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**Submission to the Human Rights and Equal Opportunity Commission
on Same-Sex Entitlements**

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EXECUTIVE SUMMARY

Australia's failure to recognise same-sex couples within the sphere of Commonwealth superannuation entitlements and Comcare is a fundamental flaw in Australia's protection of human rights. This submission outlines the discrimination inherent in these two schemes. Although recent changes to the law via the *Superannuation Legislation Amendment (Choice of Superannuation Funds) Act 2004* brought about much needed improvements within superannuation law for many same-sex couples; Commonwealth employees, members of the Australian Defence Force and Parliamentarians continue to face discrimination if they are in a same-sex relationship. In analysing the law in foreign jurisdictions, it becomes apparent that there is a universal trend towards legal recognition of the full range of human rights enjoyed by all persons, regardless of their sexual orientation.

Workers Compensation under Comcare fails to recognise that a same-sex partner is entitled to benefits if their partner dies in a workplace accident. This is out of step with the law in many State and Territory jurisdictions within Australia, as well as international law; in particular the International Covenant on Civil and Political Rights, the International Labor Organisation Convention No. 111. An examination of this jurisprudence indicates that the international community advocates for the recognition of same-sex couples and their entitlement to the same benefits as different-sex couples.

The Federal Government's failure to recognise same-sex couples by maintaining gender specific language within its legislation is based on a past era and is out of sync with the laws in its own State and Territory jurisdictions, other civilised countries and international law.

The former Chief Justice of the Family Court, Alastair Nicholson stated that

“what must be properly understood is that the real effect of refusing to acknowledge and provide protections to same-sex relationships is to fail to recognize nothing else but *relationships* and the meanings they give to an individual's life. This current state of the law smacks of society punishing otherwise law-abiding members for a sexual orientation that is, in and of itself, lawful.”¹

It is with this in mind that the Castan Centre for Human Rights Law makes this submission to the Human Rights and Equal Opportunity Commission. The inquiry that HREOC is seeking to undertake into same-sex entitlements is very broad ranging. Limits on resources make it impossible for the Castan Centre to address all areas identified by HREOC, and therefore the Castan Centre has nominated to focus just on the discrimination inherent in the Commonwealth Superannuation and the Comcare schemes.

The purpose of providing a death benefit to the dependant of an employee, whether via Superannuation or Comcare, is to support the dependant of an employee during a traumatic period. Australia's current laws provide further hardship to same-sex couples by excluding them from such entitlements based solely on their sexual orientation.

Superannuation Entitlements

(i) Australia – Current Law

As of 2005, superannuation coverage was around 87% of all persons employed, including self-employed individuals in Australia.² Almost 100% of full-time employees in Australia had superannuation coverage.³

Approximately 0.5% of household couples are same-sex couples.⁴ Curtailing the entitlements of same-sex couples to superannuation benefits is fundamentally discriminatory. Shadow Minister Anthony Albanese highlighted this discrimination when he stated that:

“We are talking about someone's money that they have contributed as part of their working life. What this discrimination says is that if you happen to be in a same-sex relationship you cannot determine where that money goes...it is an obscene form of theft of people's money and a blatant abuse of human rights.”⁵

a. Recent Changes to Australian law

Although many people draw up a will, a will does not necessarily encompass the distribution of an individual's superannuation fund following their death, as the money distributed from a superannuation fund will not only include the money in the fund, but also an insurance payment (a death benefit) if life insurance was included in the individual's superannuation fund membership. The fund may pay the death benefit to either the deceased's dependants or to his/her estate.

The *Superannuation Legislation Amendment (Choice of Superannuation Funds) Act 2004* provides that a member of a same-sex couple can nominate their partner to receive their superannuation benefits when they die and that the tax free status for superannuation benefits extends to same-sex couples. The recent changes to superannuation via the *Superannuation Industry (Supervision) Act 1993* allow same-sex partners to receive the same superannuation benefits as heterosexual couples. Section 62 of the *Superannuation Industry (Supervision) Act 1993* provides that “Each trustee of a regulated superannuation fund must ensure that the fund ... [provides] ... benefits in respect of each member of the fund on or after the member's death if...the benefits are provided to the member's legal personal representative, to any or all of the member's dependants or both”. At section 10, a 'dependant' is defined as “the spouse of the person, any child of the person and any person with whom the person has an interdependency relationship.” Section 10A defines

an interdependency relationship, stating that for the purposes of this Act, two persons (whether or not related by family) have an *interdependency relationship* if:

- (a) they have a close personal relationship; and
- (b) they live together; and
- (c) one or each of them provides the other with financial support; and
- (d) one or each of them provides the other with domestic support and personal care.

b. What amounts to interdependency?

The following cases give an indication as to how the new law relating to ‘interdependency’ might be interpreted by the courts. In the 1988 case of *Ball v Newey*, the New South Wales Court of Appeal held that if two people were “mutually financial dependent’ on one another that was sufficient to amount to dependency.⁶

In the case of *McKenzie v Baddeley*,⁷ Frank Burton owned a block of land and invited Ken McKenzie to park his caravan on it. The two men soon commenced a relationship and consequently did most things together; including cooking, shopping and socialising. McKenzie used Burton’s property to grow vegetables, which he would then sell. McKenzie’s sole asset was the caravan and he was also receiving \$150 per week in Government benefits. McKenzie was held to be partially dependent on Burton.⁸

In the case of *Hope v NIB Health Funds*⁹, the Tribunal stated that

“dependent...is an ordinary word having normal connotations of reliance, need, confidence, favour and aid in sickness and in health including social and financial support and its normal meaning is not limited to financial dependence...The mere fact that one member of a household couple is in receipt of earnings does not mean that he or she is not a dependant of the other or that they may not be mutually dependent.”¹⁰

c. Commonwealth employees, Australian Defence Force members and Parliamentarians

The recent amendments via the *Superannuation Industry (Supervision) Act 1993* are progressive steps in removing discrimination within the field of same-sex entitlements. However, legislation governing Commonwealth employees, members of the Australian Defence Force and parliamentarians continues to discriminate against same-sex couples.

Commonwealth Employees

The *Superannuation Act 1976 (Cth)* relates to Commonwealth employees. Section 8B(2) of this Act states that:

“..For the purposes of this Act, a person is a spouse who survives a deceased person if the person had a marital relationship with the deceased person at the time of the death of the deceased person.”

Section 8A states that for the purposes of this Act, a person has a ‘marital relationship’ with “another person at a particular time if the person ordinarily lived with that other person as that other person’s husband or wife on a permanent and *bona fide* domestic basis at that time.” The use of the terms ‘husband’ and ‘wife’ in section 8A exclude the possibility for same-sex relationships being included within this definition.

In 1992, Parliament introduced section 8A to the *Superannuation Act 1976*. The previous definition of spouse contained in the Act discriminated against persons living in a de facto relationship. Consequently, the introduction of section 8A removed this discrimination.

In 1995 in the case of *Brown v Commissioner for Superannuation*, the Administrative Appeals Tribunal (AAT) held that “the fact that the persons must be of the opposite sex is inherent...in the use of the words ‘husband’ and ‘wife’.”¹¹ Further, the AAT held that the “clear import of section 8A is to restrict access to spouse benefits to husbands and wives who have lived together on a *bona fide* basis whether or not they are legally married. It would be stretching the language of the section beyond any permissible bounds to find otherwise.”¹² Finally, the AAT held that in this case there was no doubt that the applicant and his same-sex partner “had a close marriage-like relationship and that they conformed to the requirements of sections 8A in all respects except for their gender.”¹³ The case of *Brown v Commissioner for Superannuation* illustrates that the 1992 amendments to Section 8A, which intended to remove discrimination on the grounds of marital status did not provide redress to same-sex couples.¹⁴ Despite this, in his Second Reading Speech in relation to these amendments, the Minister stated that the “key criterion for eligibility of a surviving spouse...will be the existence of a permanent and *bona fide* relationship”.¹⁵ No reference as to whether or not the Act was intended to extend to same-sex relationships was made.¹⁶

In the schedule to the *Superannuation Act 1990*, which relates to employees of the Australian Public Service, a spouse is entitled to a reversionary pension upon the death of a retirement pensioner. However, Rule 1.1.1 states that:

“‘spouse’ in relation to a person who has died and who was, at the time of his or her death, a member or a retirement pensioner, means (a) a person who was legally married to the deceased person at the time of the person’s death and who, at that time, was ordinarily living with the person on a permanent and *bona fide* domestic basis.”

Since same-sex marriage is illegal in Australia, same-sex couples are not entitled to the reversionary pension inherent in the *Superannuation Act 1990*.

Members of the Australian Defence Force

The *Defence Force Retirement and Death Benefits Act 1973* relates to Australian Defence Force (ADF) members. The Act states that a ‘spouse’ may receive pensions on the death of a contributing member or a recipient member.¹⁷ For the purposes of this Act, a spouse

must have been in a marital relationship with the deceased. The *Defence Force Retirement and Death Benefits Act 1973* defines a ‘marital relationship’ by stating that “a person has a marital relationship with another person at a particular time if the person ordinarily lived with that other person as that other person’s husband or wife on a permanent and *bona fide* domestic basis at that time”.¹⁸ The *Military Superannuation and Benefits Rules* which are scheduled to the *Military Superannuation and Benefits Act 1991* entitle a spouse and children to the payment of the deceased’s superannuation benefit.¹⁹ A ‘spouse’ is defined as being in a marital relationship which has the same definition as above.²⁰

Parliamentarians

The *Parliamentary Contributory Superannuation Act 1948 (Cth)* relates to parliamentarians. Section 19 of the Act states if a deceased parliamentarian is survived by a spouse, the spouse is entitled to an annuity during his or her life-time.²¹ A spouse is defined as a person who had a marital relationship with the deceased person at the time of the death of the deceased person.²² The Act states that for the purposes of the Act, a person had a marital relationship with another person “at a particular time if the person ordinarily lived with that other person as that other person’s husband or wife on a permanent and *bona fide* domestic basis at that time.”²³

d. Terminology

The legislation relating to superannuation benefits for Commonwealth employees, members of the Australian Defence Forces or Parliamentarians, all contain gender-specific definitions of the term ‘spouse’ and consequently lead to discrimination against same-sex couples. The law in this regard has not changed since 1866 when Lord Penzance stated that marriage “according to law, is the union of a man and a woman to the exclusion of all others, voluntarily entered into for life”²⁴ The fact that the Commonwealth has based its legislation relating to superannuation on outdated concepts leads to inherent discrimination against same-sex couples and the entitlements available to them.

The use of the terms ‘husband’, ‘wife’ and ‘spouse’ in order to define a marital relationship has generated a great deal of jurisprudence and academic debate. Many have questioned whether the term spouse encompasses same-sex couples and whether the terms ‘husband’ and ‘wife’ are necessarily gender-specific.

In the case of *Brown v Commissioner for Superannuation*,²⁵ the possibility of the term ‘spouse’ encompassing same-sex couples was discussed by the Federal Court of Australia. In that case, Gregory Brown stated that he was entitled to be found to be a dependant by the trustee of his deceased same-sex partner’s superannuation fund. Mr. Brown’s partner, who died in 1993 worked as an Administrative Services Officer within the Commonwealth Defence Department. As he was a member of the Commonwealth Superannuation Scheme, his superannuation entitlements were dictated by the *Superannuation Act 1976 (Cth)*. Brown and his partner had pooled their incomes, and shared all living expenses, including rent, food, clothing, furniture, appliances and bills. At the hearing, the Commissioner for Superannuation agreed that the relationship

between Brown and his partner was both permanent and *bona fide*. However, when Brown applied for spousal benefits under section 81(1) of the *Superannuation Act 1976 (Cth)*, the Commissioner refused the application stating that there was no ‘marital relationship’ between Mr. Brown and his partner as per section 8A of the *Superannuation Act 1976 (Cth)*. Upon review of the decision, Mr. Brown argued that the terms ‘husband’ and ‘wife’ could be extended to include same-sex partners. However, the Court held that:

“The words ‘husband’ and ‘wife’ were incapable of application to partners in a homosexual relationship. The words connote a relationship which presupposes the existence of the other. There cannot be a ‘husband’ without there also being a ‘wife’. The words presupposed the existence of a marital relationship involving each of them as parties. The fact the persons must be of opposite sex was inherent in the meaning of the words...Section 8A extends only to husbands and wives, and not to other persons in similar or analogous situations.”²⁶

The Federal Court decisions of *Commonwealth v Human Rights and Equal Opportunity Commission & Kelland* and *Commonwealth v Human Rights and Equal Opportunity Commission & Muller* support the decision in *Brown v Commissioner for Superannuation*.²⁷

A great deal of discussion was generated in the case of *Brown v Commissioner for Superannuation* relating to whether the term ‘spouse’ should refer exclusively to the relationship between a husband and a wife, or whether the terms were gender neutral. The Court referred to the *Macquarie Dictionary* in order to define the terms, stating that “the primary meaning of ‘husband’ is the ‘man of a married pair (correlative of a wife).’ The definition of a ‘wife’ is a ‘woman joined in marriage to a man as husband.”²⁸ Dr. Edgar, a sociologist, stated that “the social definition of the words ‘husband’ and ‘wife’ is not fixed but reflects the dominant gender norms in society, and presently could encompass homosexual couples in a lasting relationship. The gender of the parties...is no longer a crucial element in determining whether the relationship of husband and wife exists.”²⁹ Further, Professor Ball, a psychiatrist, stated that “the actual gender of the partners is no longer a criterion by which one can determine whether or not a relationship exists.”³⁰

Counsel for Mr. Brown asserted that “there is no reason why s8A [of the *Superannuation Act 1976*] should not extend to husbands who live with husbands or wives who live with wives.”³¹ Counsel for Mr. Brown highlighted the use of the Legislature’s words “as that other person’s husband or wife” in section 8A of the *Superannuation Act 1976*. Counsel held that the use of the word ‘as’ permits the section to be extended to those living in a relationship analogous to that of husband and wife. It was argued that this was not only intended by Parliament, but that it is also consistent with Australia’s treaty obligations.³² However, the Court held that this interpretation is only valid if the term ‘as’ is defined as meaning ‘in the manner of’. The Court held that ‘as’ was intended to be read as meaning ‘in the character, capacity, function, or role of’ as per the *Shorter Oxford Dictionary*.³³

Despite the court stating that “society is moving away from the assignment of gender based roles within relationships”³⁴ it ultimately held that same-sex couples did not come within the scope of the *Superannuation Act 1976*. The court cited Swinfen Eady LJ in the case of *Marquis of Camden v Commissioners of Inland Revenue*³⁵ in stating that:

“It is the duty of the court to construe a statute according to the ordinary meaning of the words used, necessarily referring to dictionaries or other literature for the sake of informing itself as to the meaning of any words, but any evidence on the question is wholly inadmissible...it is a public Act of Parliament, and the court must take judicial cognizance of the language used without evidence.”³⁶

This judgment places greater emphasis on the Australian legislature to ensure that legislation encompasses both opposite-sex and same-sex couples. The case of *Brown v Commissioner of Superannuation* highlights that the judiciary will only interpret legislation in line with the intentions of Parliament, and as such the onus is heavily on the Legislature to change the current law in relation to same-sex couples.

(ii) Approaches in Foreign Jurisdictions

In order to gain a clearer insight into the discrimination inherent within Australia’s superannuation laws, it is important to analyse the law in other jurisdictions relating to pensions or schemes similar to the Australian superannuation scheme.

a. United Kingdom

In 2003, a survey conducted in the United Kingdom of seventy-six public and private sector organisations revealed that 72% provided equal benefits to same-sex and unmarried opposite sex partners.³⁷ By virtue of the *Civil Partnerships Act 2004 (CPA)*, same-sex couples may now enter into a civil partnership which not only provides legal recognition for their relationship but also many benefits.³⁸ The Civil Partnership scheme came into force on 5 December 2005. As of 2010, civil partners will be treated the same way as husbands and wives.³⁹ Prior to the introduction of the *CPA*, a same-sex partner was not entitled to any survivor benefits if their partner, who was a member of a pension scheme, died.⁴⁰ Further, if a same-sex relationship broke up neither partner could claim a portion of the other’s pension fund. The *CPA* ensures that couples in a civil partnership are entitled to many of the same benefits as heterosexual couples; including most state and occupational pension benefits, income related benefits, tax credits and child support.⁴¹

However, civil partners still do not have complete parity with different-sex couples. Within public-service schemes, civil partners are entitled to a pension based on the pension rights accumulated by their deceased civil partner. A surviving partner will benefit from their civil partner’s pension, based on the contracted-out pension rights which were accumulated by their partner from 1988 to the date of retirement or death.⁴² This rule applies to all State pensions and contracted-out private pension schemes, including public service pensions, such as civil service and Armed forces pensions in addition to occupational and personal pension schemes in the private sector. This rule is

almost akin to the regulations currently controlling the widowers' pension, with the exception that widowers' pensions accrue from 1978.⁴³

Amendments which were introduced to the *Employment Equality (Sexual Orientation) Regulations* in light of the CPA, render it unlawful for employers to treat married partners and civil partners differently as of December 2005.⁴⁴ Thus, if an occupational pension scheme is contracted-in to the State Second Pension Scheme, the surviving civil partner need only be treated as a surviving spouse in relation to their civil partner's service after the amended *Employment Equality (Sexual Orientation) Regulations* came into force in 2005. As such, if a couple formed a civil partnership in December 2005, and the pension scheme member died in December 2006, the surviving partner would only be eligible to a survivor pension calculated on the basis of one year of contributions.⁴⁵ In response to several trade unions stating that they would appeal this facet of the law, the Government has agreed that an element of backdating could be taken into account.⁴⁶ Contracted-out pension schemes differ in that their benefits accrue as of 1988.⁴⁷

If a member of a same-sex couple retires prior to registering a civil partnership, the Government has stated that it is their intention:

“that the surviving civil partner of any member – active, deferred or pensioner – with post 5 April 1988 membership should be entitled to benefit. Because civil partnership will not have been available before December 2005, no distinction will be made on the basis of whether the civil partnership was entered into before or after the members ceased local government employment.”⁴⁸

Financially interdependent same-sex couples who have not formed a civil partnership will be treated the same way as unmarried heterosexual couples.

b. Canada

In Canada, the retirement system has three tiers, including Old Age Security (OAS), the Canada Pension Plan (CPP) and private pensions and savings. OAS which came into force in 1952 includes the security pension, the guaranteed income supplement and the allowance. The CPP, which came into force in 1966, provides benefits when a contributor to the CPP becomes disabled or retires. When the contributor dies, the Plan provides benefits to their survivors. The CPP is a monthly benefit and it is designed to replace 25% of the earnings on which a person's contributions were based.⁴⁹

In 2000, the Canadian Government introduced the *Modernization of Benefits and Obligations Act* which has been referred to as 'omnibus legislation' which gives same-sex partners in a common-law relationship the same entitlements as different-sex partners.⁵⁰ The Legislation has not changed the definition of marriage which continues to define a 'spouse' as a person of the opposite sex to whom one is legally married. However, whenever the term 'spouse' is used within legislation, it is accompanied by the words 'or common-law partner'. A common-law partner has been defined as a person of the same or opposite sex with whom one has been living in a conjugal relationship for at

least a year. The *Modernization of Benefits and Obligations Act* extends to both the OAS and CPP and consequently the benefits and the obligations in both these plans have been extended to include same-sex couples.⁵¹

Canadian jurisprudence indicated a change within Canadian society prior to the legislative reforms in 2000. The two formative cases included *Leshner v Ontario (No 2)* and *Egan v Canada*.

The case of *Leshner v Ontario (No.2)*⁵² held that pension plans for employees in Ontario discriminated against same-sex couples. The Ontario *Public Service Pension Act* gave benefits to the surviving spouse of an employee and the applicant nominated his same-sex partner as his spouse. The Board read down the requirement for the spouse to be ‘of the opposite sex’ from the *Public Service Pension Act* deeming it to be discriminatory.⁵³

The couple in the case of *Egan v Canada*,⁵⁴ was in a long-term same-sex relationship. When Mr. Egan reached the age of 65, he began receiving an old-age pension and his partner applied for a spousal allowance under the *Old Age Security Act*. The Canadian Supreme Court dismissed the application, with the court divided 5-4. The Majority held that the requirement for a spouse to be of the opposite sex in the Act was valid. The Minority; however, held that the definition of the term ‘spouse’ in the Act was discriminatory in its failure to ensure equality before the law for same-sex couples.⁵⁵ Although, the court dismissed this application, this was the first time that the highest court in Canada unanimously recognised sexual orientation as a ground of discrimination under the Canadian Charter of Rights and Freedoms.⁵⁶

c. United States

In the case of *Goodridge v Department of Public Health*, the Massachusetts Supreme Judicial Court held that under the state constitution, same-sex couples have the right to marry. In light of this case, many in the United States have questioned the entitlements available to same-sex couples.

In the United States, social security benefits are payable to the spouses of retired, disabled or deceased workers covered by Social Security.⁵⁷ The *Social Security Act*⁵⁸ allows States to determine whether a marriage is valid for the purpose of qualifying for spousal or survivor benefits. However, the Social Security Administration has stated that the use of the gender specific terms ‘wife’ and ‘husband’ is intended to exclude same-sex spouses or survivors from entitlements to Social Security Benefits.⁵⁹ Further, the *Defense of Marriage Act 1996* asserts that the legal definition of marriage is limited to the legal union between a man and a woman and that a ‘spouse’ is a person of the opposite sex who is a husband or wife for the purposes of any Act of Congress, ruling, regulation, or interpretation by federal agencies.⁶⁰ As this federal definition must be used in interpreting all Acts, the legality of same-sex marriage in Massachusetts appears to have no bearing on the validity of marriage for the purposes of social security.⁶¹ In effect, the *Defense of Marriage Act* ensures that a same-sex partner cannot qualify as a spouse for any purpose under federal law.

The retirement and disability benefits of federal employees with permanent appointments are covered by either the *Civil Service Retirement System (CSRS)* or the *Federal Employees Retirement System (FERS)*, depending on their time of employment. Both CSRS and FERS provide survivor benefits for spouses and dependent children of deceased federal employees or retirees. Title 5 of the *U.S. Code* governs benefits under both the CSRS and FERS and it provides a gender-specific definition of the term 'spouse'.⁶² Further, marriage is defined in the *Code of Federal Regulations* in relation to federal retirement benefits, as "a marriage recognized in law or equity under the whole law of the jurisdiction with the most significant interest in the marital status of the employee, member, or retiree, unless the law of that jurisdiction is contrary to the public policy of the United States."⁶³

The *Employee Retirement Income Security Act 1974 (ERISA)* is a federal law which sets the minimum standard for the majority of voluntarily established pensions and health plans within the private industry. An employer is not required to ensure that the benefits that they provide to their employees under an ERISA plan extend to the same-sex partners of their employees.⁶⁴ Provided that the choice of the employer is not discriminatory under federal law, employers do have discretion to extend their benefits to the same-sex partners of their employees.⁶⁵ It appears that as long as the *Defense of Marriage Act* remains in place, employers are not required to extend their benefits to the same-sex partners of their employees.

The case of *Rovira v AT&T*⁶⁶ provides an appropriate example of the application of this law. Ms. Rovira was the surviving same-sex partner of an employee of AT&T. Ms. Rovira was not permitted to collect death benefits under the AT&T Employment Policy despite the fact that her partner was covered by an employee benefit plan governed by the ERISA. Ms. Rovira requested the benefit for herself and for her two children who had been living with her and her partner. The death benefits were denied on the basis that Ms Rovira did not fall within the definition of 'spouse' within ERISA as the two women were not legally married. AT&T had made an assurance that it would not discriminate against its employees; however, due to the *Defense of Marriage Act* and the *ERISA*, AT&T was not required to comply with this promise. The Court held that the limiting of spouses to married spouses was neither unreasonable nor discriminatory.⁶⁷

Several bills were introduced in the 108th Congress in 2004 in an attempt to liberalise the definition of marriage at the federal level. One bill introduced by Representative Barney Frank H.R. 2677 sought to eliminate any form of federal policy as to the definition of marriage. The 'Equal Access to Social Security Act of 2004' H.R. 4701 Bill, introduced by Representative Nadler on 24 June 2004 sought to provide Social Security spousal and survivor benefits to same-sex couples. The H.R. 2426 and S.1252 Bills sought to extend survivor benefits under both CSRS and FERS to domestic partners of eligible federal employees, defining domestic partner as "an adult person, living with, but not married to, another adult person in a committed intimate relationship."⁶⁸ However, none of these bills were passed at the 108th Congress in 2004 and consequently the *Defense of Marriage Act* continues to curtail the granting of entitlements to same-sex couples.

d. Denmark

In 1989, the national legislature of Denmark passed laws recognising same-sex relationships. The *Danish Registered Partnership Act 1989 (Act Number 372)* allows same-sex couples to register their partners in a civil ceremony which allows these relationships to have similar legal consequences to legal marriage. Same-sex partners who do not register their relationships have the same legal status as de facto heterosexual couples, including pension rights and rights of survivorship.⁶⁹

e. Norway

In 1993, Norway passed legislation allowing same-sex partnership registration. The *Norwegian Registered Partnership Act 1993* largely provides same-sex couples with the same guarantees as legal marriage.⁷⁰ Within the *Norwegian Registered Partnership Act 1993*, a registered partner who supports their same-sex partner and receives an old-age pension or a disability pension, is entitled to a supplemented payment for their partner. A survivor's pension will be given to a surviving registered partner in the event of the death of their same-sex partner.

f. Germany

In Germany, the *Life Partnerships Act 2000* allows same-sex couples to register their partnerships. Registration entitles same-sex couples to survivor pension rights.⁷¹

g. Hungary

Common Law same-sex relationships have been recognised in Hungary since 1996. Same-sex couples are entitled to the same rights as heterosexual couples, except in the adoption of children.⁷² A surviving partner is eligible for a survivor's pension in Hungary if the surviving partner can prove that the couple lived together for ten uninterrupted years. A court case in Hungary argued that as registered partnerships only became legal in 1996, the surviving pension scheme would only come into practice for same-sex couples in 2006. However, the court held that any period of cohabitation preceding the enactment of the legislation in 1996 should be taken into account.⁷³

3. Workers Compensation under Comcare

(i) Commonwealth of Australia

Comcare in Australia is another glaring example of discrimination against same-sex couples. Comcare regulates workplace safety, rehabilitation and compensation for federal employees via the *Safety, Rehabilitation and Compensation Act 1988 (Cth)*. A dependant is entitled to compensation under Comcare. A 'dependant' in relation to a deceased employee is defined in the *Safety, Rehabilitation and Compensation Act 1988* as 'the spouse, father, mother, step-father, step-mother, father-in-law, mother-in-law, grandfather, grandmother, son, daughter, step-son, step-daughter, grandson, grand-daughter, brother, sister, half-brother or half-sister of the employee; or a person in relation to whom the employee stood in the position of a parent or who stood in the position of a parent to the employee; being a person who was wholly or partly dependent on the employee at the date of the employee's death.'⁷⁴ Despite the length of this list, a

same-sex partner is not included within the definition of ‘dependant’; as a ‘spouse’ is defined as a ‘person of the opposite sex; who lives or lived with the employee on a bona fide basis.’⁷⁵ The result of this is that if a Commonwealth employee dies, their same-sex partner will not be entitled to compensation that would otherwise be provided to the dependants of an employee.⁷⁶ In comparison with most State jurisdictions, the Federal Government has failed to recognise that surviving same-sex partners should be entitled to compensation if the death of their partner has been caused by a workplace injury.⁷⁷

An analysis of the law relating to Workers Compensation within Australia’s own states and territories highlights the blatant discrimination inherent in the Comcare scheme.

(ii) The Approach of Australian States and Territories to Workers Compensation

Victoria

Section 92 of the *Accident Compensation Act 1985* (Vic)⁷⁸ provides that “if a worker’s death results from or is materially contributed to by an injury”, the worker’s dependants, including members of his or her family or his/her spouse, will be entitled to compensation.

The recently amended section 92A commences by defining a ‘dependent partner’ as a “partner wholly or mainly dependent on the worker’s earnings” and a ‘partially dependent partner’ as a “partner who is to any extent dependent on the worker’s earnings”. The Section then states that a partner or a dependant is entitled to compensation upon the death of a worker.

Within the definitions section of the *Accident Compensation Act 1985* (Vic), ‘dependant’ is defined as a person who “at the time of the death of a worker was wholly, mainly or partly dependant on the earnings of a worker.” A ‘member of a family’ includes the ‘partner’ of the worker. In relation to the definition of ‘partner’, if a worker died prior to June 2001, a partner is defined as “the worker’s spouse at the time of the worker’s death; or a person of the opposite sex who, though not married to the worker, lived with the worker at the time of the worker’s death on a permanent and bona fide domestic basis.” However, if the worker died after June 2001, a partner is defined as “the worker’s spouse or domestic partner at the time of the worker’s death.” A ‘Spouse’ is defined as a person to whom the worker was married. Whereas, a ‘domestic partner’ is defined as 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)”.

Australian Capital Territory

WorkCover in the Australian Capital Territory is regulated by the *Workers Compensation Act 1951*.(ACT) Section 77 outlines that death benefits will be payable upon the death of a worker to the dependants of that worker. The Dictionary in Schedule 2 of the *Workers Compensation Act 1951* defines a dependant as an individual “who was totally or partly dependant on the worker’s earnings on the day of the worker’s death...and who was a member of the worker’s family”. Included within the definition of a ‘member of the

family' is a 'domestic partner' which is defined as a 'person who was the worker's domestic partner when the worker died.' The definition of 'domestic partner' directs the reader to the definition of 'domestic partner' found in the *Legislation Act 2001*, which states at section 169 that "a reference to a person's 'domestic partner' is a reference to someone who lives with the person in a domestic partnership, and includes a reference to a spouse of the person...A domestic partnership is the relationship between 2 people, whether of a different or the same sex, living together as a genuine couple on a genuine domestic basis." The *Legislation Act 2001* provides a non-exhaustive list of indicators to decide whether two people are in a domestic partnership, including: the length of their relationship; whether they are living together; if they are living together – how long and under what circumstances have they lived together; whether there is a sexual relationship between them; their degree of financial dependence or interdependence and any arrangements for financial support, between them or by them; the ownership, use and acquisition of their property, including any property that they own individually; their degree of mutual commitment to a shared life; whether they mutually care for and support children; the performance of household duties; and the reputation, and public aspects of the relationship between them.

New South Wales

WorkCover in New South Wales is governed by the *Workers Compensation Act 1987* (NSW) which states at section 25 that the dependant of a worker who dies as a result of a work injury is entitled to compensation. Section 37 of the *Workers Compensation Act 1987* states that if a worker is still totally incapacitated after 26 weeks, they will be entitled to payment and a weekly payment will be made to "a dependent wife, husband, de facto spouse or other family member, child, brother or sister during the period of dependency." In defining a 'de facto spouse or other family member', the *Workers Compensation Act 1987* states that in relation to an injury which occurred before the Commencement of the *Workers Compensation Legislation Amendment (Dust Diseases and Other Matters) Act 1998*, a 'de facto spouse or other family member' has been defined as a person who, although not legally married to the worker, lives with the worker as the worker's husband or wife on a permanent and genuine domestic basis. In relation to an injury which occurred after the commencement of the *Workers Compensation Legislation Amendment (Dust Diseases and Other Matters) Act 1988*, a 'de facto spouse or other family member' is "the other party to a de facto relationship with the worker". A de facto spouse has not been defined and it is therefore unclear as to whether this Act extends to same-sex couples.

Northern Territory

The Northern Territory WorkSafe laws are governed by the *Northern Territory of Australia Work Health Act* (NT) which came into force on 14 December 2005. Section 62 of the *Work Health Act* provides that where the death of a worker is a result of a work-related injury, the dependants of the worker "where the dependants are a spouse, a child or children, or a spouse and a child or children" will be entitled to receive lump-sum compensation. The term 'dependant' is defined in Section 49 to mean 'a spouse or other member of the worker's family; a person to whom the worker stood in loco parentis or who stood in loco parentis to the worker; or a grandchild to the worker who was wholly or in part dependent on his or her

earnings at the date of his or her death.” Further, ‘spouse’ is defined in Section 49 as including a de facto partner of the worker. However, a de facto partner has not been defined, and it is therefore unclear as to whether de facto encompasses same-sex couples.

Queensland

Section 200 of the *Workers’ Compensation and Rehabilitation Act 2003* (QLD) states that, upon the death of a worker, compensation will be payable to their dependants. A dependant is defined in Division 4 as “a member of the deceased worker’s family who was completely or partly dependent on the worker’s earnings at the time of the worker’s death...” Section 28 reads that a person is a member of the worker’s family if the person is the worker’s “spouse; or parent, grandparent and stepparent; or child, grandchild and stepchild; or brother, sister, half-brother and half-sister...” Section 29 continues in defining the term ‘spouse’ stating the “spouse of a deceased worker, includes the worker’s de facto partner only if the worker and the de facto partner lived together as a couple on a genuine domestic basis with the meaning of the *Acts Interpretation Act 1954*, section 32DA10...generally for a continuous period of at least 2 years ending on the worker’s death; or for a shorter period of time ending on the deceased’s death, if the circumstances of the de facto relationship of the deceased and the de facto partner evidenced a clear intention that the relationship be a long term, committed relationship; or if the deceased left a dependant who is a child of the relationship immediately before the worker’s death.”

s32DA of the *Acts Interpretation Act 1954* stated that a reference to a de facto partner is “a reference to either 1 of 2 persons who are living together as a couple on a genuine domestic basis but who are not married to each other or related by family.” The *Acts Interpretation Act* states that the following factors may be taken into account in determining whether the couple is a de facto couple: the nature and extent of their common residence; the length of their relationship; whether or not a sexual relationship exists or existed; the degree of financial dependence or interdependence, and any arrangement for financial support; their ownership, use and acquisition of property; the degree of mutual commitment to a shared life, including the care and support of each other; the care and support of children; the performance of household tasks and the reputation and public aspects of their relationship. Further, s32DA(5) states that “the gender of the persons is not relevant”.

s32DA(6) of the *Acts Interpretation Act* states that “in an Act enacted before the commencement of this section, a reference to a spouse includes a reference to a de facto partner as defined in this section unless the Act expressly provides to the contrary”. Consequently, it is necessary to note section 611 of the *Workers’ Compensation and Rehabilitation Act 2003* which states that compensation is only payable to dependants upon the death of an employee if the death of the worker happened after the commencement of section 611 but before 1 April 2004. If this is the case, compensation is payable to the spouse of the deceased worker which “includes a person who, although not legally married to the deceased worker lived with the worker as the worker’s husband or wife for a continuous period of at least 1 year immediately before the commencement of the section; and continued to live with the worker as the worker’s husband or wife

until the worker died.” The use of the terms ‘husband’ and ‘wife’ in this section appear to exclude same-sex couples from the scope of the Section.

South Australia

Section 44 of the *Workers Rehabilitation and Compensation Act 1986* (SA) states that if a worker dies; their spouse, their dependant child or their dependent relative (not being a spouse or child) are entitled to a lump sum payment. A ‘dependant’ is defined as a “relative of the worker who, at the time of the worker’s death was wholly or partially dependent for the ordinary necessities of life on earnings of the worker...” Further, a spouse is defined as a “person who is cohabiting with the worker as the *de facto* husband or wife of the worker if: the person has been so cohabiting with the worker continuously for the preceding period of 5 years; or the person has during the preceding period of 6 years cohabitated with the worker for periods aggregating not less than 5 years; or although neither subparagraph (i) nor (ii) applies, the person has been cohabiting with the worker for a substantial part of a period referred to in either of those subparagraphs and the Corporation considers that it is fair and reasonable that the person be regarded as the spouse of the worker for the purposes of this Act; or if a child, of whom the worker and the person are the parents, has been born (whether or not the child is still living)”. The use of the terms ‘husband’ and ‘wife’ appear to exclude same-sex couples from the scope of the *Workers Rehabilitation and Compensation Act 1986*.

Tasmania

As per section 67 of the *Workers Rehabilitation and Compensation Act 1988*, (TAS) if a worker dies due to a work-related injury, a dependent spouse or a dependent caring partner are eligible for a lump sum payment. A ‘dependant’ is defined as dependant members of the family of the worker. The definition of a ‘member of the family’ includes a spouse and a caring partner.

A ‘caring partner’ is defined as a person “who is in a caring relationship with that person which is the subject of a deed of relationship registered under Part 2 of the *Relationships Act 2003* or the person who was, at the time of the death of the first-mentioned person, in a caring relationship with that person which was the subject of a deed of relationship registered under Part 2 of the *Relationships Act 2003*.” A ‘spouse’ is defined as “the person with whom a person is, or was at the time of his or her death, in a significant relationship, within the meaning of the *Relationships Act 2003*.”

The *Relationships Act 2003* defines a significant relationship at Section 4 to be a relationship between two adult persons “who have a relationship as a couple; and who are not married to one another or related by family.” The matters to be taken into account, include: “the duration of the relationship; the nature and extent of common residence; whether or not a sexual relationship exists; 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 performance of household duties; and the

reputation and public aspects of the relationship.” It is at the discretion of the court as to how much weight to place on the individual factors listed above.

Western Australia

The WorkSafe laws in Western Australia are regulated by the *Workers Compensation and Injury Management Act 1981* (WA). In this Act, Schedule 1 states that if death results from the injury of a worker, a dependant; a spouse or de facto partner; a parent or a child or step-child may claim compensation. A ‘de facto partner’ is defined as a “person who, immediately before the death of the worker, was living in a de facto relationship with the worker and had been living on that basis with that worker for at least the previous 2 years; and any former de facto partner of the worker if the worker was legally obliged immediately before the death of the worker to make provision for that former de facto partner with respect to financial matters”. A ‘dependant’ has been defined as a member of the “worker’s family [who was] wholly or in part dependent upon the earnings of the worker at the time of his death...” The definition of a ‘member of a family’ includes a spouse and a de facto partner. Finally, a ‘spouse’ is defined as “any former spouse of the worker if the worker was legally obliged immediately before the death of the worker to make provision for that former spouse with respect to financial matters.”

The legislation relating to Workers Compensation in Victoria, the Australian Capital Territory and Queensland provide useful precedents for the Commonwealth Government. The *Safety, Rehabilitation and Compensation Act 1988* should be amended by removing provisions discriminatory against same-sex couples.

4. International Law Obligations

(i) International Covenant on Civil and Political Rights (ICCPR)

Article 26 of the ICCPR reads:

“All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any grounds such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”

The Human Rights Committee, established under the ICCPR has stated that “Article 26 is ... concerned with the obligations imposed on States parties concerning their legislation and the application thereof.” As such, the onus is on a State party to the ICCPR to ensure that its legislation complies with Article 26 in that its contents are not discriminatory.⁷⁹

Article 2(1) of the ICCPR declares that:

“Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race,

colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”

A substantial amount of debate has been generated around whether the term ‘sex’ in Article 2(1) extends to sexual orientation. This question was categorically answered in the affirmative by the Human Rights Committee in the case of *Toonen v Australia* when they stated that “the reference to ‘sex’ in Articles 2, paragraph 1 and 26 is to be taken as including sexual orientation.”⁸⁰ Consequently, the Committee has held that discrimination based on sexual orientation is not permitted under the ICCPR. Alternative trains of thought assert that sexual orientation is included within the words ‘or other status’ found in Article 2(1).

The case of *Young v Australia*⁸¹ further highlights the Human Rights Committee’s view that same-sex couples are entitled to make a claim relating to discrimination based on the grounds of sexual orientation. *Young v Australia* was heard by the Human Rights Committee in 2003. The author, Mr. Young had been in a same-sex relationship for thirty-eight years. The Repatriation Commission and the Veterans Review Boards both denied Mr. Young’s application for a Veteran’s Dependant pension under the *Veterans’ Entitlement Act* on the basis that he did not come within the definition of a ‘dependant’ as defined in the *Veteran’s Entitlement Act*. Section 11 of the *Veteran’s Entitlement Act* defines ‘a dependant’ as ‘a partner’. Section 5E of the *Veteran’s Entitlement Act* defines a partner by stating that “a partner, in relation to a person ‘who is a member of a couple’, [as] the other member of the couple”. The term ‘couple’ is subsequently defined in section 5E(2) which states that a person is a member of a couple for the purposes of the *Veteran’s Entitlement Act* if “the person is legally married to another person and is not living separately and apart from the other person on a permanent basis; or all of the following conditions are met: the person is living with a person of the opposite sex, the person is not legally married to the partner, the person and the partner are in the Commission’s opinion ...in a marriage-like relationship, the person and the partner are not within a prohibited relationship...”

Mr. Young argued that Australia’s refusal to provide him with a pension benefit due to the fact that he was in a same-sex relationship was a blatant violation of Article 26 of the ICCPR. In response, Australia argued that the fact that he was in a same-sex relationship was not the sole cause for the rejection of his claim; asserting that Mr. Young had also failed to prove his *de facto* relationship. Consequently, Australia argued that the refusal to grant Mr. Young a pension was not discriminatory for the purposes of Section 26 of the ICCPR.

The Committee observed that:

“The domestic authorities refused the author a pension on the basis that he did not meet the definition of being a ‘member of a couple’ by not having lived with ‘a person of the opposite sex’. In the Committee’s view, it is clear that at least those domestic bodies seized of the case, found the author’s sexual orientation to be determinative of lack of entitlement. In

that respect, the author has established that he is a victim of an alleged violation of the Covenant for the purposes of the Optional Protocol.”⁸²

The Committee reiterated its stance that the prohibition against discrimination in Article 26 of the ICCPR includes discrimination based on sexual orientation,⁸³ and recalled:

“its constant jurisprudence that not every distinction amounts to prohibited discrimination under the Covenant, as long as it is based on reasonable and objective criteria. The State party provides no arguments on how this distinction between same-sex partners, who are excluded from pension benefits under law, and unmarried heterosexual partners, who are granted such benefits, is reasonable and objective, and no evidence which would point to the existence of factors justifying such a distinction has been advanced. In this context, the Committee finds that the State party has violated article 26 of the Covenant by denying the author a pension on the basis of his sex or sexual orientation.”⁸⁴

Australia’s continued discrimination against same-sex couples within the Commonwealth sphere is in blatant disregard of the Human Rights Committee’s decisions in *Young v Australia* and *Toonen v Australia*. By failing to respect its treaty obligations; Australia is at risk of being brought before the Human Rights Committee a third time for continuing to discriminate against persons based on their sexual orientation.

(ii) *International Labor Organisation Convention No. 111 (ILO 111)*

ILO 111 concerns discrimination in respect of employment and occupation and was ratified by Australia on 15 June 1974. Article 1 states that for the purposes of the Convention, the term discrimination includes:

“(a) any distinction, exclusion or preference made on the basis of race, colour, sex, religion, political opinion, national extraction or social origin, which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation;

(b) such other distinction, exclusion or preference which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation as may be determined by the Member concerned after consultation with representative employers’ and workers’ organisations, where such exist, and with other appropriate bodies.”

ILO 111 defines ‘employment’ and ‘occupation’ in Article 1(3) as including “access to vocational training, access to employment and to particular occupations, and terms and conditions of employment.” It is clear that superannuation benefits arise through employment, particularly if contribution to one’s superannuation scheme is compulsory insofar as an employee does not exercise discretion as to whether superannuation is withdrawn from their salary.⁸⁵ If the requirement to contribute to one’s superannuation scheme is a requirement of employment, it is fundamentally linked to the employment contract. The employee’s entitlement to subsequently receive the superannuation benefits

is also linked to their employment relationship.⁸⁶ Further, Workers' Compensation is also inextricably linked to the employment relationship in that the employer's obligation to ensure a safe workplace is implied in each workplace agreement.

The Australian Government must take heed of the fact that all State parties to the ILO 111 have agreed to eliminate discrimination in employment and that such discrimination includes discrimination on the grounds of sex. The Human Rights Committee's decision in the case of *Toonen v Australia* which held that a prohibition of discrimination on the grounds of 'sex' includes 'sexual orientation' is likely to be applied to the definition of 'sex' within ILO 111.

(iii) *European Commission on Human Rights (ECHR)*

Article 14 of the ECHR provides:

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

Article 14 requires that states parties to the European Convention on Human Rights not discriminate in the protection and application of the rights protected by the European Convention on Human Rights. In the case of *Euan Sutherland v The United Kingdom*⁸⁷, the European Commission of Human Rights stated that “it is not required to determine whether a difference based on sexual orientation is a matter which is properly to be considered as a difference on grounds of 'sex' or of 'other status'. In either event, it is a difference in respect of which the Commission is entitled to seek justification.”⁸⁸

Further, the *Treaty of Amsterdam (Treaty of Amsterdam amending the Treaty on European Union, the Treaties establishing the European Communities and certain related acts)* which came into force on 1 May 1999, inserted a new Article 13 into the Treaty of the European Community which states:

“Without prejudice to the other provisions of this Treaty and within the limits of the powers conferred by it upon the Community, the Council, acting unanimously on a proposal from the Commission and after consulting the European Parliament, may take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or *sexual orientation*.⁸⁹ (emphasis added).”⁹⁰

In 2003, in *Karner v Austria*,⁹¹ the European Court of Human Rights held that differential treatment between same-sex couples and de facto opposite-sex couples in tenancy succession law is discrimination on the ground of sexual orientation and is therefore contrary to Article 14 of the Convention.⁹² Evidently, Australia is not bound by European Law. However, such laws add credence to the fact that discrimination based on sexual preference is unjust and is not tolerated by civilised nations.

5. Conclusion

In the 1997 case of *R v Secretary for State for Defence; ex parte Perkins*, the High Court of Australia held that “homosexual orientation is a reality today which the law must recognise and adjust to, and it may well be thought appropriate that the fundamental principle of equality and the irrelevance of a person’s sex and sexual identity demand that the court be alert to afford protection to them to ensure that those of homosexual orientation are no longer disadvantaged in terms of employment”⁹³ It is imperative to ensure that same-sex couples are entitled to the superannuation benefits and the workers compensation benefits of their partners in the Commonwealth sphere. It is time that the law reflects the changing nature of relationships and families in Australia in order to ensure recognition for same-sex couples.

The Castan Centre for Human Rights Law submits that the relevant Commonwealth legislation be amended so that that heterosexual marriage and dependence are no longer defining characteristics of modern-day relationships. Gender neutral terminology should be introduced into all legislation so as to avoid discrimination against same-sex couples.

¹ Hon. Chief Justice Alastair Nicholson AO RFD, ‘The Changing Concept of a Family – the Significance of Recognition and Protection’, (1997) 11 *Australian Journal of Family Law* 13 at page 13.

² R. Clare, ‘Superannuation and contemporary families – Issues of dependence, interdependence and self-reliance’, 9th Australian Institute of Family Studies Conference. Melbourne 9-11 February 2005.

³ *Ibid.*

⁴ *Ibid.*

⁵ A. Albanese, ‘Superannuation (Surcharge Rate Reduction) Amendment Bill 2003: Consideration of Senate Message’ (8 October 2003) www.anthonyalbanese.com.au/file.php?file=/news/448/index.html (last accessed on 24 May 2006)

⁶ *Ball v Newey* (1988) 13 NSWLR 489, NSWCA Judgment from 1988, cited in C. Delphine, ‘Will I receive your death benefit? It all depends...’ (May 2001) 10 *Gay and Lesbian Law Journal*, page 87.

⁷ Unreported, NSWCA, 3 December 1991 cited in C. Delphine, ‘Will I receive your death benefit? It all depends...’ (May 2001) 10 *Gay and Lesbian Law Journal*, page 89.

⁸ *McKenzie v Baddeley*, Unreported, NSWCA, 3 December 1991 cited in C. Delphine, ‘Will I receive your death benefit? It all depends...’ (May 2001) 10 *Gay and Lesbian Law Journal*, page 89. Ultimately Mr. McKenzie was unsuccessful.

⁹ (1995) 8 ANS Ins. Case § 61-269.

¹⁰ Citing *Hope v NIB Health Funds* (1995) 8 ANS Ins. Case § 61-269 cited in C. Delphine, ‘Will I receive your death benefit? It all depends...’ (May 2001) 10 *Gay and Lesbian Law Journal*, page 92.

¹¹ *Brown and Commissioner for Superannuation* (1995) 38 ALD 344.

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.*

¹⁵ Commonwealth Hansard, House of Representatives 1992, Weekly Hansard, No.14, page 2160 cited in ‘Superannuation Entitlements of Same-Sex Couples’, Report of Examination of Federal Legislation, HRC Report No.7, page 4.

¹⁶ ‘Superannuation Entitlements of Same-Sex Couples’, Report of Examination of Federal Legislation, HRC Report No.7, page 4.

¹⁷ *Defence Force Retirement and Death Benefits Act 1983*, sections 38-39.

- ¹⁸ *Ibid.*, sections 6A, 6B.
- ¹⁹ *Military Superannuation and Benefits Rules scheduled to the Military Superannuation and Benefits Act 1991*, Schedule 1, r1, Part 4, sub-rules 38, 41, 46 and 47.
- ²⁰ *Ibid.*, Schedule 1, r2, part 1A.
- ²¹ *Parliamentary Contributory Superannuation Act 1948 (Cth)*, section 19(2).
- ²² *Ibid.*, section 4C(2).
- ²³ *Ibid.*, section 4B(1).
- ²⁴ Lord Penzance in *Hyde v Hyde* (1866) LR 2 P&D 130 at page 133 cited in ‘Superannuation Entitlements of Same-Sex Couples’, Report of Examination of Federal Legislation, HRC Report No.7, page 10.
- ²⁵ (1995) 28 ALD 344
- ²⁶ *Re Brown v Commissioner for Superannuation* (1995) 28 ALD 344, page 346.
- ²⁷ C. Delphine, ‘Will I receive your death benefit? It all depends...’ (May 2001) 10 *Gay and Lesbian Law Journal*, page 86.
- ²⁸ *Re Brown v Commissioner for Superannuation* (1995) 28 ALD 344 § 30.
- ²⁹ *Ibid.*, § 18.
- ³⁰ *Id.*
- ³¹ *Ibid.*, § 35.
- ³² *Ibid.*, § 46.
- ³³ *Ibid.*, § 45. It is interesting to note that in the case of *The Automobile Fire & General Insurance Co of Australia Ltd v Davey* (1936) 54 CLR 534 Starke J held that “the word ‘wife’ expresses a certain relationship...and is not merely a mode of denoting gender or sex.” (*The Automobile Fire & General Insurance Co of Australia Ltd v Davey* (1936) 54 CLR 534 cited in *Re Brown v Commissioner for Superannuation* (1995) 28 ALD 344 § 39).
- ³⁴ *Ibid.*, § 43
- ³⁵ [1914] 1 KB 641 at 649-650
- ³⁶ *Marquis of Camden v Commissioners of Inland Revenue* [1914] 1 KB at 649-650 cited in *Re Brown v Commissioner for Superannuation* (1995) 28 ALD 344 § 23.
- ³⁷ M. Bell, ‘Employment Law Consequences of the Civil Partnership Act 2004’, *Industrial Law Journal*, Vol.35, No.2 (June 2006), page 179.
- ³⁸ Women & Equality Unit of the United Kingdom Government Website, www.womenandequalityunit.gov.uk (last accessed 24 May 2006).
- ³⁹ *Ibid.*
- ⁴⁰ R. Byard & S. Kerr-Davis, ‘A Civil Affair’, 155 *New Law Journal* 1435 (30 September 2005).
- ⁴¹ Women & Equality Unit of the United Kingdom Government Website, www.womenandequalityunit.gov.uk (last accessed 24 May 2006).
- ⁴² *Ibid.*
- ⁴³ M. Bell, fn.38, *supra*, page 183.
- ⁴⁴ UNISON (The Public Service Union) Website, www.unisoneast-midlands.org.uk (last accessed 23 May 2006)
- ⁴⁵ M. Bell, fn.38, *supra*, page 182.
- ⁴⁶ *Id.*
- ⁴⁷ UNISON (The Public Service Union) Website, www.unisoneast-midlands.org.uk (last accessed 23 May 2006)
- ⁴⁸ *Ibid.*
- ⁴⁹ Website of the Department of Human Resources and Social Development, Canada. www.sdc.gc.ca (last accessed 23 May 2006).
- ⁵⁰ <http://canadaonline.about.com/library/weekly/aa021300a.htm> (last accessed 23 May 2006)
- ⁵¹ Website of the Department of Human Resources and Social Development, Canada. www.sdc.gc.ca (last accessed 23 May 2006).
- ⁵² *Leshner v Ontario No.2* (1992) 16 *Canadian Human Rights Reports* (CHHR) D/184.
- ⁵³ *Leshner v Ontario No.2* (1992) 16 *Canadian Human Rights Reports* (CHHR) D/184 cited in ‘Superannuation Entitlements of Same-Sex Couples’, Report of Examination of Federal Legislation, HRC Report No.7, page 11.
- ⁵⁴ [1995] 2 SCR 513

- ⁵⁵ *Egan v Canada* [1995] 2SCR 513 cited in ‘Superannuation Entitlements of Same-Sex Couples’, *Report of Examination of Federal Legislation*, HRC Report No.7, page 11.
- ⁵⁶ Hon. Chief Justice Alastair Nicholson, AO RFD, fn.1, *supra*, page 4.
- ⁵⁷ L. Haltzel & P. Purcell, ‘The Effect of State-Legalized same-sex marriage on Social Security Benefits and Pensions’, *CRS Report for Congress – Received through the CRS Web*, 28 July 2004, page 1.
- ⁵⁸ *Social Security Act* (H.R.7260, Public Law No.271, 74th Congress)
- ⁵⁹ Section GN 00305.005 of the *SSA Program Operations Manual System*, Paragraph B(5) referred to in L. Haltzel & P. Purcell, ‘The Effect of State-Legalized same-sex marriage on Social Security Benefits and Pensions’, *CRS Report for Congress – Received through the CRS Web*, 28 July 2004, page 2.
- ⁶⁰ L. Haltzel & P. Purcell, ‘The Effect of State-Legalized same-sex marriage on Social Security Benefits and Pensions’, *CRS Report for Congress – Received through the CRS Web*, 28 July 2004, page 2.
- ⁶¹ *Id.*
- ⁶² *Ibid.*, pages 2-3.
- ⁶³ See 5 C.F.R § 831.603 and 5 C.F.R. § 843.102 cited in L. Haltzel & P. Purcell, ‘The Effect of State-Legalized same-sex marriage on Social Security Benefits and Pensions’, *CRS Report for Congress – Received through the CRS Web*, 28 July 2004, page 3.
- ⁶⁴ Website of Law Firm, Davis Wright Tremaine LLP (last accessed 23 May 2006)
- ⁶⁵ Website of Law Firm, Davis Wright Tremaine LLP (last accessed 23 May 2006)
- ⁶⁶ *Rovira v American Tel. & Tel.*(817 F.Supp 1062 S.D.N.Y 1993).
- ⁶⁷ F.N. Balonwu, ‘Rights and Entitlements of Same-Sex Cohabitants: Should gays and lesbians have a right to their partners employment benefits?’, *Thurgood Marshall Law Review*, 23.2 (Spring 1998), page 495.
- ⁶⁸ L. Haltzel & P. Purcell, fn.61, *supra*, pages 4-5.
- ⁶⁹ *Report on the Provisions of the Superannuation (Entitlements of same sex couples) Bill 2000*, Appendix 4: International approaches to recognizing same-sex marriages.
- ⁷⁰ Equal Opportunity Commission of Victoria, *Same Sex relationships and the Law* (March 1998).
- ⁷¹ http://www.ilga-europe.org/europe/issues/marriage_and_partnership/same_sex_marriage_and_partnership_country_by_country#hungary (last accessed 30 May 2006)
- ⁷² Equal Opportunity Commission of Victoria, *Same Sex relationships and the Law* (March 1998).
- ⁷³ Dr. Judit Takács, ‘How to put equality into practice? Anti-discrimination and equal treatment policymaking and LGBT people’, Research Paper, OSI – International Policy Fellowship 2004-2005, <http://www.policy.hu/takacs/research-paper/Takacs-rps.pdf> (last accessed 30 May 2006).
- ⁷⁴ *Id.*
- ⁷⁵ *Safety Rehabilitation and Compensation Act 1988*, Part I, Section 4 (Interpretation)
- ⁷⁶ See section 17
- ⁷⁷ In the United States of America, the Court in *Marvin v Marvin* recognized that a same-sex partner could be a “good faith member of another’s household” and consequently that a partner could be considered the employee’s dependant for the purposes of the workers’ compensation. (D. Zielinski, ‘Domestic partnership benefits: Why not offer them to same-sex partners and unmarried opposite sex partners?’ *Journal of Law and Health* 13.2 (Summer 1998), page 281)
- ⁷⁸ Act No.10191/1985
- ⁷⁹ Human Rights Committee, General Comment No.18 (1989) § 12 cited in ‘Superannuation Entitlements of Same-Sex Couples’, *Report of Examination of Federal Legislation*, HRC Report No.7, page 6.
- ⁸⁰ *Toonen v Australia*, Communication No.488/1992, U.N. Doc CCPR/C/50/D/488/1992(1994) § 8.7.
- ⁸¹ Communication No.941/2000: Australia 18/09/2003. CCPR/C/78/D/941/2000.
- ⁸² *Young v Australia*, Communication No.941/2000: Australia 18/09/2003. CCPR/C/78/D/941/2000 § 9.3.
- ⁸³ *Young v Australia*, Communication No.941/2000: Australia 18/09/2003. CCPR/C/78/D/941/2000 § 10.4.
- ⁸⁴ *Young v Australia*, Communication No.941/2000: Australia 18/09/2003. CCPR/C/78/D/941/2000 § 10.4.
- ⁸⁵ ‘Superannuation Entitlements of Same-Sex Couples’, *Report of Examination of Federal Legislation*, HRC Report No.7, page 8.
- ⁸⁶ *Id.*
- ⁸⁷ Application No.25186/94
- ⁸⁸ *Euan Sutherland v The United Kingdom* (Application No.25186/94) § 50.

⁸⁹ K. Walker, 'Moving gaily forward? Lesbian, gay and transgender human rights in Europe', 2 *Melbourne Journal of International law* 123 (2001) page 135 citing Treaty of Amsterdam amending the Treaty on European Union, the treaties establishing the European Communities and Related Acts.

⁹⁰ K. Walker, 'Moving gaily forward? Lesbian, gay and transgender human rights in Europe' 2 *Melbourne Journal of International law* 123 (2001), page 135.

⁹¹ Application No.40016/98, 24 July 2003.

⁹² M. Bell, fn.38, *supra*, page 179.

⁹³ *R v Secretary of State for Defence; ex parte Perkins* [1997] IRLR 297 at page 303.