

TADDEUCCI & MCCALL v. ITALY
APPLICATION No. 51362/09

WRITTEN SUBMISSION OF ICJ, ILGA-EUROPE AND NELFA
SUBMITTED ON 18 MAY 2012

INTRODUCTION

1. These comments are submitted by the International Commission of Jurists, ILGA-Europe, and NELFA pursuant to leave granted by the President of the Chamber in accordance with Rule 44 § 3 of the Rules of Court.¹ Their interest and expertise are set out in their Application for leave to submit written comments.
2. This submission addresses the legal considerations arising where an unmarried same-sex partner in a bi-national couple seeks a residency permit. The Interveners respectfully submit that many jurisdictions around the world recognize that a same-sex couple in a long-term, committed and established relationship is in fact a family member, regardless of whether the couple has been able to marry or otherwise obtain formal legal recognition for their relationship. As *Schalk & Kopf v. Austria* held that a same-sex couple enjoys the right to family life, protected under Article 8 of the European Convention, so too have domestic courts and legislatures reached the same conclusion in respect of their own laws. In order that they may live together and enjoy family life, partners in a same-sex couple, notwithstanding the absence of a marriage certificate, are entitled to the rights and benefits that the law bestows on family members. This is the unmistakable trend both within Member States of the Council of Europe and a number of other States around the world.
3. Part I discusses national-level legislation and judicial decisions affording a means for same-sex partners to emigrate and reside in each other's countries of origin. Part II addresses the concept of functional families and provides examples of courts recognizing unmarried same-sex couples as family members or *de facto* spouses for purposes of other types of benefits. In Part III considers how indirect discrimination (or disparate impact) has been used in cases involving same-sex couples that are treated differently from married couples.

PART I: GRANTING RESIDENCY BENEFITS TO UNMARRIED SAME-SEX PARTNERS

4. Many States now have either marriage equality laws or other forms of legal recognition for same-sex couples, such as the UK Civil Partnership Act or the Pacte civil de solidarité in France, which include residency rights for foreign spouses or partners. The discussion here, however, is confined to States that have granted residency to foreign nationals on the basis of their relationship with a citizen or lawful resident independent of marriage or other form of civil union. Furthermore, this discussion is limited to States outside the Council of Europe since Council of Europe developments are expected to be covered by another Third-Party Intervener.
5. A significant number of States in all regions of the world grant residency to the unmarried same-sex partners of their citizens or permanent residents. In addition, States that now have marriage equality laws often provided a means for same-sex partners to emigrate or reside prior to the enactment of such laws. Although the means of affording same-sex partners residency varies, the impetus behind such changes in law, policy and practice has been similar. States have recognized that same-sex partners, just like opposite-sex couples, should not be forced to separate from their long-term life partners and that where such couples are bi-national, there should be a means for them to make their life together.
6. **Australia:** Since 1991, same-sex partners of citizens have had the right to reside in Australia under an "interdependency visa."² According to the Australian government, an interdependent relationship was "usually a same-sex partner relationship."³ In 2009, Australia amended its immigration laws to create a new category of "*de facto* partner" for both same-sex and opposite-sex couples. Both married and *de facto* partners, whether same-sex or opposite-sex, qualify for the same kind of partner visa. To prove a *de facto* partnership, the applicant and his or her partner must show that they "have a mutual commitment to a shared life to the exclusion of all others" and have a "genuine and continuing relationship" that has lasted for at least

¹ Letter of Section Registrar S. Naismith dated 19 April 2012.

² Migration Regulations (Amendment) 1991 No. 60 (Cth), regs 17, 19, 20, 28, 31.

³ Human Rights Watch & Immigration Equality, *Family, Unvalued: Discrimination, Denial, and the Fate of Binational Same-Sex Couples Under U.S. Law* (2006), available at <http://www.hrw.org/sites/default/files/reports/FamilyUnvalued.pdf> [hereinafter *Family, Unvalued*], at 151.

12 months prior to the application for a visa. To assess a *de facto* relationship, the Australian government notes that it will look at evidence of such elements as “living together full-time, sharing important financial and social commitments, and setting up a household separately from other people.”⁴ In other words, Australian federal law makes no distinction between same-sex or opposite-sex *de facto* couples, nor between *de facto* and *de jure* (married) partners for immigration purposes. Although Australia does not recognize same-sex marriage, it does recognize that same-sex couples are families and have the same rights as married opposite-sex couples under immigration law.

7. **New Zealand:** Since 1999, the same-sex partner of a citizen has been able to apply as a *family member* for a residence permit. New Zealand law defines family members to include children, spouses and partners. A partner is defined as “the civil union partner or *de facto* partner of the applicant.”⁵ The application for a partner residence permit requires that the sponsor declare that he or she is “living in a genuine and stable partnership” with the applicant.⁶ The government of New Zealand explains: “We need to be satisfied that you and your partner entered your relationship with the intention of it being maintained on a long-term and exclusive basis. We also need to be satisfied that your relationship is stable and likely to last.”⁷ The visa requirements for same- and opposite-sex *de facto* partners are the same.
8. **Brazil:** A 2003 administrative regulation of the National Immigration Council ended immigration distinctions between same-sex and opposite-sex partners who could prove a stable relationship.⁸ In February 2008, the Council adopted Normative Resolution No. 77/2008, providing for the granting of temporary or permanent visas or residence permits to the partner in a stable relationship, regardless of sex.⁹
9. **Israel:** In Israel, the Interior Ministry began treating same-sex couples in the same manner for immigration purposes as opposite-sex *de facto* or common law couples in 2000.¹⁰ Although governed by different laws – respectively the Citizenship Law and the Law of Entry into Israel – non-Jewish members of both married opposite-sex couples and unmarried same-sex couples may obtain the right to reside in Israel. They must prove that their relationship is “sincere” and that they are living together and running a joint household.¹¹
10. **Canada:** In the 1990s, long before Canada amended its marriage law to permit same-sex couples to marry, the Department of Immigration and Employment granted permanent residency on “humanitarian and compassionate” grounds to same-sex partners of Canadians. The first known case occurred in 1991. In 1994, the Department officially recognized that the prolonged separation of same-sex couples could cause undue hardship that constituted grounds for applying the “humanitarian and compassionate” criteria. This policy, titled “Processing of Same Sex and Common Law Cases,” was sent to all Canadian embassies and consulates.¹²

⁴ Australian Government Department of Immigration and Multicultural Affairs, *Partner Migration Booklet* at 35 (April 2012), available at <http://www.immi.gov.au/allforms/booklets/books1.htm>.

⁵ Immigration Regulations 1999, Regulation 20(4)(b), available at <http://www.legislation.govt.nz/regulation/public/1999/0284/latest/DLM291997.html>.

⁶ Partnership Support Form for Residence INZ 1178, available at <http://www.immigration.govt.nz/NR/rdonlyres/EC300E2C-0635-4170-B29D-F3CA16FF5CD9/0/INZ1178.pdf>.

⁷ Summary of Terms: Genuine and Stable Relationship, available at <http://glossary.immigration.govt.nz/Genuineandstablereationship.htm>.

⁸ Resolução Administrativa Nº 05, de 03/12/2003, available at <http://portal.mte.gov.br/legislacao/resolucao-administrativa-n-05-de-03-12-2003.htm>.

⁹ Resolução Normativa nº 77, de 11/02/2008, available at <http://www.abglt.org.br/port/imigracao.php>.

¹⁰ Family, Unvalued at 161; see also Gay Law Net, Israel Allows Partner Immigration, available at <http://www.gaylawnet.com/laws/il.htm>; S. Iimay Ho & Megan Rolfe, “Same-sex partner immigration and the civil rights frame: A comparative study of Australia, Israel, and the USA,” 52 *International Journal of Comparative Sociology* (October 2011) 390, 397.

¹¹ Association for Civil Rights in Israel, “The Immigration Rights of Same-Sex Couples,” available at <http://www.acri.org.il/en/2008/02/07/the-immigration-rights-of-same-sex-couples>.

¹² Nicole LaViolette, “Coming Out to Canada: The Immigration of Same-Sex Couples Under the Immigration and Refugee Protection Act,” 49 *McGill Law Journal* (October 2004) 969, 976 & n. 36.

11. Since 2001, gay and lesbian Canadians have had the right to sponsor their unmarried partners for immigration. Under the Immigration and Refugee Protection Act, a citizen or permanent resident may sponsor his or her partner as a spouse, a common law partner, or a conjugal partner.¹³ The Immigration and Refugee Protection Guidelines state: “A foreign national is a member of the family class if, with respect to a sponsor, the foreign national is... the sponsor's spouse, common-law partner or conjugal partner.”¹⁴ A common law partner is defined as “an individual who is cohabiting with the person in a conjugal relationship, having so cohabited for a period of at least one year.”¹⁵ A conjugal partner is defined as a foreign national “residing outside Canada who is in a conjugal relationship with the sponsor and has been in that relationship for a period of at least one year.”¹⁶ The immigration agency explained: “A conjugal relationship is more than a physical relationship. It means you depend on each other, there is some permanence to the relationship and there is the same level of commitment as a marriage or a common-law relationship.”¹⁷
12. **South Africa:** Same-sex couples have had the same immigration rights as opposite-sex married spouses since 1999, when the National Coalition for Gay and Lesbian Equality brought a constitutional challenge to the Aliens Control Act definition of “spouse.” The Constitutional Court of South Africa held that the Act discriminated against partners in same-sex relationships by not giving them the same immigration benefits as spouses. The Court ordered that the Act be amended by adding the words “or partner in a permanent same-sex life partnership.”¹⁸ In 2002, the immigration laws were further amended by defining “spouse” as “a person who is party to a marriage, or a customary union, or to a permanent homosexual or heterosexual relationship which calls for cohabitation and mutual financial and emotional support, and is proven by a prescribed affidavit substantiated by a notarial contract.”¹⁹
13. **Colombia:** A 2009 decision of the Constitutional Court extended to same-sex couples a number of important civil, political, economic and social rights, including full immigration rights, that had previously been reserved to opposite-sex couples.²⁰ The ruling modified Article 5 of Law 43 of 1993, which had previously allowed unmarried opposite-sex “permanent companions” to acquire Colombian nationality after two years but excluded same-sex partners.²¹ The Court concluded that differential treatment of opposite-sex and same-sex couples violated the principle of equal treatment.

PART II: “FUNCTIONAL FAMILIES” IN ECHR JURISPRUDENCE AND AROUND THE WORLD

14. As the European Court recognizes, marriage does not make a family. In a series of decisions, this Court has upheld the right to family life, as protected by Article 8 of the European Convention, regardless of formal legal ties.²² For the Court, it is a fact-based inquiry into factors such as “whether the couple live together, the

¹³ “Prior to the coming into force of the *IRPA*, common-law partners of Canadian citizens or permanent residents who wished to apply for permanent resident status to reunite with their partner were considered on humanitarian and compassionate grounds under subsection 114(2) of the former *Immigration Act*, R.S.C. 1985, c. 1-2 [1985 Act].” Nicole LaViolette, “Coming Out to Canada,” at n. 8.

¹⁴ Immigration and Refugee Protection Regulations, SOR/2002-227, Part 7, available at <http://www.canlii.org/en/ca/laws/regu/sor-2002-227/92026/sor-2002-227.html#history>.

¹⁵ Immigration and Refugee Protection Regulations, SOR/2002-227, Part 1.

¹⁶ *Id.*

¹⁷ CIC, “Sponsoring your family: Spouses and dependent children—Who can apply” available at <http://www.cic.gc.ca/english/immigrate/sponsor/spouse-apply-who.asp#definitions>.

¹⁸ *National Coalition for Gay and Lesbian Equality v. Minister for Home Affairs* (2 December 1999).

¹⁹ Immigration Act, 2002, Act No. 13 of 2002, Section 1(xxxvi), available at <http://www.info.gov.za/view/DownloadFileAction?id=68047>.

²⁰ *Sentencia C-029/09*, Sala Plena of the Constitutional Court (28 January 2009).

²¹ Republica de Colombia Corte Constitucional, *Sentencia C-029/09*, available at <http://www.corteconstitucional.gov.co/relatoria/2009/c-029-09.htm>.

²² See, e.g., *Marckx v. Belgium*, Application no. 6833/74 (13 June 1979) (holding that Article 8 “applies to the “family life” of the “illegitimate” family as it does to that of the “legitimate” family). See also *Van der Heijden v. The Netherlands*, Application no. 42857/05 (3 April 2012), at para. 50.

length of their relationship and whether they have demonstrated their commitment to each other by having children together.”²³ This functional approach to assessing the existence of family ties that deserve Convention protection characterizes the Court’s cases involving same-sex couples as well. In *Kozak v. Poland*, the Court found no justification for distinguishing between opposite-sex and same-sex *de facto* marital cohabitants in terms of tenancy rights.²⁴ In *Schalk & Kopf v. Austria*, the Court concluded that “the relationship of the applicants, a cohabiting same-sex couple living in a stable *de facto* partnership, falls within the notion of “family life”, just as the relationship of a different-sex couple in the same situation would.”²⁵

15. Courts in a number of jurisdictions have likewise adopted a functional definition of families. A 1991 *Harvard Law Review* article explained, “Instead of focusing on the identities and formal attributes of the individuals within a relationship, the functional approach inquires whether a relationship shares the essential characteristics of a traditionally accepted relationship and fulfills the same human needs. Thus, the specific characteristics of each relationship, such as economic cooperation, participation in domestic responsibilities, and affection between the parties, play a crucial role in a functional determination of family status.”²⁶ Although the functional approach was originally employed to assess relationships between unmarried opposite-sex couples or between adults and children, courts have also used it when determining that same-sex couples are entitled to rights and benefits as family members.²⁷
16. In the United States, for example, the leading case is *Braschi v. Stahl Assocs.* There the state’s highest court, the New York Court of Appeals, held that the term “family,” under state tenancy law, “should not be rigidly restricted to those people who have formalized their relationship by obtaining, for instance, a marriage certificate or an adoption order. The intended protection against sudden eviction should not rest on fictitious legal distinctions or genetic history, but instead should find its foundation in the reality of family life. In the context of eviction, a more realistic, and certainly equally valid, view of a family includes two adult lifetime partners whose relationship is long term and characterized by an emotional and financial commitment and interdependence.”²⁸ *Braschi v. Stahl* has influenced the reasoning of many other domestic courts, including ones in Canada, the United Kingdom, South Africa, and Israel.
17. In Canada, a functional approach to families was described by Justice L’Heureux-Dubé, dissenting in the 1993 case of *Canada (Attorney General) v. Mossop*. She approved the approach that had been adopted by the Human Rights Tribunal, stating that “the potential scope of the term “family status” is broad enough that it does not *prima facie* exclude same-sex couples. In making this finding, the Tribunal used the proper interpretational approach and considered the purpose of the [Canadian Human Rights] Act and the values at the base of the protection of families.”²⁹ She added:

Given the range of human preferences and possibilities, it is not unreasonable to conclude that families may take many forms. It is important to recognize that there are differences which separate as well as commonalities which bind. The differences should not be ignored, but neither should they be used to de-legitimize those families that are thought to be different.³⁰
18. Justice L’Heureux-Dubé’s emphasis on the reality of family diversity was adopted by lower Canadian courts, including the Ontario Court of Appeal in *Rosenberg v. Attorney General*, where the issue was whether the

²³ *Emonet v. Switzerland*, Application no. 39051/03 (13 December 2007), at paras. 34-36.

²⁴ Application no. 13102/02 (2 March 2010).

²⁵ Application no. 30141/04 (24 June 2010), at para. 94.

²⁶ “Looking for a Family Resemblance: The Limits of the Functional Approach to the Legal Definition of Family,” 106 *Harvard Law Review* 1640, 1646 (1991).

²⁷ The functional family approach has also been utilized by courts in cases relationship status and recognition and in adoption and custody decisions involving children. Although this body of case law is significant, the Interveners are excluding such cases in order to focus on the functional family methodology specifically in terms of access to benefits and entitlements.

²⁸ *Braschi v. Stahl Assocs.*, 544 N.Y.S.2d 784, 788-89 (New York Court of Appeals 1989).

²⁹ *Canada (Attorney General) v. Mossop*, [1993] 1 SCR 554 (Supreme Court of Canada 1993) (L’Heureux-Dubé, J., dissenting).

³⁰ *Id.*

restriction of pension plan survivor benefits to opposite sex spouses was justifiable under the Canadian Charter of Rights and Freedoms. Finding it was not, the Court of Appeal stated: “Differences in cohabitation and gender preferences are a reality to be acknowledged, not an indulgence to be economically penalized. There is less to fear from acknowledging conjugal diversity than from tolerating exclusionary prejudice.”³¹ The remedy was to read the words “or same sex” into the definition of spouse.

19. In 1999, the Supreme Court adopted the reasoning of Justice L’Heureux-Dubé’s *Mossop* dissent by acknowledging that same-sex couples had conjugal relationships just as opposite-sex couples did. The statute under attack, the Family Law Act (FLA), defined “spouse” to include both people who were actually married as well as opposite-sex couples who were in conjugal relationships with a degree of permanence. Justice Cory wrote:

Since gay and lesbian individuals are capable of being involved in conjugal relationships, and since their relationships are capable of meeting the *FLA*’s temporal requirements, the distinction of relevance to this appeal is between persons in an opposite-sex, conjugal relationship of some permanence and persons in a same-sex, conjugal relationship of some permanence. ... Under s. 29 of the *FLA*, members of opposite-sex couples who can meet the requirements of the statute are able to gain access to the court-enforced system of support provided by the *FLA*. It is this system that ensures the provision of support to a dependent spouse. Members of same-sex couples are denied access to this system entirely on the basis of their sexual orientation.³²

20. The exclusion impaired the dignity of individuals in same-sex relationships because it implied that their relationships were “less worthy of recognition and protection.”³³ Thus the definition of “spouse” in the *FLA* violated the Charter.

21. The functional approach is also evident in decisions of the United Kingdom House of Lords regarding same-sex couples, beginning with *Fitzpatrick v. Sterling Housing Association* in 1999. After summarizing the many different types of family relationships recognized by courts, Lord Nicholls wrote:

A man and woman living together in a stable and permanent sexual relationship are capable of being members of a family for this purpose. Once this is accepted, there can be no rational or other basis on which the like conclusion can be withheld from a similarly stable and permanent sexual relationship between two men or between two women. Where a relationship of this character exists, it cannot make sense to say that, although a heterosexual partnership can give rise to membership of a family for Rent Act purposes, a homosexual partnership cannot. Where sexual partners are involved, whether heterosexual or homosexual, there is scope for the intimate mutual love and affection and long-term commitment that typically characterize the relationship of husband and wife. This love and affection and commitment can exist in same sex relationships as in heterosexual relationships.³⁴

22. In *Ghaidan v. Godin-Mendoza*, the House of Lords rejected the argument that “same sex partnerships cannot be equated with family in the traditional sense.”³⁵ Lord Nicholls wrote: “A homosexual couple, as much as a heterosexual couple, share each other’s life and make their home together. They have an equivalent relationship. There is no rational or fair ground for distinguishing the one couple from the other in this context.”³⁶ Lady Justice Hale of Richmond wrote: “It follows that a homosexual couple whose relationship is marriage-like in the same ways that an unmarried heterosexual couple’s relationship is marriage-like are indeed in an analogous situation. Any difference in treatment is based upon their sexual orientation.”³⁷

23. In Israel, a 1994 decision of the Supreme Court held the refusal of an employer to award benefits on the same basis to same-sex and opposite-sex couples to constitute an arbitrary and unfair distinction. *El-Al Israel*

³¹ *Rosenberg v. Canada (Attorney General)*, 1998 CanLII 3243 (Ontario Court of Appeal 1998), at para. 48.

³² *M v. H*, [1999] 2 SCR 3 (Canada Supreme Court 1999), at paras. 61-62.

³³ *Id.* at para. 73

³⁴ *Fitzpatrick v. Sterling Housing Association Ltd* [1999] UKHL 42 (UK House of Lords 1999), at para. 47.

³⁵ *Ghaidan v. Godin-Mendoza* [2004] UKHL 30 (UK House of Lords 2004) at para. 15.

³⁶ *Id.* at para. 17.

³⁷ *Id.* at para. 143.

Airlines had refused to give a free or discounted ticket to the same-sex partner of a flight attendant. Vice-President Barak, writing for the Court, reasoned that the purpose of a free ticket was to reduce the pain of frequent separation between two members of the same household and thus the ticket supported a “firm social unit, based on a life of sharing.”³⁸ He asked “(I)s parting from a same-sex companion easier than parting from a companion of the opposite sex? Is living together for persons of the same sex different, with regard to the relationship of sharing and harmony and running the social unit, from this life of sharing for heterosexual couples?”³⁹ Justice Dorner, concurring, wrote:

The proper test is therefore to consider the relevance of the sexual orientation to the benefit conferred on the spouse. The functional test meets this requirement. According to this test, no distinction should be made between homosexual couples and heterosexual couples, if the spousal relationship between the spouses of the same sex meets the criteria that realize the purpose for which the right or benefit is conferred.⁴⁰

24. The same emphasis on the function of relationships, rather than formal names or categories, is seen in South Africa, beginning with the 1999 immigration case *National Coalition for Gay and Lesbian Equality* referenced above. In finding the limitation of an immigration permit to “spouses” to be unconstitutional, the Constitutional Court noted that the law was intended to protect “family life.” Gays and lesbians in “same-sex life partnerships” were equally as “capable as heterosexual spouses of expressing and sharing love in its manifold forms” and of “forming intimate, permanent, committed, monogamous, loyal and enduring relationships.” The Court concluded that gays and lesbians were just as capable of “constituting a family” and their family life was “not distinguishable in any significant respect from that of heterosexual spouses.”⁴¹
25. In *Satchwell v. President of the Republic of South Africa* and *Du Plessis v. Road Accident Fund*, the courts extended this reasoning to other types of benefits for same-sex partners. *Satchwell* concerned the exclusion of same-sex partners from employment benefits that were conferred on the spouses of judges. The Constitutional Court found the limitation of benefits to heterosexual spouses to be discriminatory and amended the law to include same-sex partners who had undertaken reciprocal duties of support.⁴² In *Du Plessis*, the issue was whether a same-sex partner had the right to recover damages for loss of support when his partner was killed in a road accident. The Supreme Court of Appeal recognized that two people of the same sex could form a “life partnership” and that they could owe each other a duty of support, just as husbands and wives could. According to the Court, insofar as the law “affords to a spouse an action for loss of support against a wrongdoer who unlawfully killed the other spouse but not to a same-sex partner who has established such a relationship, unfairly discriminates against such same-sex partners.”⁴³
26. In Colombia, a similar line of cases has extended a variety of rights previously reserved to opposite-sex couples to same-sex couples. In 2007, the Constitutional Court held that the denial of marital property rights to same-sex couples to be discriminatory.⁴⁴ The Court recognized the importance of protecting couples as couples, rather than as simply gay and lesbian individuals on the basis of their sexual orientation. Same-sex couples were just as valid and deserving of legal protection as opposite-sex couples and, furthermore, the possibility of entering into a relationship with another person was an essential aspect of personal fulfillment. Thus, limiting the law to opposite sex couples contravened the constitutional guarantees of dignity, equality, and free development of personality. Later decisions concerned social security benefits, pension benefits, the duty to pay alimony, and housing subsidies to same-sex couples.⁴⁵ In *Sentencia C-029/09*, the Court ordered

³⁸ *El-Al Israel Airlines v. Danielowitz*, H CJ 721/94 (Supreme Court of Israel sitting as the High Court of Justice 1994), at para. 15 (Barak, V-P).

³⁹ *Id.*

⁴⁰ *Id.* at para. 10 (Dorner, J., concurring).

⁴¹ *National Coalition for Gay and Lesbian Equality and Others v. Minister for Home Affairs and Others*, [1999] ZACC 17 (South Africa Constitutional Court 1999), at para. 53.

⁴² *Satchwell v. President of the Republic of South Africa*, [2002] ZACC 18 (South Africa Constitutional Court 2002).

⁴³ *Du Plessis v Road Accident Fund* (443/2002) [2003] ZASCA 86 (South Africa Supreme Court of Appeal 2003), at para. 26.

⁴⁴ *Sentencia C-075/07*.

⁴⁵ *Sentencia C-811/07* (Colombia Constitutional Court 2007) (extending social security and health benefits); *Sentencia C-*

changes in 42 laws and regulations that excluded same-sex couples, giving them the full package of rights that had previously been afforded only opposite-sex couples in *de facto* partnerships.⁴⁶ In T-716/11, the Constitutional Court observed that the family bond could arise in different factual situations. Heterosexuality was not a “defining aspect of the family, nor a requirement for constitutional recognition.”⁴⁷

27. In Australia, one of the earliest functional family cases was *Hope v. NIB Health Funds*. There the Equal Opportunity Tribunal of New South Wales found same-sex partners to be entitled to qualify for health benefits at the discounted “family” rate because they were in a “permanent and bona fide domestic relationship” and were just as emotionally and financially inter-dependent as an opposite-sex couple.⁴⁸ Denying them the family rate amounted to discrimination on the basis of sexual orientation. The decision was affirmed on appeal.⁴⁹ Beginning in 1999, almost every state and territory in Australia enacted legislative reforms to give recognition to same-sex couples, thus placing same-sex couples on an “equal footing” with opposite-sex *de facto* couples.⁵⁰ In 2007, the Human Rights and Equal Opportunity Commission published *Same Sex: Same Entitlements*, a national inquiry into discrimination in terms of financial and work-related entitlements and benefits.⁵¹ The recommendations of the report were then adopted by the federal government. Cohabiting same-sex couples now have the same federal rights as cohabiting opposite-sex couples. A *de facto* partner is defined to include same-sex and opposite-sex couples in more than 100 areas of federal law.⁵²
28. It is worth emphasizing that none of these cases concerned the right to marry or formal recognition for same-sex couples. Rather, they were challenges to laws that denied certain benefits to individuals who were in relationships that the courts found entitled to protection under the law – namely committed, loving relationships between same-sex partners. By using a “functional families” approach, courts were able to look beyond names and categories to the purpose of protecting certain kinds of relationships.

PART III: MARITAL STATUS AND INDIRECT DISCRIMINATION BASED ON SEXUAL ORIENTATION

29. Disparate impact, also known as indirect discrimination, refers to the consequences of apparently neutral laws that have a discriminatory effect on a protected group. The concept is familiar not only in European Court jurisprudence, but also in EU legislation and domestic laws and cases.⁵³ In *Thlimmenos v. Greece*, this Court

336/08 (Colombia Constitutional Court 2008) (extending pension benefits); *Sentencia C-798/08* (Colombia Constitutional Court 2008) (duty to pay alimony); *Sentencia C-029/09* (Colombia Constitutional Court 2009) (finding unconstitutional a variety of laws that restricted rights to opposite-sex partners).

⁴⁶ For more on this case, see ICJ *Sexual Orientation, Gender Identity and Justice: A Comparative Law Casebook* (Geneva 2011) at 328-329.

⁴⁷ T-716/11 (La Sala Novena de Revisión de la Corte Constitucional 2012) (“Por lo tanto, resulta claro que la heterosexualidad o la diferencia de sexo entre la pareja, e incluso la existencia de una, no es un aspecto definitorio de la familia, ni menos un requisito para su reconocimiento constitucional.”)

⁴⁸ *Hope & Anor v. NIB Health Funds LTD*, (1995) 8 ANZ Insurance Cases ¶¶61-269 (NSW Equal Opportunity Tribunal 1995).

⁴⁹ *NIB Health Funds Ltd v. Hope and Anor*, New South Wales Supreme Court (1996).

⁵⁰ Jenni Millbank, “Recognition of Lesbian and Gay Families in Australian Law – Part One: Couples,” 34 *Federal Law Review* (2006), 1-35.

⁵¹ HREOC, *Same Sex: Same Entitlements: A National Inquiry into Discrimination against People in Same-Sex Relationships: Financial and Work-Related Entitlements and Benefits* (2007), available at http://www.hreoc.gov.au/human_rights/samesex/index.html.

⁵² Same-Sex Relationships (Equal Treatment in Commonwealth Laws—General Law Reform) Act 2008.

⁵³ *Griggs v. Duke Power*, 401 U.S. 424 (U.S. Supreme Court 1971); *Ontario Human Rights Commission v. Simpson-Sears*, [1985] 2 SCR 536 (Canadian Supreme Court 1985), at para. 16 (“The idea of treating as discriminatory regulations and rules not discriminatory on their face but which have a discriminatory effect, sometimes termed adverse effect discrimination, is of American origin and is usually said to have been introduced in the *Duke Power* case, *supra*, in the Supreme Court of the United States.”); R. Hunter & E. Shoben, “Disparate Impact Discrimination: American Oddity or Internationally Accepted Concept?”, 19 *Berkeley Journal of Employment & Labour Law* (1998) 108. The authors write: “The disparate impact theory of discrimination is an American innovation. It is fundamentally different from the theory of intentional exclusion because motive is irrelevant under disparate impact analysis. This theory of discrimination, also known as indirect discrimination or adverse impact discrimination, refers to the disproportionate exclusion of individuals on a protected basis, such as race or

explained that Article 14 could be violated by the failure “to treat differently persons whose situations are significantly different.”⁵⁴ In *D.H. and Others v. the Czech Republic*, this Court held that a neutral policy that imposed an unequal burden on an ethnic group constituted a prima facie case of discrimination.⁵⁵

30. A number of courts around the world have found that a difference in treatment based on marital status can have the effect of discriminating on the basis of sexual orientation when same-sex couples are prohibited from marrying. These courts use disparate impact (or indirect discrimination) analysis to show that the application of an apparently neutral rule has a discriminatory result for a protected group. When a law gives a benefit to a person based on marital status and same-sex partners are not able to marry, the impact of the law is to discriminate on the basis of sexual orientation. In such a situation, the unmarried same-sex couple must be compared not with unmarried opposite-sex couples – who after all are permitted to marry – but with married same-sex couples. As this Court has acknowledged, same-sex couples “are in a relevantly similar situation to a different-sex couple as regards their need for legal recognition and protection of their relationship.”⁵⁶ A difference in treatment between same-sex couples and opposite-sex couples is discriminatory if it has no objective and reasonable justification.
31. Several U.S. courts and human rights commissions have relied on disparate impact to find discrimination where unmarried same-sex couples were denied a benefit that was given to married opposite-sex couples.⁵⁷ In *Levin v. Yeshiva University*, plaintiffs were a same-sex couple enrolled as medical students who were denied shared accommodation by the medical school. New York’s highest state court ruled unanimously that the school’s housing policy of only providing housing to married students could amount to disparate impact on the basis of sexual orientation. It reversed the order to dismiss and reinstated the disparate impact claim.⁵⁸ Under the city and state human rights laws, sexual orientation was a protected class and a claim of discrimination based on sexual orientation could be stated “where a facially neutral policy or practice has a disparate impact on a protected group.” The lower court had dismissed the disparate impact claim because it had compared the unmarried same-sex couple to unmarried opposite-sex couples. The Court of Appeals rejected this reasoning, stating that “[e]xcluding a large portion of the class benefitted by this policy from the disparate impact comparison group” rendered “the disparate impact analysis ... meaningless.” Chief Judge Kaye wrote in a separate opinion:

Here, [the school’s] policy of providing partner housing to married students is facially neutral with respect to sexual orientation. That policy, however, has a disparate impact on homosexual students, because they cannot marry and thus cannot live with their partners in student housing. By contrast, heterosexual students have the option of marrying their life partners.

The Appellate Division erred by holding that the appropriate comparison groups were *unmarried* heterosexual students versus *unmarried* homosexual students. This holding defined plaintiffs’ claim out of existence, since the disparate impact is created by [the school’s] restriction of partner housing to *married* students. ... Further, it is

gender.” *Id.* at 109. The International Covenant on Civil and Political Rights prohibits both direct and indirect discrimination. See *Bhinder v. Canada*, UN Doc. CCPR/C/37/D/208/1986, at para. 6.2. For examples of legislation, see UK Equality Act (Sexual Orientation) Regulations 2007, Regulation 3(3) (defining indirect discrimination); New South Wales (Australia) Anti-Discrimination Act 1977, section 49ZG; EU Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, Article 2(2)(b)(i).

⁵⁴ *Thlimmenos v. Greece*, Application no. 34369/97 (6 April 2000), para. 44.

⁵⁵ *D.H. and Others v. the Czech Republic*, Application no. 57325/00 (13 November 2007), at para. 175. See also *id.* at para. 107 (quoting *Griggs v. Duke Power*).

⁵⁶ *Schalk & Kopf* at para. 99.

⁵⁷ In *Anglin v. City of Minneapolis Library Bd.*, No. 88180-EM-2, the Department of Civil Rights, found that the lesbian employees who sought health care benefits for their partners could most likely “establish a prima facie case of disparate impact” discrimination based on sexual orientation. Similarly, the Vermont Labor Relations Board ruled that the University of Vermont had discriminated on the basis of sexual orientation by denying medical benefits to same-sex partners of employees while extending benefits to spouses of employees. *Grievance of B.M., S.S., C.M., and J.R.*, No. 92-30 (Vermont Labor Relations Bd. 1993).

⁵⁸ *Levin v. Yeshiva University*, 754 N.E.2d 1099 (New York Court of Appeals 2001).

immaterial that State law permits only heterosexual marriage. The City Human Rights Law specifically bans housing discrimination on the basis of sexual orientation. The State marriage law merely defines who can and cannot marry; it was not intended to permit landlords to violate New York City's laws against housing discrimination.⁵⁹

34. In *Alaska Civil Liberties Union v. State*, state employees with same-sex partners filed an action alleging that the denial of benefits available to married partners violated the equal protection guarantee under the state constitution.⁶⁰ The employees maintained that the benefits programs discriminated against them by denying benefits that were provided to similarly situated, but married, couples. The Supreme Court of Alaska agreed.

Unmarried public employees in opposite-sex domestic relationships have the opportunity to obtain these benefits, because employees are not prevented by law from marrying their opposite-sex domestic partners. In comparison, public employees in committed same-sex relationships are absolutely denied any opportunity to obtain these benefits, because these employees are barred by law from marrying their same-sex partners in Alaska or having any marriage performed elsewhere recognized in Alaska. Same-sex unmarried couples therefore have no way of obtaining these benefits, whereas opposite-sex unmarried couples may become eligible for them by marrying. The programs consequently treat same-sex couples differently from opposite-sex couples.⁶¹

32. Disparate impact analysis was also used by courts in Oregon and New Hampshire in similar benefits cases. In *Tanner v. Oregon Health Sciences University*, the Court of Appeals held that the denial of insurance benefits to unmarried same-sex partners violated the state constitution.⁶² In *Bedford v. New Hampshire Community Technical College System*, the New Hampshire Superior Court found that conditioning health insurance and bereavement leave for state employees on marital status amounted to unlawful discrimination on the basis of sexual orientation.⁶³

33. In *Egan v. Canada*, the Supreme Court unanimously held that sexual orientation was a ground protected from discrimination by the Canadian Charter.⁶⁴ In *Vogel v. Manitoba*, the Court of Appeal of Manitoba, applying *Egan*, reversed a lower court's finding that discrimination on the basis of marital status did not constitute sexual orientation discrimination. Judge Helper wrote: "As the law now stands, same-sex couples cannot marry. Any rationalization of the appellants' exclusion from benefits on the basis of their non-marital status in an attempt to avoid addressing the complaint of discrimination on the basis of sexual orientation cannot be done."⁶⁵

34. In *National Coalition for Gay and Lesbian Equality*, the South African immigration case discussed above, the government defended the omission of residency benefits to same-sex life partners on the ground that they were not spouses, a circumstance which had nothing to do with their sexual orientation. In the alternative, the government argued that "there was nothing that prevented gays and lesbians from contracting marriages with persons of the opposite sex, thus becoming and acquiring spouses and accordingly being entitled to the spousal benefits under section 25(5). Thus the fact that they did not enjoy the advantages of a spousal relationship was of their own choosing."⁶⁶ The Court called this reasoning a "meaningless abstraction" that ignored "the constitutional injunction that gays and lesbians cannot be discriminated against on the grounds of their own sexual orientation and the constitutional right to express that orientation in a relationship of their own choosing."⁶⁷ The immigration law amounted to discrimination on the overlapping and intersecting

⁵⁹ Id. at 503 (Kaye, C.J., concurring in part and dissenting in part).

⁶⁰ *Alaska Civil Liberties Union v. State*, 122 P.3d 781 (Alaska Supreme Court 2005).

⁶¹ Id. at 788.

⁶² *Tanner v. Oregon Health Sciences University*, 980 P.2d 186 (Oregon Court of Appeals 1999). The Oregon Supreme Court denied the university's petition for review. 994 P.2d 129.

⁶³ *Bedford v. New Hampshire Community Technical College System*, not reported in A.2d, 2006 WL 1217283 (N.H.Super. 2006).

⁶⁴ *Egan v. Canada*, [1995] 2 SCR 513.

⁶⁵ *Vogel v. Manitoba*, 1995 CanLII 6260 (Manitoba Court of Appeals 1995).

⁶⁶ *National Coalition for Gay and Lesbian Equality*, at para. 34.

⁶⁷ Id. at para. 38.

grounds of marital status and sexual orientation, both prohibited by the Constitution.

35. The UN Human Rights Committee has also suggested that a difference in treatment based on marital status could be discriminatory. Where the Committee has found no discrimination in a difference of treatment between married and unmarried opposite-sex couples, it has emphasized that the opposite-sex couples had made the conscious decision not to marry.⁶⁸ For example, the Committee has observed that “the decision to enter into a legal status by marriage, which provides under Dutch law for certain benefits and for certain duties and responsibilities, lies entirely with the cohabitating persons. By choosing not to enter into marriage, the author has not, in law, assumed the full extent of the duties and responsibilities incumbent on married persons.”⁶⁹ In *Joslin v. New Zealand*, two Committee members wrote separately to distinguish between access to the institution of marriage for same-sex couples and access to benefits that were contingent on being married. They stated: “No such possibility of choice exists for same-sex couples in countries where the law does not allow for same-sex marriage or other type of recognized same-sex partnership with consequences similar to or identical with those of marriage. Therefore, a denial of certain rights or benefits to same-sex couples that are available to married couples may amount to discrimination prohibited under article 26, unless otherwise justified on reasonable and objective criteria.”⁷⁰

Conclusion

As the discussion above demonstrates, giving same-sex partners the same rights and benefits as family members is a significant trend around the world. This includes the right to live and reside together regardless of the opportunity to be formally married or to be acknowledged as spouses. These developments have occurred independently of either formal relationship recognition or same-sex marriage. Courts and legislatures have essentially found that two people of the same sex who are in a long-term and loving relationship should be treated the same as opposite-sex couples and that the family life they share together has the same need for legal protection. Indeed, protection for family life would be meaningless if it did not include the right of a couple to actually live together as a family.

⁶⁸ See, e.g., *Danning v. The Netherlands*, UN Doc. CCPR/C/29/D/180/1984 (1987), at para. 14, and *Derksen & Bakker v. The Netherlands*, UN Doc. CCPR/C/80/D/976/2001 (2004) at para. 9.2.

⁶⁹ UN Doc. CCPR/C/64/D/602/1994, at para. 11.4.

⁷⁰ See UN Doc. CCPR/C/75/D/902/1999, Concurring Opinion of Lallah and Scheinin.