provide greater equality for same-sex couples, and offer up a critique of the Victorian model of reform in relation to suggestions for reform of legislation conferring financial and employment-related benefits and entitlements more generally. The Commission's submission also highlights where Commonwealth and Victorian legislative schemes intersect or impair one another in the adjustment of property and financial entitlements following relationship breakdown to the detriment of people in same-sex relationships. Finally the submission comments on the importance of access to effective redress for people who experience discrimination on the basis of their sexual orientation, and on the Commonwealth's power to legislate to prohibit discrimination on that ground.

The Commission acknowledges, however, that considerable financial and employment-related benefits and entitlements accrue and are regulated through Commonwealth laws that unfairly differentiate between same-sex couples and heterosexual de facto or married couples. As conveyed by HREOC in its discussion paper for this inquiry, same-sex couples are excluded for no apparent reason from accessing financial benefits and entitlements in defined spheres of Commonwealth responsibility, such as through the provision of public services such as social security, taxation and health care concessions and through the regulation of private industries such as superannuation, health insurance and the workplace. Wherever Commonwealth legislative schemes contain the terms ‘spouse’, ‘partner’ or ‘dependent’, defined to have the effect of excluding same sex couples from accessing financial and work related benefits and entitlements, these definitions should be amended to be inclusive of same-sex couples on equal terms.

The Commission notes that the Commonwealth's policy stance in respect of marriage as the 'union between a man and a woman' and exclusion of same-sex couples from marrying should not preclude it recognising broader rights of equality before the law and non-discrimination for same-sex couples in financial and employment-related entitlements where this can be done through amendments to legislative definitions.

International jurisprudence recognises at present that the right to marry in Article 23(2) of the ICCPR is only a substantive provision constrained by the use of terms 'men and women', rather than using terms 'every human being', 'everyone' and 'all persons'¹. Therefore a mere refusal of a State party to provide for marriage between same-sex couples will not necessarily violate the rights of same sex couples under the Covenant. This right is a right to marry and nothing more. On the other hand, courts in Canada, South Africa and some US states, and Parliaments in Spain, Belgium and the Netherlands, have decided in recent years that equality rights require non-discriminatory access to marriage.

Where financial and employment-related benefits and entitlements are provided to heterosexual married couples it is not the mere refusal to provide for same-sex marriage that is in issue in the present Inquiry. It is the implications of this refusal *coupled* with legislative schemes that provide for financial entitlements exclusively to heterosexual married couples that result in unjustifiable discrimination against same-sex couples, that are in issue. It is the differential treatment of same-sex couples as against married heterosexual couples and heterosexual de factos in laws that provide access to financial and employment-related benefits that gives rise to breaches of the broader rights of equality before the law and non-discrimination in the *International Covenant on Civil and Political Rights* that is at the crux of this Inquiry. Differential treatment that flows from the right to marry must still satisfy reasonable and objective criteria in accordance with Articles 2(1) and 26 of the ICCPR. To date the Commonwealth has not sought to rely upon such criteria in sustaining discrimination against same-sex couples in legislative schemes regulating financial and employment-related entitlements. The Commission does not consider that any such criteria exist.

The Commission notes from Victoria's own experience that merely removing discriminatory terms from legislation is not enough to eliminate discrimination in practice. Significant education strategies should be implemented to ensure that legal practitioners are apprised of legislative changes; that regulations, forms, product disclosure statements and consumer information are all updated and amended to reflect changes; that officials administering legislation are informed and empathetic; that entities charged with handling complaints about financial and employment-related entitlements are fully aware and able to assist; and that relevant private industries are educated of their responsibilities to respect rights and entitlements of same-sex couples.

¹ *Joslin et al v New Zealand* Communication No. 902/1999 before the Human Rights Committee.

1.2 Executive Summary

The current Victorian Labor Government has enacted significant reforms in relation to the recognition of same-sex relationships through the adoption of a presumptive recognition model introducing the gender-neutral definition of ‘domestic partner’ in Victorian legislation. The Commission commends the current Government for its commitment to pursue the recommendations made by the Commission in its 1998 report *Same Sex Relationships and the Law* and its efforts in implementing some of those recommendations to date.

Notwithstanding such advances in the rights of same-sex couples, challenges still exist in Victoria, in particular difficulties in proving ‘domestic partnership’, discriminatory transitional provisions, and outstanding areas for reform.

The Commission, in this submission, has sought to highlight the challenges that Victoria has faced in redressing statutory discrimination against same-sex couples in order to offer HREOC insights from Victoria’s experience, which will it is hoped assist HREOC in drafting its recommendations in respect of Commonwealth and other State and Territory laws (where relevant) governing similar schemes.

Clearly the adoption of the presumptive recognition of same-sex relationships on its own is insufficient in removing all forms of discrimination against same-sex couples – particularly in relation to the procedural aspects of some laws.

The Equal Opportunity Commission maintains that a multi-tiered approach is necessary to address discrimination against same sex couples. A multi-tiered approach would involve broadening statutory (and common law) definitions of “*de facto* spouse” and “dependant” to include same-sex couples and the introduction of an opt-in mechanism for the formal registration of relationships.

A civil union relationship recognition model is the preferred opt-in mechanism for the recognition of same-sex couples: it offers dignity and equality. In addition, and as a safety net, an opt-in registration mechanism should be available for same-sex couples to avert some of the shortcomings of the presumptive, or definitional, approach to their recognition.

The Commonwealth Government’s refusal to act on the referral of powers in relation to property adjustments of same-sex couples under the *Commonwealth (De Facto Relationships) Act 2004* (Vic) is in breach of its international human rights obligations.

Present access to remedies for people who experience discrimination on the basis of their sexual orientation is inadequate at a Federal level and should be enhanced and improved to provide people with access to effective remedies for discrimination experienced in all areas of public life.

The Commonwealth clearly has the power to legislate to prohibit discrimination on the ground of sexual orientation and should do so promptly, alongside other reforms broadening statutory definitions of ‘de facto’ and ‘dependent’ to include same-sex couples and the introduction of an optional mechanism for the formal legal recognition of same-sex relationships.

1.3 Essential Background

1.3.1 [1998] - EOCV Report on “Same Sex relationships and the law”

Following the introduction in 1995 of the attribute of “lawful sexual activity” in the EOA, which was intended to protect people from discrimination on the basis of their sexual orientation², lesbians and gay men raised concerns about the discriminatory lack of recognition of same-sex relationships³. As a result the Commission widely disseminated a discussion paper exploring the extent and effect of the law’s non-recognition of same-sex relationships. Following around 500 submissions and 12 months research the Commission released its report *Same Sex Relationships and the Law* in 1998. The report presented to the State Attorney General for consideration:

- outlined the ways in which people in same-sex relationships are treated differently from people in heterosexual relationships
- looked at options for addressing discrimination against people in same-sex relationships
- listed sections of Victorian legislation that treated people in same-sex relationships differently from those in married or heterosexual de facto relationships.

On the basis of submissions received and the Commission’s research, the most appropriate form of relationship recognition proposed for consideration in *Same Sex Relationships and the Law* was two-tiered: first, extension of legislative definitions of *de facto* spouse to include same-sex couples, and second, the establishment of a relationship register available to both same-sex and mixed-sex couples.

A majority of submissions did not support extension of marriage rights to people in same-sex relationships, reflecting a lack of broad-based support from either the community at large, or the gay and lesbian community, for marriage between same-sex partners. (The Commission notes that eight years later it is timely to review this position given developments in this area in other jurisdictions and changing attitudes within the community.)

The Commission also considered discrimination against same-sex couples in the area of adoption and accessing fertility treatment and reproductive technology. It recommended that further consideration and community consultation was necessary prior to reforms in this area⁴. Although the Government did not propose to act on the Report at the time, the then Opposition undertook in its election campaign to implement all the Commission’s recommendations.

Following the report further amendments were made to the EOA through the *Equal Opportunity (Gender Identity and Sexual Orientation) Act 2000*, introducing the attributes of sexual orientation and gender identity.

² The Attorney General in her second reading speech said that the new attribute ‘is intended to protect homosexuals, lesbians, and heterosexuals... from discriminatory actions’.

³ Despite the attribute of lawful sexual activity being included in the EOA, section 69 of the Act meant the Act provided little assistance to same sex couples in relation to the non-recognition of their relationships in Victorian legislative schemes. Section 69 provides a general exemption for discrimination where the conduct is necessary to comply with, or is authorised by an Act or enactment.

⁴ In 2002 the State Government issued the Victorian Law Reform Commission with terms of reference to review these areas of the law, which it is currently undertaking, including looking at allowing same sex couples access to these services. The Law Reform Commission released three position papers last year on eligibility for ART (including posthumous use of gametes, and gamete donation); parentage and adoption (including birth registration and access to information); and surrogacy. Submissions were due in January this year. The Law Reform Commission is expected to release its final report this year.

1.3.2 [2001] - Relationships Acts Amendments

In 2001 Victorian Parliament amended some 57 Acts through the *Statute Law Amendment (Relationships) Act 2001* and the *Statute Law Further Amendment (Relationships) Act 2001* (referred to collectively as the *Relationships Acts* in this submission). These Acts introduced the term ‘domestic partner’ into various Victorian statutes to recognise the rights and liabilities of partners in domestic relationships irrespective of the gender of each partner. Two definitions of ‘domestic partner’ were adopted. The principal definition is:

- Domestic partner of a person means a person to whom the person is not married but with whom the person is living as a couple on a genuine domestic basis (irrespective of gender)

This definition applies to legislative schemes dealing with property-related benefits⁵, compensation schemes⁶, Victorian public service superannuation schemes⁷, and general legislation such as the EOA and the *Guardianship and Administration Act 1986*.

The second definition of ‘domestic partner’ is a (possibly broader) definition applied to health-related legislation⁸, legislation dealing with the criminal law⁹, and consumer and business legislation¹⁰. This definition is:

- Domestic partner of a person means an adult to whom the person is not married but with whom the person is in a relationship as a couple where one or each of them provides personal or financial commitment and support of a domestic nature for the material benefit of the other, irrespective of their genders and whether or not they are living under the same roof, but does not include a person who provides domestic support and personal care to the person—
 - for a fee or reward; or
 - on behalf of another person or an organisation (including a government or government agency, a body corporate or a charitable or benevolent organisation).

This second definition of ‘domestic partner’ differs from the principal definition by expressly recognising relationships where people may not necessarily live under the one roof, but are mutually committed to an intimate personal relationship and a shared life as a couple¹¹.

In order to determine whether persons are domestic partners all the circumstances of the relationship must be taken into account, including a number of matters if relevant. These matters include:

- duration of the relationship
- the nature and extent of common residence
- whether or not a sexual relationship exists

⁵ *Administration and Probate Act 1958, Duties Act 2000, First Home Owners Grant Act 2000, Land Act 1958, Land Acquisition and Compensation Act 1986, Land Tax Act 1958, Landlord and Tenant Act 1958, Perpetuities and Accumulations Act 1968, Property Law Act 1958, Residential Tenancies Act 1997, Retail Tenancies Reform Act 1998, Sale of Land Act 1962, Stamps Act 1958, Wills Act 1997.*

⁶ *Accident Compensation Act 1985, Education Act 1958, Police Assistance Compensation Act 1968, Transport Accident Act 1986.*

⁷ *Country Fire Authority Act 1958, Emergency Services Superannuation Act 1986, Parliamentary Salaries and Superannuation Act 1968, State Employees Retirement Benefits Act 1979, State Superannuation Act 1988, Transport Superannuation Act 1988.*

⁸ *Alcoholics and Drug Dependent Persons Act 1968, Coroners Act 1985, Health Act 1958, Health Records Act 2001, Human Tissue Act 1982, Mental Health Act 1986.*

⁹ *Crimes(Family Violence) Act 1987, Victims of Crime Assistance Act 1996.*

¹⁰ *Cooperative Housing Societies Act 1958, Goods Act 1958, Motor Car Traders Act 1986, Partnerships Act 1958, Prostitution Control Act 1994, Retirement Villages Act 1986, Second hand Dealers and Pawnbrokers Act 1989, Trustee Companies Act 1984.*

¹¹ Explanatory memorandum to the *Statute Law Amendment (Relationships) Act 2001*.

- the degree of financial dependence or interdependence, and any arrangements for financial support between the parties
- the ownership use and acquisition of property
- the degree of mutual commitment to a shared life
- the care and support of children
- the reputation and public aspects of the relationship¹².

1.3.3 [2005] - Victorian Parliamentary Scrutiny of Acts and Regulations Committee Inquiry into Discrimination and the Law

Following an extensive public consultation process from December 2003 to July 2005 the Victorian Parliamentary Committee for the Scrutiny of Acts and Regulations (SARC) released its Final Report in September 2005 on “provisions in Victorian law that discriminate or may lead to discrimination against any person” on the grounds of one or more of the attributes prescribed in the EOA¹³. In the course of this broad review SARC identified two Victorian enactments, the *Anzac Day Act 1958* and the *Credit Act 1984*, that may facilitate discrimination against same-sex couples. These Acts and the Committee’s recommendations are discussed below.

SARC also considered the operation of section 69 of the EOA. This provision is a general exemption for discrimination where the conduct is necessary to comply with, or is authorised by an Act or enactment; giving all other laws priority over the provisions of the EOA¹⁴. SARC recommended that:

- this provision be repealed with a sunset period;
- any enactment identified as incompatible with the EOA but which is intended to override the provisions of the EOA should be prescribed in a schedule;
- any enactment identified as incompatible with the EOA but not intended to override the EOA be amended to remove the discrimination;
- all proposed enactments should be scrutinised against equal opportunity principles and proposed enactments that are incompatible with them or are intended to override the provisions of the EOA should be accompanied by a Ministerial declaration justifying such incompatibility at the time of the enactment is introduced.

The Victorian Government in its response to the SARC inquiry noted that it would consider this group of recommendations in the development and implementation of the proposed *Charter of Human Rights and Responsibilities*.

¹² Section 275(2) *Property Law Act 1958*.

¹³ The EOA prohibits discrimination in relation to the following personal characteristics or attributes: age, sex, race, breastfeeding, physical features, disability/impairment, pregnancy, parental status, lawful sexual activity, gender identity, industrial activity, sexual orientation, marital status, political belief or activity, carer status, religious belief or activity, personal association with someone who has any of the above characteristics.

¹⁴ Notwithstanding that it is not unlawful to discriminate if it is necessary to comply with or is authorised by State laws this may not result in the discriminator avoiding liability where Federal legislation covers the same field. The Federal Court in *McBain v Victoria* (2000) 99 FCR 116 held that where the Victorian *Infertility Treatment Act 1995* denied a single woman access to infertility treatment it was inconsistent with the Federal *Sex Discrimination Act 1984* which rendered discrimination unlawful on the basis of marital status. The State Act was found to be inconsistent with the Federal Act and thereby inoperative to the extent of the inconsistency pursuant to section 109 of the Australian Constitution.

The Commission notes that the periodic review of discriminatory legislation after the fact can be an unsatisfactory response to discriminatory actions. The present inquiry being undertaken by HREOC emphasises the need at the Federal level for a mechanism for the scrutiny of new legislation against non-discrimination and human rights principles before it is introduced.

1.3.4 [2006] - Victorian Human Rights Charter

Following extensive public consultation, on 2nd May 2006 the Attorney-General introduced a bill into the Victorian Parliament for a *Charter of Human Rights and Responsibilities*¹⁵. The Charter will be a tool in assessing whether human rights protection in Victoria reaches minimum standards by requiring laws, government policies and decisions to take into account civil and political rights, including rights such as non-discrimination and equality before the law. The *Charter* aims to ensure that there is proper debate about whether proposed measures strike the right balance between the human rights of Victorians and what limits can be justified in a free and democratic society. The *Charter* will place the following obligations on the following entities:

- Parliament – must subject proposed laws to scrutiny on human rights principles. In exceptional circumstances, it can override the Charter and pass incompatible legislation. Parliament will continue to have the final say on all laws.
- The Executive – must ensure that human rights standards are built into all policy, legislation and practices. It must provide human rights compatibility statements to Parliament, either demonstrating compliance or explaining the rationale for departures from human rights principles. The Executive responds in Parliament to declarations of inconsistent interpretation made by the Supreme Court.
- Public Authorities — (including private bodies performing public functions on behalf of Government, including under contract) are required to approach the execution of their functions in a manner that is consistent with human rights principles set out in the *Charter*.
- The Courts – must, where possible, interpret laws to be compatible with the *Charter*, but the Supreme Court can make declarations that are sent to Parliament if a law is not compatible with Charter rights.

It is probably fair to say there is little in the way of Victorian governmental conduct that is not potentially impacted by, or at least needs to occur within an awareness of the civil and political rights that are proposed for the Victorian Charter. This being the case the Charter will provide significant protection for same-sex couples in respect of future legislative reforms, governmental actions and policies affecting their rights and lives in Victoria. The same cannot be said however in relation to discriminatory actions and legislation enacted by the Commonwealth. The Victorian *Charter* cannot protect same-sex couples from discriminatory Commonwealth laws and actions. This emphasises the need federally for the broader recognition of same-sex couples, the establishment of broader protection from discrimination on the ground of sexual orientation, and greater recognition and implementation of Australia's international human rights obligations in the form of an Australian Bill of Rights.

¹⁵ Charter second reading speech, Legislative Assembly, 4 May 2006 at 1289: "It follows a comprehensive community consultation undertaken in 2005, during which around 2500 people and organisations took the time to provide views about whether human rights could be better protected in Victoria. That consultation revealed overwhelming community support for a change in Victorian law to better protect human rights."

PART TWO

2.1 Victorian Laws

This section of the submission seeks to critically assess the effectiveness of the *Relationships Acts* in reducing discrimination against same-sex couples. In particular it looks at remaining difficulties for same-sex partners in the area of wills and intestacy; challenges presented by transitional provisions in the *Relationships Acts* in terms of vesting of superannuation benefits and pensions to a surviving same-sex partner; highlights outstanding pieces of Victorian legislation that may discriminate against same-sex couples; and notes some shortcomings of the ‘domestic partner’ relationship recognition model in addressing discrimination against same-sex couples in Victoria.

2.2 Remaining difficulties in the area of wills and intestacy for same-sex partners

The introduction of the term ‘domestic partner’ via the *Relationship Acts* to the area of administration and probate had the effect of extending the following primary inheritance rights and entitlements to the surviving partner of a same-sex or mixed-sex domestic partnership:

- To provide for the partner of a person who dies intestate to obtain the intestate’s interest in the ‘shared home’.¹⁶
- To provide for an intestate’s domestic partner to obtain a specified share of the intestate’s residuary estate¹⁷.
- To enable an employer to transfer a deceased employee’s money or property to the surviving partner or child where the employer is satisfied by statutory declaration that the value of the deceased employee’s estate does not exceed \$25,000 without the production of probate or letters of administration¹⁸.

Since the introduction of the definition of domestic partner in the *Administration and Probate Act* some concerns have been identified with how it treats domestic partners:

- Eligibility to make a claim on an estate for a domestic partner is tied within the definition of “domestic partner” under the Act – therefore not expressly recognising relationships less than 2 years or surviving partners’ substantial contributions to the estate.
- There is no legislative guidance as to who has right to be appointed to administer the estate. This may be particularly problematic where there may be conflict between a domestic partner and the deceased’s parents or children, or between two domestic partners, or between a domestic partner and spouse.
- Difficulties for a surviving domestic partner in proving their relationship with the deceased in the absence of formal documentation or public and familial acknowledgment of the relationship.

¹⁶ Section 37A *Administration and Probate Act 1958*.

¹⁷ Division 6 of Part 1 *Administration and Probate Act 1958*.

¹⁸ Section 32 *Administration and Probate Act 1958*.

In the raft of amendments coming out of the *Relationships Acts*, the *Administration and Probate Act* was the only Act to have the definition of domestic partner qualified by a minimum period of cohabitation; section 3 of that Act defines “domestic partner” of a person who dies as meaning:

A person who, although not married to the person—

(a) was living with the person at the time of the person’s death as a couple on a genuine domestic basis (irrespective of gender); and

(b) either—

(i) had lived with the person in that manner continuously for a period of at least 2 years immediately before the person’s death; or

(ii) is the parent of a child of the person who was under 18 years of age at the time of the person’s death.

This provision therefore links eligibility to apply for interests in an estate with the definition of domestic partner under this Act. In effect this means that relationships between domestic partners will not be recognised in terms of primary inheritance rights (identified above) or in grants of letters of administration in intestacy where the minimum period of continuous cohabitation cannot be proved to have been satisfied. The effect of this is that a domestic partner who wasn’t living with the deceased or who had been living with them for less than two years does not have primary inheritance rights; no such condition applies to a *de jure* spouse. This is a considerable concern and could detrimentally affect surviving domestic partners who made considerable contributions to the estate – notwithstanding the period of the relationship.

In these circumstances, however, the bereaved domestic partner may have the option of a family provision claim under Part IV—Family Provision of the *Administration and Probate Act*. The [Court](#) may order that provision be made out of the estate of a deceased person for the proper maintenance and support of a person for whom the deceased had responsibility to make provision. Amongst the matters that the Court can take into the account in assessing whether the deceased had a responsibility to make provision for the applicant is any contribution (not for adequate consideration) of the applicant to building up the estate or to the welfare of the deceased or the family of the deceased¹⁹. These provisions do not fully address this issue however as the process may be a stressful, costly and circuitous course of action which may ultimately reduce the amount of money in the estate.

The application of this definition of ‘domestic partner’ (as it is constrained by the eligibility requirements) to obtain interests in an estate may be less favourable treatment towards both same-sex couples and unmarried mixed-sex couples. For the Act does not place length of relationship constraints on surviving spouses. Essentially the Commission would caution that tests for eligibility to entitlements should not be tied up in definitions of domestic partner due to the potential for less favourable treatment.

The *Administration and Probate Act* does not provide legislative guidance as to who has the right to be appointed to administer the estate. Traditionally the right to apply for letters of administration to administer an estate would fall to the person with the major inheritance rights—usually a spouse or a domestic partner. This will be particularly problematic where there is conflict between a domestic partner and the deceased’s parents or children, or between two domestic partners, or between a domestic partner and spouse. This situation may be particularly problematic for a same-sex domestic partner when they are required to prove their relationship status with the deceased (including proving the duration of their relationship to satisfy eligibility requirements). This may result in delays where admissible proof is

¹⁹ Section 91(4)(k) *Administration and Probate Act 1958*.

being sought by same-sex domestic partners in order to obtain letters of administration; which could result in same-sex domestic partners being trumped by others, such as the deceased's parents or children.

The difficulties discussed above are particularly unfair for same-sex couples given that they are denied marriage and the preferential treatment that such status receives in primary inheritance situations.

In an analysis of the *Relationships Acts* amendments to the *Administration and Probate Act* Caroline Sparke highlights an array of difficulties that the term 'domestic partner' may create for trustees administering estates, for the Registrar of Probates, and practitioners advising on intestacy²⁰. Whilst Sparke speaks of the difficulties surrounding the application of the term domestic partner generally and not just for same-sex couples her observations are useful in considering and indeed amplifying one of the possible difficulties that a partner from a same-sex couple may encounter in proving their status.

Sparke notes that the meaning of domestic partner in practice as determined by the Courts is not necessarily fixed; in that there need not be intertwined finances, nor will a sexual relationship be determinative of the existence of a domestic relationship. Sparke notes that many of the cases she cites in relation to 'domestic partner' have been determined with the benefit of the courts being able to hear evidence from both the partners and difficulties may arise given a deceased person cannot be cross examined. Sparke notes further that the public view of the relationship will be crucial, particularly the view of neighbours, friends and family as to whether the couple appeared to have the requisite commitment²¹.

If Sparke's assessment is accurate this may raise greater problems for a surviving partner of a same-sex domestic relationship; particularly in situations where the public aspects of their relationship may be concealed for fear of nonacceptance by family members/friends, or recriminations, discrimination and harassment generally, notwithstanding a genuine commitment. *Private Lives*, based on surveys conducted by the Australian Research Centre in Sex, Health and Society, reported that an overall 67.3% of participants indicated that fear of prejudice or discrimination caused them to modify their daily activities (to conceal their sexual orientation) and of those who modified their daily activities 42.2% modified their daily activities within family settings and 72.9% in public²². Whilst Sparke notes that resolving the problem of proving a domestic relationship in these situations can be done by either marrying or making a will, she does concede that the former option will not be available to some couples, namely those of the same sex. Therefore she offers the advice that clients who are prepared to declare their relationship in writing or describe each other as a 'domestic partner' on official documentation will go some way to providing the requisite proof after death²³.

Clearly, the issue of proving a 'domestic partnership' in inheritance and intestacy situations is not without its challenges and will be compounded for a same-sex partner where formal documentation of their relationship is scarce²⁴ or public acknowledgment non-existent. The problems discussed in this section raise questions about the adequacy of an expanded statutory definition of partner in addressing discrimination against same-sex couples in the absence of avenues for formal legal relationship recognition. This point is discussed further at the conclusion of this part.

²⁰ "When is a spouse not a spouse", *Law Institute Journal*, Vol76, No1, Feb 02, at p61.

²¹ *Ibid*, p62.

²² *Private Lives* Report, p 48.

²³ Sparke *Ibid*, p 63.

²⁴ Same-sex couples may be particularly hampered in declaring their relationship on formal documentation, as areas such as social security, taxation, superannuation and Medicare do not permit the recognition of same-sex partners.

2.3 Challenges presented by transitional provisions in the Relationships Acts in terms of vesting of superannuation benefits and pensions with surviving same-sex partner

The *Relationships Acts* amendments to the Victorian public-sector superannuation schemes²⁵ had the effect of extending superannuation entitlements to surviving non-heterosexual domestic partners²⁵ of members of public sector superannuation schemes who die. These amendments purported to act “prospectively”, but what actually happened is that the old, discriminatory provisions were preserved, and continue to operate, to the detriment of elderly Victorians – that is, the new, non-discriminatory provisions only apply to members who “become entitled” to superannuation benefits or pensions (that is, when their super entitlements vest) after the amendments came into operation. Therefore members who “became entitled to their benefits” prior to the *Relationships Acts* amendments (either by retiring and in receipt of a pension or death) could not have their benefits or entitlements subsequently vest with their same-sex partners. This means that discrimination still occurs where, for example, a same-sex couple member who retired prior to the amendments commencing, was receiving a pension from his or her scheme and dies after the amendments commenced would be prohibited from having a reversionary pension or other benefit pass to their surviving same-sex domestic partner.

The various schemes which permit a retired deceased member’s pension to revert to their surviving partner or children²⁶ have been limited to only enabling such benefits to pass to surviving same-sex partners where the deceased member has commenced the benefit after the *Relationships Acts* amendments commenced, see for example section 2 of the *State Employees Retirement Benefits Act 1979* :

“partner” means—

(a) in relation to a person who became entitled to benefits under this Act before the commencement of section 5 of the Statute Law Amendment (Relationships) Act 2001—

(i) the person's husband, wife, widower or widow; or

(ii) a person of the opposite sex who, though not married to the person, in the opinion of the Board lives with the person, or lived with the person at the date of the person's death, on a bona fide domestic basis as the person's husband or wife;

(b) in any other case—the person's spouse or domestic partner;

The Commission was advised that the principal rationale for the Victorian Government maintaining discrimination against elderly same-sex couples in this way was that an entitlement to claim retrospective benefits would infringe the presumption against statutes operating retrospectively and the Government could not be sure that the retrospective operation of the new entitlements would not make anyone who may be affected by the schemes worse off. This was particularly the case where a deceased member’s dependent or spouse had been paid in lump sum or was receiving a reversionary pension – any subsequent retrospective entitlement could create claims on benefits already vested with other beneficiaries. The Government’s view was that a subsequent revisiting of vested benefits could create hardship for existing beneficiaries and be extremely burdensome to manage.

The Commission was advised further that the Government also considered the potential financial liabilities that it may be exposed to in the event it had to pay out on “retrospective” entitlements, which was difficult to quantify not knowing the marital status and sexual orientation of all eligible public-sector superannuation scheme members. Ceasing to discriminate against already retired super members in receipt of their pension benefits would inevitably involve some financial liabilities for the relevant super

²⁵ *Country Fire Authority Act 1958, Emergency Services Superannuation Act 1986, Parliamentary Salaries and Superannuation Act 1968, State Employees Retirement Benefits Act 1979, State Superannuation Act 1988, Transport Superannuation Act 1988.*

²⁶ Section 45 *State Employees Retirement Benefits Act 1979* and section 36 *State Superannuation Act 1988.*

fund. The Commission considers, however, the costs to the Government would have been minimal, given the proportion of people who identify as gay or lesbian in the community in terms of the numbers of eligible public-sector super members who had retired and were in receipt of a pension prior to the amendments commencing.

The Victorian Government's rationale for so-called prospective amendments seems completely implausible, however, in situations where a member who was in a same-sex relationship was receiving a pension before the amendments commenced and dies subsequent to the amendments coming into operation. The Commission offers the following case that was forwarded to us as an example:

Chris and John²⁷ have been in a same-sex relationship together for over 50 years. They watched the debate around the changes to the Victorian public sector superannuation schemes to extend superannuation entitlements to surviving same sex domestic partners with earnest in light of their own situation. Both Chris and John were employed in the Victorian public sector for over 50 years. Both retired and were receiving pension benefits (individually) under the *State Superannuation Act 1986* before the introduction of the *Relationships Acts* amendments. Subsequently, Chris and John were shocked to find out that the planned extension of benefits to same-sex couples would only apply to those members who retired after the commencement of the *Relationships Acts* amendments.

Chris and John are very disappointed with this outcome given their length of service in the Victorian public sector. They are disconcerted with the knowledge that if either partner were to die the surviving partner could not receive the benefit of the other's hard work through a reversionary pension, unlike their still privileged heterosexual colleagues.

In this scenario the only person who has received the pension benefit is the member, therefore the arguments relating to the potential for the retrospective vesting of reversionary pensions to adversely affect third party beneficiaries do not apply. This aspect of the transitional provisions of the *Relationships Acts* precluding reversionary pensions remains particularly discriminatory to same-sex couples where a member of a couple had taken their pension benefits prior to the commencement of the amendments.

The Commission highlights this ongoing discrimination and recommends that HREOC bear this in mind in drafting its recommendations to amend legislation pertaining to Federal Superannuation schemes. Provisions enabling reversionary pensions or death benefits to vest with domestic partners should apply by reference to the date of death of a superannuant or pensioner and not the date a super member became entitled to their benefits. Furthermore, a scheme should be established to enable provision for bereaved same-sex partners in necessitous circumstances where the past discriminatory laws denied them the super benefits that would otherwise have accrued or reverted to them had they been in a heterosexual relationship.

2.4 Outstanding Victorian legislation which may discriminate against same-sex couples

The Victorian SARC in its recent Report into Discrimination in the Law considered some outstanding Victorian enactments that may discriminate against same-sex couples.

After considering a submission from the Law Institute of Victoria SARC recommended that the *Anzac Day Act 1958* (Vic) be amended to provide definitions of 'dependent', 'partner' and 'domestic partner' (in respect of the Anzac day proceeds fund) consistent with the definition of those terms set out in the *State*

²⁷ The names have been changed to protect the privacy of the individuals kind enough to share this experience with us.

*Superannuation Act 1988*²⁸. The term ‘partner’ in the *State Superannuation Act 1988* is defined to include de facto and same-sex partners. The basis for this recommendation was that the Committee had considered that the *Anzac Day Act 1958* may discriminate against same-sex couples because the term dependent is not defined and may be construed to refer only to a heterosexual partner of an ex-service man or woman²⁹. The Committee had further considered that it did not appear warranted to retain the unclear wording in an Act that may be construed to discriminate against same-sex couples³⁰.

In response the Victorian Government noted that the *Veterans Act 2005* amended section 4A of the *ANZAC Day Act* to provide that money standing to the credit of the Patriotic Funds Council of Victoria³¹ is to be distributed on the recommendation of the Victorian Veterans Council to organizations whose principal object is to provide welfare to the ex-service community. Ex-service community is defined to include all veterans, all surviving partners and all dependants of veterans. It was anticipated that the amendments would come into operation in 2006. While the amendments do not adopt the definitions of “dependant”, “partner” and “domestic partner” recommended by SARC, the Victorian Government was of the view that the amendments would ensure that money was distributed to organizations providing welfare to all partners of veterans irrespective of marital status or gender and to all dependants irrespective of age. The Government would, however, monitor the operation of the amendments to the *ANZAC Day Act* to confirm that they are operating in a non-discriminatory way.

The Commission also notes that travel concessions offered to veterans’ bereaved partners, described as “war widows”, around Anzac Day refer in the press to possession of a Commonwealth DVA card or “war widows badge”.³² This makes eligibility for a State-provided benefit dependent on discriminatory Commonwealth laws. While it would be best for the Commonwealth discrimination against same-sex couples concerning veteran’s benefits to be removed, the State’s practice appears at present discriminatory as well.

SARC also received submissions that the definition of guarantor in the *Credit Act 1984* is discriminatory as de facto and same-sex partners of debtors are treated differently from married partners. The Committee noted that while the *Credit Act 1984* is still operative in respect of contracts entered into prior to the commencement of the *Consumer Credit (Victoria) Act 1995*, it does not apply to contracts made after the commencement of the new Act³³. The new Act did not impose any restrictions on spouses acting as guarantors. On this basis the Committee considered that there was no need to amend an Act still operative, but only in relation to contracts made prior to a certain date³⁴. The Government accepted this recommendation.

2.5 Outstanding reform in the area of reversionary Judicial Pensions for same-sex partners

In April 2005 the Victorian Government introduced into Parliament the *Courts Legislation (Judicial Pensions) Bill*. It sought to modernise the State’s constitutionally protected pension schemes to ensure that they operate in accordance with Commonwealth family law³⁵ and Victorian equal opportunity law. The second reading speech to this Bill acknowledged that the constitutionally protected pension schemes

²⁸ SARC Final report, p 13.

²⁹ SARC Final report, p 13.

³⁰ SARC Final report, p 13.

³¹ Anzac Day proceeds are distributed by the Patriotic Funds Council.

³² “Veterans and war widows are entitled to free travel on all Victorian public transport from April 24–26. To qualify for free travel, veterans and war widows need to wear their uniform, or wear their services medals, or wear an ex-service association or returned from active service or war widows badge, or present their DVA gold or white card”, *The Age*, 24 April 2006

³³ SARC Final report p 25.

³⁴ SARC Final report p 25.

³⁵ To comply with the amendments made to the *Family Law Act 1975* (Cth) as a result of the *Superannuation Acts (Family Law) Act 2003* which sought to enable splitting of superannuation entitlements either by agreement or court order for separating or divorcing couples.

were established in the middle of the 19th century and reversionary pensions were only made available to married partners³⁶. This Bill sought to replace references to spouse with domestic partner to ensure that reversionary pension schemes were also available to mixed-sex and same-sex unmarried partners. The proposed amendments would have brought reversionary pension entitlements up to date with commensurate relationship recognition reform under the Relationships Acts³⁷.

2.6 Conclusion on the shortcomings of the presumptive ‘domestic partnership’ legal recognition model in addressing discrimination against same-sex couples

Whilst same-sex couples in Victoria have experienced significant gains in legal recognition, which has reduced the inequality they experience compared with their heterosexual counterparts, such changes have not occurred without significant challenges for law makers. Some of these challenges have been addressed; others still continue and cause ongoing detriment to same-sex couples. The Commission has sought to highlight the challenges that Victoria has faced in redressing statutory discrimination against same-sex couples. It hopes HREOC will gain valuable insight from Victoria’s experience, and that such insight will assist HREOC in drafting its recommendations in respect of Commonwealth and other State and Territory laws (where relevant) governing similar schemes.

Given Victoria’s experiences (in adopting presumptive legal recognition of same-sex couples via the domestic partnership definition which removed gender specific references from legislation) reflected in the section above it is important to reiterate that since the release of its report in 1998 the Commission has advocated for a two-tiered approach to the recognition of same-sex relationships, which included an optional relationship register for both heterosexual and same-sex couples to access that could offer admissible documentary evidence of their status as domestic partners via registration³⁸. The rationale behind the recommended two-tiered approach to relationship recognition was based upon submissions that indicated the presumptive approach was identified as problematic and insufficient on its own as it may be difficult to prove a domestic relationship. Other submissions to the Commission highlighted that a relationship register offers a straightforward way for people to prove their relationship, without having to resort to intrusive and difficult issues of evidence in relation to financial connections³⁹. The Commission also identified in its 1998 report that there may be problems of proof if a couple breaks up or one partner dies, and lengthy legal proceedings may be needed to establish the existence of the relationship if it is contested⁴⁰. The majority of submissions received by the Commission advocating recognition of same-sex relationships recommended a combination of expanding the definition of de facto and registration of relationships for same sex couples. It was submitted that such a combination of options would avoid the disadvantages⁴¹ of both methods by providing formal recognition mechanisms, for those who register, as well as a safety net for those who do not.

³⁶ Legislative Assembly, 21 April 2005.

³⁷ It is not clear to the Commission why the Bill has not been debated and passed through Parliament.

³⁸ The topic of marriage of same-sex couples was not pursued by the Commission given a majority of submissions did not support extension of marriage rights to people in same sex relationships and due to the legal impediments of the State Government in regulating marriage. The Commission viewed registration as an optional form of relationship recognition. Upon registration, the couple would be issued with a certificate. Certain rights and responsibilities attach to registration. These rights and responsibilities would attach to the registered couple regardless of the gender of the partners and could apply to de facto and same sex couples. In jurisdictions which have established relationship registers the usual requirements for marriage apply. For example, in Denmark, the minimum age for registration is eighteen years, neither of the prospective partners can be married or in a registered partnership and neither ascendants, descendants nor siblings can register. The partners need not cohabit, nor have been together for a particular length of time, and they do not need to share finances or have a sexual relationship to register.

³⁹ EOCV report p 55.

⁴⁰ As may happen when grieving relatives believe that the deceased was not gay, see for example *McKenzie v Badderly* (1991) (unreported, NSW CA, 3 December 1991) and *McKenzie v Badderly* (1994) (unreported, NSW SC, 26 October 1994): as cited in the EOCV 1998 report at page 54.

⁴¹ The disadvantages, according to submissions received, of only extending recognition of de facto relationships to same sex couples are:

Similarly, the Australian Council of Human Rights Agencies, of which the Commission is a member, made a joint submission to the Senate Inquiry into the Marriage Legislation Amendment Bill 2004, recommending that the Australian Government adopt all necessary measures to legally recognise same-sex relationships and allow such relationships to be registered to afford the same rights, responsibilities, entitlements and protections granted to married and de facto couples.

Notwithstanding the significant advantages⁴² of a relationship register identified in the Commission's 1998 Report, the Victorian State Government has as yet only gone so far as to expand the definition of de facto to include same-sex couples. The Commission maintains that the establishment of formal opt-in models of relationship recognition, such as registered partnership or civil union schemes, is integral to ameliorating discrimination against same-sex couples, providing vital documentary proof for same-sex couples seeking to establish their eligibility for entitlements and their access to remedies.

Notwithstanding the headway that has been gained for the recognition of same sex relationships in Victoria by the *Relationships Acts* the Victorian Gay and Lesbian Rights Lobby report *Not Yet Equal* of July 2005 on its same-sex relationships survey indicated that now fewer people are satisfied with only the minimal domestic partnership recognition⁴³: 'although same sex domestic partnership recognition (which was introduced in 2001 in Victoria) was still considered important, it was no longer sufficient for two-thirds of respondents'⁴⁴. *Not Yet Equal* indicated that since the recognition of same-sex domestic partners in 2001, Victorian GLBTI people were more aware of the rights that were not granted by this form of recognition and desired more⁴⁵. In terms of the form of legal recognition that participants in the survey wanted available to them:

- 75.7% wanted domestic partnership recognition to be available
- 60.4 % wanted registration
- 79.8% wanted marriage
- 63.4% wanted recognition of overseas marriage.

It is important to note also the Gay and Lesbian Health Victoria and the Australian Research Centre in Sex, Health and Society report *Private Lives* released in March 2006 broadly indicated that the gay and

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- It may be difficult and costly to establish that a relationship exists. For example, there may be problems of proof if a couple breaks up or one partner dies, and lengthy legal proceedings may be needed to establish the existence of the relationship if it is contested.
 - People in same sex relationships may incur Court costs and experience long delays to establish rights that married couples need not establish through the Courts.
 - De facto relationships still have lesser rights than marriage. That is, discrimination against de facto couples is allowed by some legislation.
 - Current definitions of 'de facto relationship' don't reflect the diversity of relationships the community. For example, definitions restricted to financial dependence may not be appropriate for gay and lesbian relationships.

⁴²Submissions to the Commission highlighted the following advantages of a relationship register:

- That the legal rights and responsibilities conferred upon married couples by State legislation would be extended to homosexual couples, and thus, a major form of discrimination against same sex couples would be eliminated.
- People in same sex relationships would have similar access to State based financial, legal and social benefits during their relationship as do married couples.
- The law would be clear and accessible in the event of relationship breakdown.
- The law would offer protection to the economically weaker partner of a same sex relationship upon the ending of the relationship.
- Registration provides an open model of recognition as there is no need for set criteria for recognition - legal consequences flow, simply, from the choice to nominate a particular relationship as significant.
- A relationship register offers a straightforward way for people to prove their relationship, without having to resort to intrusive and perhaps difficult issues of evidence in relation to financial connections.
- Registration could entitle same sex partners to all the State based rights and responsibilities conferred upon married couples, as opposed to recognition of de facto relationships which does not confer the same rights as marriage.
- A registration system would entitle same sex couples to formal state validation of their relationships. This is important for some lesbians and gay men.

⁴³ *Not Yet Equal* p 40.

⁴⁴ *Ibid.* p 7.

⁴⁵ *Ibid.* p 40.

lesbian community are seeking increased legitimization and acceptance of their lives. This report aimed to document the health and wellbeing of GLBTI people Australia-wide. Participants were also asked questions about relationship status and whether they had formalised their commitment through marriage or some other ceremony. Whilst the report indicated that 52% of men and 39% of women had no intention or wish to formalise their current relationship, which appeared contrary to the VGLRL 2005 Report, *Private Lives* did concede that this discrepancy may be explained by the fact that participants in that survey reported being in favour of the option being available rather than whether or not they personally wished to take up such an option⁴⁶. The Report also noted another important impact that more formal modes of relationship recognition could have for same sex couples: greater community recognition and increased legitimacy of their relationship – which could make the most important contribution to the health and wellbeing of GLBTI people⁴⁷.

The above reports raise a further important issue for consideration – having the option available to elect a more formal opt-in mode of relationship recognition. Given that the option of registration or civil union is at present not available to same-sex couples in Victoria, denial of this option could be construed as less favourable treatment of same-sex couples as heterosexual couples will always have the option of marriage available to them to secure their access to all relevant rights and entitlements. The lack of opt-in models of formal recognition in Victoria is particularly problematic when proof of a domestic relationship is required to realise a right or entitlement (see discussion of intestacy above). Indeed, the findings in the reports discussed above support a need for the State Government to reflect upon the adequacy of the presumptive model of relationship recognition it presently has in place and consider the addition of the more formal opt-in models of recognition that have been taken up in other jurisdictions such as Tasmania⁴⁸ and the ACT⁴⁹ in order to fully enable same-sex couples in Victoria to achieve relationship recognition, and the rights that flow from this, on a basis of equality with heterosexual couples.

Furthermore, it is important to consider that the concept of non-discrimination requires that it will make no difference what type of couple people are, be it heterosexual or same sex, in the process of realising entitlements. This at present cannot be said in relation to same-sex couples. It is useful here to borrow the reasoning adopted in *Loving v Virginia*⁵⁰ and apply it to the merely presumptive model of removing discrimination against same-sex couples in statutes. Whilst Victorian statutes now appear to apply neutrally to both same-sex and heterosexual couples, the fact that heterosexual couples can opt for marriage and same-sex couples have no such comparable legal avenues of relationship recognition indirectly discriminates against same-sex couples. The Commission submits that fully removing discrimination against same-sex relationships, by allowing couples the option to legally record and have their relationships formally acknowledged, will be as significant as removing race discrimination in the same context.

Removing discrimination from statutory provisions and procedures requires more than mere presumptive recognition — expanding definitions of spouse, making definitions of *de facto* spouse gender neutral or establishing interdependency tests. It is the Commission's opinion that at the very least this objective can only be clearly achieved through a scheme for the formal legal recording and acknowledgment of same-sex relationships via an opt-in model of relationship recognition.

Given changes in community attitudes to same-sex relationship recognition and contemporary legal developments in other jurisdictions the Commission's preferred opt-in model for legally recording and

⁴⁶ *Private Lives* pp 26–27.

⁴⁷ *Private Lives* p 63.

⁴⁸ *Relationships Act 2003*

⁴⁹ *Civil Unions Act 2006*

⁵⁰ *Loving v Virginia* (1967) 388 U.S. 1 concerned an African-American woman and a Caucasian male who, having married in the District of Columbia, were arrested by officials in their home state of Virginia for violating laws prohibiting interracial marriages. The State argued that there was no discrimination as the laws applied equally to blacks and whites but the Supreme Court struck down the statute as discriminatory. The Court was not persuaded by the State's 'equal application' argument.

acknowledging same-sex relationships is a civil union scheme. A civil union scheme would establish a legal relationship (akin to marriage) between the partners. A civil union scheme would also provide same-sex couples the dignity of holding a ceremony to solemnise their relationship. The usual restrictions on eligibility to marry should apply in respect of civil unions. A civil union scheme would most closely provide equality and parity of treatment as far as possible for same-sex couples as against the recognition of married heterosexual couples.

In addition, and as a safety net, an optional partnership registration mechanism should be available for same-sex couples to overcome the shortcomings of the basic presumptive approach to recognising same-sex couples. A partnership registration scheme would allow couples to register their relationship with the Registrar of Births, Deaths and Marriages. A certificate would be issued to the couples and would be *prima facie* admissible evidence of their genuine domestic relationship, in the same way that a marriage certificate evidences marriage. Registration would not create a legal relationship but would merely be evidence of an existing commitment between two people. This is the only recommendation of the Commission's 1998 report whose implementation has not yet commenced.

Regardless of what opt-in model of relationship recognition is implemented by Australian Governments, whether it is registration or civil unions or non-discriminatory marriage, one thing is clear: the pursuit of equality before the law, elimination of discrimination and equality in accessing entitlements for same-sex couples are inextricably bound up in an opt-in mechanism of formal, legal relationship recognition.

PART THREE

Commonwealth Laws

This section of the submission seeks to identify an area where Commonwealth and Victorian legislative schemes intersect/impair one another to the detriment of people in same-sex relationships.

3.1 Victoria's referral of powers to the Commonwealth in relation to property matters for De Facto couples

In 2004 the Victorian Parliament passed the *Commonwealth Powers (De Facto Relationships) Act 2004* which sought to refer certain financial matters arising out of the breakdown of de facto relationships to the Parliament of the Commonwealth for the purposes of section 51(xxxvii)⁵¹ of the Constitution of the Commonwealth so as to enable the Commonwealth Parliament to make laws about those matters. This referral would enable de facto couples access to the Family Court for the resolution of financial matters after their relationship breaks down. Unfortunately the Commonwealth Government has made it clear that whilst it will accept the referral insofar as it relates to heterosexual de facto partners it will not do so in relation to same-sex de facto partners. This would mean that heterosexual de facto partners will have the convenience of accessing one jurisdiction and the one hearing for the settling of both children⁵² and financial/property matters as well as possibly accessing spousal maintenance and prospective

⁵¹ Section 51(xxxvii) of the *Constitution* provides that the Commonwealth Parliament has power to make laws with respect to "matters referred to the Parliament of the Commonwealth by the Parliament or Parliaments of any State or States, but so that the law shall extend only to States by whose Parliaments the matter is referred, or which afterwards adopt the law."

⁵² Following Victoria's referral of powers to the Commonwealth in relation to child custodial and maintenance issues by the *Commonwealth Powers (Family Law-Children) Act 1986* the Commonwealth amended the *Family Law Act* to enable both heterosexual and same sex parents access to the Family Court.

superannuation entitlements as a component of the property settlement. Conversely, same-sex domestic partners in Victoria may only continue to have their property interests dealt with by the State courts in accordance with Part IX of the *Property Law Act 1958 (Vic)*.

The scheme established under Part IX of the *Property Law Act* for the adjustment of proprietary interests in the break-down of domestic relationships is not as comprehensive as that of the *Family Law Act 1975 (Cth)*, nor does it provide as accessible a forum for the resolution of disputes. As a result of this the Commonwealth's refusal to act on the referral power in respect of same-sex domestic partners will give rise to significant detriments to same-sex domestic partners as compared to heterosexual domestic partners. These include:

1. the inconvenience and expense of having to attend two different forums to resolve child and property matters and not having a mediation and counselling service available;
2. not being able to benefit from the statutory provisions for the enforcement and creation of financial and cohabitation agreements;
3. not being able to access partner maintenance orders or superannuation splitting.

3.1.1 Two different forums for the resolution of property and child matters and not having a mediation and counselling services available

At present in relation to the dissolution of proprietary interests after relationship breakdown same-sex couples only have recourse to contractual or equitable remedies or an application under Part IX of the *Property Law Act*. These are determined in the Supreme Court, County Court or Magistrates' Court depending on the quantum of the property settlement in question. This may be very inconvenient, unwieldy and costly, especially where same-sex couples may be simultaneously accessing the Family Court jurisdiction in relation to child matters.

Under s287 of the *Property Law Act*, a Victorian Court may adjourn a proceeding in relation to the property of domestic partners if proceedings have also commenced in the Family Court; this may facilitate a consideration of child maintenance matters in the subsequent adjustment of the property interests of domestic partners. Whilst this mechanism may seek to establish fairness in the overall division of property interests and any ongoing financial liabilities for the care of children, it is not without potential side effects of protracting settlement disputes, generating greater costs, inconvenience and stress for both same-sex domestic partners and their children.

Similarly, another concern is that there is no specific provision in the *Property Law Act* on costs orders in respect of Part 9 applications. Conversely the *Family Law Act* establishes the presumption that parties to an application before the Family Court bear their own costs, unless the court considers it just to make an order for costs⁵³. Essentially the Victorian scheme of property adjustment provides less certainty in respect of costs.

The emphasis on primary dispute resolution mechanisms under the *Family Law Act*, which encourages people to access counselling, mediation, arbitration or other means of conciliation or reconciliation to resolve disputes⁵⁴, is very important in the context of family and relationship breakdowns, as it often obviates the need for court time and associated expenses. The availability of such mechanisms can assist parties in achieving more positive outcomes in respect of both emotional and financial matters.

⁵³ Section 117 *Family Law Act*

⁵⁴ See Part II Counselling and Mediation organisations and Part III Primary Dispute Resolution of the *Family Law Act*.

On the other hand the *Property Law Act* provides no specific regime for mediation or court-directed counselling for domestic partners making applications under Part 9. There are provisions in the respective Court rules that enable matters to be referred to mediation⁵⁵; but this is significantly removed from the well-developed specific scheme that exists under the *Family Law Act*.

Once the Commonwealth legislates to act upon the referral of *de facto* spouse property matters pursuant to the *Commonwealth Powers (De Facto Relationships) Act 2004* under the *Family Law Act* heterosexual de facto couples will be able to access the convenience of one jurisdiction to resolve their property and child matters on the event of relationship breakdown; significantly this will include access to primary dispute resolution procedures. This will result in a significant advantage to heterosexual de facto couples and the exclusion of same-sex de facto couples will cause significant detriment to them and their children.

3.1.2. Not being able to benefit from the statutory provisions for the enforcement and creation of financial and cohabitation agreements

Another positive feature of the *Family Law Act* is that it acknowledges financial agreements between partners and also provides for their enforcement. Part VIIIA of the *Family Law Act* sets out the different types of agreements recognised, circumstances in which they can be made, and when financial agreements will be binding on the parties. On the other hand, there is limited recognition of financial agreements in Part 9 of the *Property Law Act* other than that the Court may have regard to written agreements entered into by parties in making an order for adjustment⁵⁶. The recognition and treatment of financial agreements under the *Family Law Act* is therefore much more transparent and flexible in the kinds of orders available. Once heterosexual de factos have access to the *Family Law Act*, which establishes a stronger mechanism for the enforcement of financial agreements that give effect to the intentions of the parties in relationship breakdowns, this will result in less favourable treatment of same-sex domestic partners in relation to the recognition and enforcement of their financial agreements.

3.1.3. Not being able to access partner maintenance orders or superannuation splitting

Another significant benefit of the *Family Law Act* is that it establishes a comprehensive scheme for the provision of spousal maintenance⁵⁷. At present there is no provision for spousal maintenance under the *Property Law Act*. Whilst there is flexibility under the *Property Law Act* for a court to order the payment of a sum by instalments⁵⁸ this is by no means commensurate with the capacity to order spousal maintenance under the *Family Law Act*. There is no provision in the *Property Law Act* for 'urgent spousal maintenance orders' as per s77 of the *Family Law Act*; nor are courts making determinations under the *Property Law Act* provided with a list of relevant guidelines in determining a spousal maintenance order⁵⁹.

By comparison, the ACT⁶⁰, Tasmania⁶¹, NSW⁶², the Northern Territory⁶³, and Western Australia⁶⁴ all have comprehensive provisions in their equivalent acts for spousal maintenance orders in respect of de facto partners. Only Victoria, South Australia and Queensland are deficient in this regard.

⁵⁵ Section 108 *Magistrates' Court Act 1989*; section 46 *County Court Act 1958* (Arbitration), Order 50.07 *Supreme Court (General Civil Procedure) Rules 2005*.

⁵⁶ s285(c) *Property Law Act*.

⁵⁷ See Part VIII – Property, spousal maintenance and maintenance agreements: a party to a marriage is liable to maintain the other party, to the extent that the first-mentioned party is reasonably able to do so, if, and only if, that other party is unable to support herself or himself adequately i.e. unable to work by reason of having the care and control of a child of the marriage (section 72).

⁵⁸ (s291) *Property Law Act*.

⁵⁹ s75(2) *Family Law Act*.

⁶⁰ *Domestic Relationships Act 1994*.

⁶¹ *Relationships Act 2003*.

⁶² *Property (Relationships) Act 1984*.

⁶³ *De Facto Relationships Act 1994*.

Presumably, the spousal maintenance provisions will be available to heterosexual de facto couples after the Commonwealth acts upon the referral of powers in respect of heterosexual de facto couples. This could result in considerably less favourable treatment of same-sex couples and their children, who will not have the benefit of accessing spousal maintenance. This will be a particular concern in situations where one partner is unable to support themselves due to their responsibility of caring for a child from that relationship. Potentially children will also be treated less favourably due to their parents' sexual orientation in this situation.

The *Family Law Act* is unique in that it enables certain payments (splittable payments) in respect of superannuation interests to be allocated between the parties to a marriage, either by agreement or by court order⁶⁵. "Interest" includes a prospective or contingent interest, and also includes an expectancy but does not include a reversionary interest. Whilst superannuation interests may be taken into consideration in making an adjustment order for domestic partners under the *Property Law Act* ⁶⁶, the States have no jurisdiction to make laws to enable specifically for superannuation splitting between domestic partners as the Commonwealth retains the exclusive power to make such laws, under s51(xx) of the *Constitution*.

Whilst presumably heterosexual de facto couples will be able to have their superannuation split under the *Family Law Act*, same sex de facto couples will not be able to have the benefit of splitting such interests in property settlements.

3.2. Implications for the Commonwealth in failing to act on the referral of property matters in respect of same sex couples

Following the likelihood of the referral in respect of heterosexual de facto couples being acted upon by the Commonwealth, same-sex domestic partners will experience significantly less favourable treatment in comparison when they seek to have their property adjusted upon relationship breakdown. The Commonwealth's refusal to act on this referral (and similar referrals made by other States and Territories), in respect of same-sex couples, ignores the reality of same-sex relationships, is blatantly discriminatory and in breach of its international human rights obligations.

Article 2(1) of the *International Covenant on Civil and Political Rights* ("the ICCPR") establishes an undertaking on State Parties to *respect* and *ensure* the rights of all individuals within its jurisdiction are realised without any distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. The operation of this obligation is limited to the rights enshrined in the ICCPR – that is it requires non-discrimination in the realisation of rights in that Covenant.

Article 26 of the ICCPR, however, is of broader application. It provides that all persons are equal before the law and are entitled to equal protection of the law without any discrimination on the basis of any ground, including race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. General Comment 18 (paragraph 12) notes that art 26 of the ICCPR does not merely duplicate the guarantee already provided for in article 2 but provides in itself an autonomous right. It prohibits discrimination in law or in fact in any field regulated and protected by public authorities. Article 26 is therefore concerned with the obligations imposed on States Parties in regard to their legislation and the application thereof.

⁶⁴ *Family Court Act 1997*.

⁶⁵ Part VIIIIB *Family Law Act*.

⁶⁶ The *Property Law Act* provides that in making an order for adjustment under s285, the Court may have regard to the 'financial resources' of the parties. 'Financial resources' are defined in s275 to include a prospective claim or entitlement in respect of a scheme, fund or arrangement under which superannuation, retirement or similar benefits are provided.

Significantly also General Comment 18 (paragraph 7) notes that whilst international conventions deal with discrimination on specified grounds the term discrimination as used in the ICCPR should be understood to imply any distinction, exclusion, restriction or preference based on any identified ground or other status that has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise by all persons, on an equal footing, of all rights and freedoms.

In the case of referral of powers to the Commonwealth regarding the adjustment of property matters for unmarried couples a distinction is clearly drawn on the basis of a person's sexual orientation as there is no difference between such unmarried couples other than one involves members of different sexes and the other involves members of the same sex. The Commission submits that this distinction is not reasonable and objective, nor is there a discernible legitimate purpose for which the distinction is sought. Therefore the Commonwealth will inevitably be in breach of its obligations under the ICCPR if it fails to act on the referral of powers in relation to the adjustment of property and financial interests for same-sex couples.

3.3 Recommendations to reduce discrimination against separating same-sex de facto couples in relation to the adjustment of financial/property matters

Article 2(2) of the ICCPR obliges the Commonwealth to take all necessary steps to give effect to the rights enshrined in that Covenant. The ICCPR also makes it explicit that both federal and state governments have responsibility for the realisation of human rights. Article 28 of the ICCPR provides that in federations such as Australia, the obligations in the Covenant are binding on the federation as a whole and must extend across all parts of the federation, without any limitations or exceptions. This means that both the Commonwealth and State and Territory governments must act to ensure that human rights are realised.

Therefore the Commission urges the HREOC to recommend emphatically that the Commonwealth act on this referral in respect of same-sex couples in order to meet and implement its international human rights obligations.

As an interim measure to address discrimination in this area it will be necessary for individual States and Territories to contemplate amendments to State-based schemes to bring some parity between the mechanisms available to same-sex couples and heterosexual couples in the adjustment of property matters following relationship breakdowns. Indeed the Victorian Government acknowledges the importance of appropriate mechanisms to resolve disputes in order to ensure that rights and obligations are being observed and are not being abandoned for lack of an accessible opportunity to enforce them.⁶⁷

In the context of Victoria the following recommendations should be considered in relation to amendments to Part IX of the *Property Law Act 1958*:

- Each party to bear their own costs in relation to applications under Part IX⁶⁸.
- Courts hearing applications under Part IX to firstly refer parties to counselling, mediation or arbitration in appropriate circumstances⁶⁹. The State Government should also endeavour to

⁶⁷ Attorney General's Justice Statement, May 2004, p 33.

⁶⁸ The principle is already in use in Victoria under the *Victorian Civil and Administrative Tribunal Act 1998* (section 109) which establishes the jurisdiction of the Victorian Civil and Administrative Tribunal in relation to small claims, anti-discrimination, guardianship and administration, tenancy, domestic building works, planning and environment and administrative review of governments decisions.

⁶⁹ See for example s60 of the *Family Court Act 1997* (WA), which provides that if a court considers that the parties to a dispute before the court could be helped to resolve the dispute then the court must, in accordance with any relevant regulations, advise the parties to seek the help of a family and child mediator.

provide same-sex couples with access to appropriate dispute resolution pathways in line with its commitments set out in the Victorian Attorney-General's Justice Statement, May 2004.

- Officially recognise agreements between parties and provide for the enforcement of binding agreements similar to that established under the *Family Law Act*. Consider also the recognition and enforcement of other types of agreements that seek to give effect to the intentions of domestic partners such as cohabitation and separation agreements.
- Develop a mechanism to enable Courts to make orders for the provision of maintenance for domestic partners – particularly in circumstances where a domestic partner is unable to adequately support themselves due to their responsibilities for the care of a child from that domestic relationship.
- The State Government should analyse the manner in which courts are taking into consideration prospective claims or entitlements in respect of a scheme, fund or arrangement under which superannuation, retirement or similar benefits are dealt with in the adjustment of property of domestic partners and consider whether the courts require any further legislative guidance in the consideration of such matters.

PART **FOUR**

In section 3.2 of this submission we highlighted the obligations imposed on the Commonwealth in relation to respecting rights and ensuring the rights of all people are realised without distinction of any kind. This part of the submission looks at the Commonwealth's obligation to implement effective mechanisms to allow people to seek redress for breaches of their rights in the context of discrimination on the ground of sexual orientation; international jurisprudence that establishes discrimination against gay men and lesbians is prohibited by international covenants and the Commonwealth's ability to legislate in this respect; and recommendations for the development of legislation to prohibit discrimination on the ground of sexual orientation.

4.1 Access to redress from discrimination on the ground of sexual orientation

The ICCPR requires Australia to provide an effective remedy for persons claiming that their rights have been breached. Specifically Article 2.3 of the ICCPR provides that each State Party to the Covenant must undertake:

- To ensure that any person whose rights or freedoms as recognised in the Covenant are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity;
- To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy;
- To ensure that competent authorities shall enforce such remedies when granted.

This effectively obliges State Parties to develop effective remedies to prevent breaches of rights and freedoms guaranteed by the ICCPR. This obligation was highlighted in *Young v Australia* where the

United Nations Human Rights Committee enunciated Australia's obligation to provide Mr Young with an effective remedy:

“Pursuant to article, 2, paragraph 3(a), of the Covenant, the Committee concludes that the author, as a victim of a violation of article 26 is entitled to an effective remedy, including the reconsideration of his pension application without discrimination based on his sex or sexual orientation, if necessary through the amendment of law. The State party is under an obligation to ensure that similar violations of the Covenant do not occur in the future.”⁷⁰

However the Commission would venture further that the duty to provide effective remedies implies the need for broader protection in the public sphere for gay men and lesbians who experience discrimination.

Whilst most states and territories provide some degree of protection from discrimination on the ground of sexual orientation, at the Federal level there are almost no effective avenues of redress for people who experience such discrimination. The *Human Rights and Equal Opportunity Commission Act 1986* provides an extremely limited avenue for redress for discrimination on the ground of “sexual preference”, but only in relation to Commonwealth bodies and agencies and in employment. Complainants wishing to pursue redress through this avenue may access HREOC's complaint-handling service only, as HREOC has no power to make enforceable determinations in respect of complaints under the Act and complainants have no access to a formal determination of an entitlement to remedy by a Court. Where complaints cannot be resolved by conciliation, the only option available is for HREOC to report its findings and recommendations to the Commonwealth Attorney-General who is required to table the report in the Federal Parliament. This situation arguably breaches the ICCPR with respect to the obligation that a person claiming such remedy should have their right thereto determined by competent judicial, administrative, or legislative authorities. The use of the term ‘determined’ in the Covenant connotes that a decision or resolution is made upon whether the alleged conduct amounts to a breach of the rights set out in the Covenant.

The fundamental human rights principles of equality before the law and the right to non-discrimination as set out in the ICCPR require Australia to ensure that all people within its jurisdiction are equal before the law, as well as receive equal protection of the law and are free from discrimination under the law. The current status of significant discrimination against same-sex couples and the current lack of access to effective remedies cannot be said to be meeting this international commitment. In the Commission's opinion what is necessary is the expansion and enhancement of the Federal avenue of civil redress for people who experience discrimination on the grounds of sexual orientation.

4.2 The Commonwealth's power to enact discrimination laws to protect people on the ground of sexual orientation

It is well accepted that the Commonwealth power to enact discrimination laws rests upon the use of its external affairs power under the *Constitution*⁷¹. This power has also been interpreted liberally to validate Commonwealth anti-discrimination provisions that give effect to the principles stated in international conventions notwithstanding that the relevant convention does not expressly refer to the matter being legislated upon⁷². This is a particularly pertinent point in considering the Commonwealth's power to

⁷⁰ *Young v Australia* at para 12.

⁷¹ *Koonwarta v Bjelke-Petersen* (1982) 153 CLR 168.

⁷² In *Aldridge v Booth* (1988) 80 ALR 1, the respondent challenged the validity of a provision in the Federal *Sex Discrimination Act 1984* which made sexual harassment in employment unlawful. It was argued that sexual harassment was not expressly prohibited by the Convention on the Elimination of All Forms of Discrimination against Women. Spender J ruled that the sexual harassment provisions were valid by reason of the Commonwealth's external affairs power and even though the Convention did not expressly refer to sexual harassment it was enough that the provisions of the SDA sought to give effect to the principles stated in the Convention which prohibited discrimination.

legislate for the prohibition of discrimination on the basis of sexual orientation and the scope of international law to provide that basis.

The International Labour Organisation Convention (no 111) concerning discrimination in respect of employment and occupation requires Australia to ensure ‘equality of opportunity and treatment in respect of employment and occupation with the view to eliminating discrimination in respect thereof.’ Whilst the ILO111 does not include specifically discrimination on the basis of sexual orientation it does provide an inclusive definition of discrimination which enables member States to determine such other distinctions that may give rise to discrimination. We have already seen the Federal Government draw upon this provision in respect of the inclusion of ‘sexual preference’ in the *Human Rights Equal Opportunity Commission Regulations*⁷³.

Similarly, the ICCPR requires Australia to respect and ensure the enjoyment of rights recognised in the Covenant without distinction of any kind (Article 2) and the right to equality before the law (Article 26): “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 scope of Article 26 of the ICCPR to prohibit discrimination on the grounds of sexual orientation was first raised in *Toonen v Australia*. Mr Toonen complained that the Tasmanian Criminal Code which criminalised all sexual conduct between consenting male persons, including in private, breached articles 2, paragraph 1, 17 and 26 of the ICCPR. Principally the Committee found that the Tasmanian Criminal Code provisions arbitrarily and unlawfully interfered with Mr Toonen’s privacy in contravention of Article 17 of the ICCPR.

Significantly, in this Communication, Australia as the responding State party sought the Committee’s guidance as to whether sexual orientation may be subsumed under the term ‘other status’ for the purposes of Article 26. Notwithstanding that the Committee in its majority judgment did not consider it necessary to consider whether there had also been a breach of Article 26, the Committee noted that the same issues could arise under article 2, paragraph 1 of the Covenant; and in its view the reference to “sex” in Article 2, paragraph 1 and Article 26 is to be taken as including sexual orientation.

A separate opinion by Mr Wennergren concurred with the majority’s view that reference to the term sex in the Covenant is to be taken as including sexual orientation, but he ventured further that the Tasmanian criminal code provisions set aside the principle of equality before the law thereby infringing Article 26 in conjunction with Articles 17 and 15 of the Covenant.

The scope of the ICCPR to encompass sexual orientation was confirmed by the United Nations Human Rights Committee in the seminal decision in *Young v Australia*. This case concerned an Australian man who applied for a pension on the basis of being a dependent of a war veteran. He was refused as he was not considered a “member of a couple” within the meaning of the relevant legislation. The Committee accepted that the Australian Government’s refusal to provide Mr Young with a pension benefit on the basis he was the same sex as his partner, violated his right to equal treatment before the law, due to his sexual orientation, and was contrary to Article 26 of the Covenant. This finding was made after the Committee affirmed its jurisprudence in the communication of *Toonen* that the prohibition against discrimination in article 26 of the Covenant also comprises discrimination based on sexual orientation.

⁷³ One might locate the beginning of this process in June 1973, with Australia’s accession to the ILO’s Convention 111 on Discrimination, and the consequent setting up of National and State Committees on Discrimination in Employment and Occupation. From their inception the CDEOs received complaints of discrimination on the ground of homosexuality. The Committees were abolished when Australia’s obligations under the Convention were put on a statutory basis with the enactment of the *Human Rights and Equal Opportunity Commission Act 1986* (Cth). Regulations made in 1989 confirmed that discrimination on the ground of “sexual preference” was covered by the Act. Cited from 1992 Research project of EOCV Commission member Jamie Gardiner, ‘Invisible Families – Discrimination and the Legal Status of Gay Couples’ available at http://homepage.mac.com/jamie_gardiner/words/

Regardless of whether discrimination on the basis of sexual orientation comes under the ground of “sex” or “other status” and given the international jurisprudence provided by the communications of *Young and Toonen* it seems clear that the ICCPR and ILO Convention (no 111) provide a substantial basis for the Commonwealth to invoke its foreign affairs power to legislate to prohibit discrimination on the ground of sexual orientation.

4.3 Recommendations for implementing legislation to protect people from discrimination on the ground of sexual orientation

The Commission is aware that past attempts have been made to introduce legislation in the Commonwealth Parliament prohibiting discrimination against same-sex couples⁷⁴. Notwithstanding the lack of success of such past attempts it is time to remedy this as laws prohibiting discrimination will provide more than just a source of enforceable rights and remedies for gay, lesbian and bisexual people; they may also provide a basis for shifting prejudicial community attitudes and increased acceptance and legitimacy of same-sex relationships. The Commission suggests two options for prohibiting discrimination on the ground of sexual orientation in order of preference:

1. First, introduction of an Act solely dedicated to the prohibition of discrimination on the ground of sexual orientation⁷⁵; a dedicated Act will act as a powerful statement to the community of the acceptance, respect and recognition of gay, lesbian and bisexual people and their relationships.
2. Alternatively, amendments to the Sex Discrimination Act to incorporate a ground of sexual orientation, to enable greater protection for people who experience discrimination on this ground in all public areas of their lives and more effective enforceable remedies.

⁷⁴ Senator Sid Spindler introduced a private member’s Bill – the *Sexuality Discrimination Bill 1994* and a similar attempt was made by Senator Kerry Nettle in 2004 with the *Same Sex Relationships (Ensuring Equality) Bill 2004*.

⁷⁵ The Commission prefers the term ‘sexual orientation’ over ‘sexuality’ and ‘sexual preference’ because it semantically best represents the experience of being gay, lesbian or bisexual. The term ‘sexual orientation’ is also used in the *Equal Opportunity Act 1995* (Vic). The term sexuality pertains to the recognition or emphasis of sex, whereas discrimination suffered by gay, lesbian or bisexual people mostly relates to the direction of a person’s emotional or sexual feelings, which is what sexual orientation emphasises, and why it is the preferred term. The term ‘sexual preference’ implies that homosexuality, lesbianism and bisexuality are a choice, with the reactionary implication that they can therefore be changed, an implication in conflict with the lived experience of gay, lesbian or bisexual people, and therefore an inappropriate term.