

Same-Sex Couples and the Law – Backgrounding the Issues

Ministry of Justice

Te Manatū Ture

Introduction

- The Human Rights Act 1993 protects all New Zealanders from discrimination on the grounds of sexual orientation. However, New Zealand law currently treats people differently in a number of areas according to the nature of their relationship - marriage, property issues, relationships with children, and various entitlements.
- We should also remember, when looking at the legal status of same-sex relationships, that in many circumstances the law still treats those in opposite-sex de facto relationships differently from those who are married. On the other hand, some statutes do recognise opposite-sex de facto relationships (relationships in the nature of marriage), and some recent legislation expressly recognises same-sex relationships.¹
- This background paper is a detailed source of information complementing the discussion paper **Same-Sex Couples and the Law - A Discussion Paper**, which is designed to prompt public feedback. This paper:
 - sketches the domestic and international context in which the issues are being debated
 - outlines developments overseas
 - sets out in a non-judgmental way key examples of the different ways the law treats same-sex couples.
- Feedback is sought on whether the different treatment illustrated by these examples is justified. Public feedback will help Parliament consider the issues relating to legislative recognition of same-sex couples as they arise in the future.

¹ Examples of recent statutes which specifically recognise same-sex relationships include the Domestic Violence Act 1995 and the Accident Insurance Act 1998.

General human rights principles and sexual orientation issues

The concept of discrimination

- Discussions about the legal treatment of same-sex couples often assume *different treatment equals discrimination*. But it is generally accepted that, in New Zealand law and in that of comparable jurisdictions, not every difference amounts to discrimination.
- Although the five Court of Appeal judgments in the same-sex marriage case *Quilter v Attorney-General* [1998] 1 NZLR 523 differ significantly in many ways, they contain a common thread - that different treatment does not, per se, constitute discrimination. For different treatment to be legally discriminatory, it must entail disadvantage, burden or detriment to the person treated differently.
- This paper assumes different treatment does not necessarily amount to discrimination, and its main purpose is to show differences in the legislative treatment of married couples, de facto opposite-sex couples and same-sex couples. The paper makes no judgement about whether particular instances of different treatment *are* discriminatory. Instead, it seeks your views on whether these differences are unjustified and so, discriminatory. As Keith J noted in *Quilter*, the question as to whether there is discrimination in a particular area of the law must be worked out case by case.

Sexual orientation in New Zealand's human rights legislation

- The Human Rights Act prohibits discrimination on the grounds of sexual orientation² in certain areas of public life - employment matters; access to places, vehicles and facilities; provision of goods and services; provision of land, housing and other accommodation; and access to educational establishments. The Act covers both direct and indirect discrimination.
- There are, though, a number of specific exceptions to the Act's general principles which allow behaviour that would otherwise be unlawful discrimination. These are intended to preserve a reasonable balance between competing social values and interests. Exceptions allowing lawful discrimination in relation to sexual orientation include domestic employment in a private household; counselling and courses relating to highly personal matters; and some forms of employment involving the propagation of religious beliefs.
- Currently, section 151 of the Human Rights Act states that the Act does not override other legislation. But section 151 expires on 31 December 1999. In the absence of alternative provisions, the relationship between the Act and other legislation will be unclear and will have to be determined by the courts. This relationship would be clarified should the Human Rights Amendment Bill be passed before the end of the year. The Act would still not override other statutes, but regulations would be subject to the Act unless empowering legislation specifically authorised the discrimination in question.

² The other grounds of discrimination the Act prohibits are sex, marital status, religious belief, ethical belief, colour, race, ethnic or national origins, disability, age, political opinion, employment status, and family status.

- The New Zealand Bill of Rights Act 1990 (BORA) affirms certain rights and freedoms to individuals in relation to actions by the State. Section 19 of the BORA affirms the right to freedom from discrimination on the grounds set out in the Human Rights Act 1993, including sexual orientation. In contrast to the Human Rights Act's application to limited areas of public life, the BORA applies to acts by the legislative, judicial and executive branches of Government, and by other persons or bodies performing any public function, power, or duty conferred or imposed by law.
- Section 5 of the BORA states that rights prescribed under the Act may be subject to such reasonable limits 'prescribed by law' as can be demonstrably justified in a free and democratic society. That other legislation is inconsistent with the BORA does not affect its validity or enforceability.

Sexual orientation in international law

- Sexual orientation is not widely accepted as a ground of discrimination in international law. New Zealand is party to no international human rights instrument that specifically prohibits discrimination by reason of sexual orientation.
- Thomas J noted in the *Quilter* case that some human rights (such as freedom from torture, or the right not to be arbitrarily executed) are readily capable of universal interpretation, but others are not because of differing cultural attitudes. He noted that a number of participating states believed homosexuality to be fundamentally wrong, and their cultural or religious beliefs made them less tolerant of gay and lesbian partnerships than other states. He concluded there was no 'universal common denominator' in relation to sexual orientation discrimination.
- The Human Rights Committee³ has expressed the view that reference to 'sex' in article 26⁴ of the International Covenant on Civil and Political Rights 1966 (ICCPR), providing for equality before the law, is to be read as including sexual orientation (*Toonen v Australia* (1995) 69 ALJ 602). But as Keith J points out in *Quilter*, this finding was not determinative in the particular case because the Committee based its decision on the view that Tasmanian laws criminalising sexual relations between consenting adult males were an unreasonable interference with the right to privacy (protected by article 17 of the ICCPR).
- The European Court of Human Rights has taken a similar approach, considering private sexual conduct a vital component of an individual's private life.

Approaches in similar jurisdictions

- The law in other jurisdictions can be, and often is, relevant to New Zealand, and we often look to other countries for legislative models. Jurisdictions with similar legal systems, such as Australia, Canada, and the UK, are usually more influential. A number include sexual orientation in their domestic legislative and/or constitutional protections. Some have also recognised same-sex couples in various contexts. Following is a summary of key jurisdictions.

³ The United Nations body responsible for considering States' periodic reports under, and communications in relation to, the ICCPR.

⁴ "All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status".

Australia

- Discrimination because of an individual's sexuality is prohibited not only at Commonwealth level, but also by a number of states (although expression of the ground of prohibited discrimination varies between jurisdictions). These statutes are structured similarly to our Human Rights Act - they prohibit discrimination in certain areas of public life, with general anti-discrimination principles subject to various exceptions.
- In many other areas, Australian law does not recognise same-sex couples. They may not marry and there is no provision for joint adoption applications from same-sex couples. But an increasing number of areas of the law do recognise same-sex relationships:
 - New South Wales has recently passed legislation which amends the De Facto Relationships Act so that same-sex couples are included within the definition of de facto relationships, and a new category of "domestic relationships" is created. "Domestic relationships" is defined to include de facto relationships, and other close personal relationships between two adults (whether or not related) who are living together and where one or both of the parties provides the other with domestic support and personal care. The effect of the amendments is that parties to de facto relationships (whether opposite-sex or same-sex) and other "domestic relationships" may now bring claims before the Court for adjustment of property interests between the parties and for maintenance. The Property (Relationships) Legislation Amendment Act also amends a number of other statutes to extend recognition of same-sex couples and, in some cases, de facto relationships in other areas including inheritance, coroners, and various next of kin type provisions. (Property (Relationships) Legislation Amendment Act (NSW).)
 - Queensland recently passed legislation which extends the right to parental, family, and bereavement leave to same-sex couples. Any State awards or State-based workplace agreements which include provisions for employees' partners or families will extend the same rights to same-sex couples. The bill also includes broad anti-discrimination coverage which extends the current legal protection against discrimination by reason of "lawful sexual activity" to cover a person's "sexual preference". (Industrial Relations Act 1999 (Queensland).)
 - Australian Capital Territory legislation provides for adjusting property interests and maintenance in a broad range of 'domestic relationships'. This term is broadly defined to cover personal relationships (other than legal marriage) between two adults in which one provides personal or financial commitment and support of a domestic nature for the material benefit of the other (and includes de facto marriages). Same-sex relationships are covered in the same way as several other types of relationships (Domestic Relationships Act 1994 (ACT)).
 - Same-sex partners are recognised as 'eligible partners' under Australian Capital Territory inheritance legislation, so a same-sex partner automatically inherits if his or her partner dies intestate. If the deceased partner has a legal spouse as well as an 'eligible partner' with whom they have lived for less than five years, the estate is divided between spouse and partner. If the deceased partner and the eligible partner have lived together for more than five years, the eligible partner inherits the entire estate ahead of the legal spouse (Administration and Probate Act 1929 (ACT)).

- Same-sex partners are explicitly recognised as ‘relatives’ in New South Wales legislation allowing relatives of a victim of a crime to apply to a state tribunal for compensation (Victims Compensation Act 1996 (NSW)).
- Same-sex partners are also recognised as ‘relatives’ by New South Wales legislation giving the relatives of a victim of a crime the opportunity to make a statement at the sentencing stage of criminal proceedings (Criminal Procedure Act 1986 (NSW)).
- Since 1995, same-sex partners have been able to sponsor the immigration of a partner from overseas, under similar conditions to those applying to opposite-sex couples (Migration Regulations 1993 (Commonwealth)).
- The Australian Courts have recognised same-sex families for the purposes of child maintenance. In the case of *W v G* ((1996) 20 Fam LR 49), the New South Wales Supreme Court held that a lesbian who helped her ex-partner artificially conceive two children and acted as their parent for some time, had a duty to maintain them. The decision was based on the principles of equitable estoppel.

United Kingdom

- No UK legislation expressly protects against discrimination on the grounds of sexual orientation. The Human Rights Act 1998 (UK) implements the European Convention for the Protection of Human Rights and Fundamental Freedoms, and Article 14 of the Convention provides that its rights and freedoms are to 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’.
- Commentators have noted, though, that the Strasbourg authorities have been reluctant to deal with complaints about sexual orientation discrimination under article 14.⁵ These issues seem to be dealt with more frequently as privacy issues under article 8 (right to respect for private and family life). The jurisprudence of the European Court of Justice under the Convention will probably be influential in the interpretation and application of the Human Rights Act by the UK Courts.
- Also relevant is the European Parliament’s approval of the Amsterdam Treaty, which all fifteen member states must ratify. The treaty provides for ‘appropriate action’ to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation.
- As in Australia, UK law does not generally recognise same-sex couples. There is no right to marry, and same-sex couples cannot jointly apply to adopt a child. Immigration is one of very few areas explicitly recognising same-sex couples. Since 1997, the same-sex partner of a British citizen, European Union national or permanent resident of the UK can, subject to certain conditions, be granted permission to remain in the UK. The policy, which applies equally to heterosexual partners who are unable to marry, requires the couple to have lived together for at least four years.

⁵ See for example, Christopher Baker (ed) *Human Rights Act 1998: A Practitioner’s Guide* (London, Sweet & Maxwell, 1998).

Canada

- Section 15 of the Canadian Charter of Rights and Freedoms 1982 (the Charter) guarantees every person the equal benefit and protection of the law without discrimination. In particular, the Charter prohibits discrimination on such grounds as race, national or ethnic origin, colour, religion, sex, age or mental or physical disability. The Supreme Court of Canada has held that sexual orientation is an additional ground of discrimination prohibited by the Charter.⁶
- Canadian federal and provincial anti-discrimination legislation (similarly structured to our Human Rights Act) also prohibits discrimination on the basis of sexual orientation. In fact, in *Haig v Canada* (1992) 94 DLR (4th) 1 (Ontario Court of Appeal) and *Vriend v Alberta* (1998) 156 DLR (4th) (Supreme Court of Canada), it was held that failure to prohibit discrimination on the grounds of sexual orientation in the Canadian Human Rights Act 1985 and the Individual's Rights Protection Act 1980 (Alberta) violated s. 15 of the Charter - it denied homosexual people the formal equality and protection from discrimination given other disadvantaged groups.
- Canadian law has not traditionally recognised same-sex couples the way it has married couples (and in some cases, opposite-sex de facto couples). Increasingly the courts have had to grapple with challenges to legislation and policies which treat these couples differently. Challenges have been based on the principle of equality enshrined in the Charter and in provincial and federal human rights legislation. They have focused on a range of legislation and policies, including marriage, adoption, employee benefits, pension plans, spousal support, social security and survivor's benefits.
- In *Layland v Ontario (Minister of Consumer and Commercial Relations)* (1993) 104 DLR (4th) 214, denying a marriage license to a same-sex couple was challenged as an alleged breach of section 15 of the Charter. But a majority of the Court decided that there was no breach of the Charter because marriage is defined by common law as involving those of opposite sex, and section 15 could not change this definition.
- In the case of *Re K and B* (1995) 125 DLR (4th) 653, the Ontario Court (Provincial Division) found the Child and Family Services Act 1990 (Ontario) infringed section 15 of the Charter by not allowing same-sex couples to bring a joint application for adoption. The court modified the Act's definition of spouse to include same-sex couples, thereby permitting same-sex joint applications under the Act. (Same-sex couples may also jointly apply to adopt in the provinces of Quebec, British Columbia and Saskatchewan.)

⁶ See for example, *Vriend v Alberta* (1998) 156 DLR (4th) 385.

- In *Egan v Canada* [1995] 2 S.C.R. 513, the Supreme Court focused on the statutory definition of spouse in the Old Age Security Act which provides pensions for those aged 65 and over. The Act lets a spouse's allowance be paid to a pensioner's spouse if the spouse is 60 or older and their combined income is below the threshold stipulated by the Act. The Act defined spouse to include de facto 'spouses' (based on one year of living together), but was restricted to spouses 'of the opposite sex'. It was that restriction that was challenged, and a Supreme Court majority of five to four rejected the challenge. Five judges held the plaintiffs had been disadvantaged (by denial of the spouse's allowance) because of their sexual orientation, and that sexual orientation was a ground of discrimination analogous to those listed in section 15. One judge held that the law was justified under section 1 of the Charter⁷; the other four held that sexual orientation was an analogous ground, but relevant to 'the functional values underlying the law'. They said the law was designed to support heterosexual relationships, since such couples can procreate and an ability to procreate was relevant to the law's purpose. Excluding homosexual couples, along with other couples who live together but not in a sexual relationship (friends, sibling, parent and child), was not based on an irrelevant ground and so was not discriminatory under section 15 of the Charter.
- The Ontario Court of Appeal recently held that 'spouse' as defined in the Income Tax Act 1985 (Ontario) to exclude same-sex couples, was contrary to section 15 of the Charter and not justified by section 1 (*Rosenberg v Canada (Attorney General)* (1998) 158 DLR (4th) 664). The federal government decided not to appeal the *Rosenberg* decision.
- The most recent decision on same-sex issues was made by the Supreme Court of Canada in *M v H*. A majority of the Supreme Court found the exclusion of same-sex couples from the definition of 'spouse' in section 29 (spousal support for married and opposite-sex de facto couples) of the Family Law Act 1990 (Ontario) was discriminatory and not justified under section 1 of the Charter.
- Judicial consideration of same- and opposite-sex couple issues seems likely to continue in Canada. Successful legal challenges to legislation and policy may lead to further legal recognition of same-sex couples.
- Other recent significant developments in recognising same-sex couples in Canada include extending some spousal benefits to the same-sex partners of Federal Government employees in 1997. Provincial governments have also recognised same-sex couples for the purpose of certain spousal benefits to the partners of Government employees. In January 1999 the Canadian Minister of Immigration announced new directions in immigration policy, including a proposal to expand the definition of spouse in immigration law and policy to cover opposite-sex de facto couples and same-sex couples.

Other jurisdictions

- Other jurisdictions are also grappling with same-sex couples issues. Some European countries have passed legislation treating same-sex relationships similarly to legal marriages, with specified exceptions, although these laws do not in any case confer the right to legal marriage. Exceptions commonly apply to activities such as adoption where rights are confined to heterosexual couples. The most common legislative model is registration, whereby same-sex couples may opt to register and so change the status of their relationship⁸.

⁷ Section 1 of the Charter is the equivalent of section 5 of the New Zealand Bill of Rights Act.

⁸ See, for example, the Registered Partnership Act 1995 (Sweden), Registered Partnerships Act 1989 (Denmark) and the Registered Partnership Act 1993 (Norway). Iceland, Greenland, the Netherlands, and Belgium also have registration models.

Key issues arising out of legislative treatment of same-sex couples

Marriage

- In *Quilter v Attorney-General*, the Court of Appeal held that the wording and scheme of the Marriage Act 1955 did not accommodate marriage between people of the same sex. The majority of the court also held that the right to freedom from discrimination under section 19 of the BORA does not require equal legislative recognition of heterosexual and same-sex marriages.
- Many rights and duties depend on marital status. The inability of same-sex couples to marry results in differing treatment in various contexts across the statute book, because denying marital status means also denying the rights and duties contingent on marriage. Following are key instances of different treatment arising from the inability to marry - not an exhaustive analysis, but a summary of the more significant impacts on same-sex couples.

Differences in treatment between married and unmarried minors

- A number of legislative provisions give minors who are married, or have been married, full legal capacity for specific purposes, while unmarried minors the same age are denied it. Because this type of provision treats married and unmarried persons differently it impacts on both opposite-sex and same-sex couples. But the impact on same-sex couples is arguably more significant because they can never legally marry and do not have the same choices as opposite-sex couples. Examples of this type of differing treatment include:
 - **Administration Act 1969** – the children of an intestate person must reach full legal age or marry before that in order to receive payment from the estate.
 - **Guardianship Act 1968** – there is provision for ending guardianship in relation to someone younger than 20 if they marry before that age. There is also provision for married children of or over the age of 16 to consent or refuse consent to medical treatment for others. Unmarried children aged 16 to 20 cannot do so.
 - **Minors' Contracts Act 1969** – a minor who is, or has been, married has full contractual capacity as if he or she was of full age.
- The self-audit of legislation administered by the Ministry of Justice conducted for the *Consistency 2000* project identified 39 statutory provisions treating minors differently on the basis of their marital status.

Use of the term 'spouse' in legislation

- Rights of action or entitlements often follow from the status of spouse. Where it is defined to cover only legal spouses, there is a distinction in treatment between married and unmarried people that impacts on unmarried opposite-sex couples and same-sex couples. In some cases, 'spouse' may be defined to specifically include people living in a relationship in the nature of marriage with someone of the opposite sex. Examples of legislative provisions using the word 'spouse' in this way include:
 - **Holidays Act 1981** – employees are entitled to special leave where their spouse is sick or dies.
 - **Judicature Act 1908** – if a juror's spouse, a member of a juror's family, or a member of his or her spouse's family is ill or has died, the Court has the discretion to discharge the jury without their giving a verdict, or proceed with remaining jurors and take their verdict.
 - **Coroners Act 1988** – 'immediate family' is defined to include 'de facto spouses', which appears to cover opposite-sex de facto couples but not same-sex couples. The significance of this is that immediate family have certain rights and entitlements over how the deceased is treated under the Act.
 - **Legal Services Act 1991** – a prescribed amount may be deducted for a dependant spouse when calculating someone's disposable income to determine their entitlement to legal aid. 'Spouse' covers opposite-sex relationships in the nature of marriage, but not same-sex relationships.
- A search of the statute book uncovered 631 instances of the word 'spouse' in 97 statutes.

Use of the terms 'husband' and/or 'wife' in legislation

- As with the term 'spouse', benefits and entitlements are often tied to the status of being a husband or a wife. Unless a particular statute defines these terms to include de facto partners, there is a distinction between married and unmarried people that impacts on unmarried opposite-sex couples and same-sex couples. The impact may be more severe on same-sex couples because they do not have the choice of marrying. Examples include:
 - **Joint Family Homes Act 1964** – joint family homes may be settled on a husband and wife by a husband or a wife, or both.
 - **Life Insurance Act 1908** – a wife may insure her own or her husband's life for her own benefit.
 - **Harbours Act 1950** – a Harbour Board may make an advance to an employee and his wife for purchasing or constructing a property and/or a house.
- A search of the statute book uncovered 328 uses of the term 'husband', and 371 uses of the term 'wife'.

Use of the term 'relationship in the nature of marriage' in legislation

- A number of statutory references to a 'relationship in the nature of marriage' explicitly exclude same-sex couples by using words such as 'persons of the opposite sex', 'husband and wife', or 'a man and a woman' living together in a relationship in the nature of marriage. Examples of such provisions include:
 - **Family Proceedings Act 1980** – the term 'marriage' is defined for certain purposes to include 'a relationship in which the parties are or have been living together as husband and wife, although not legally married to each other'.
 - **Legal Services Act 1991** – 'spouse' is defined to include 'any person (being a person who is of the opposite sex to the first-mentioned person) with whom the first-mentioned person is for the time being living in a relationship in the nature of marriage although those persons are not legally married to each other'.
 - **Social Security Act 1964** – 'husband' is defined to include a man with whom a woman has entered into a relationship in the nature of marriage although not legally married to him, and 'wife' has a corresponding meaning.
- Some statutory references to a 'relationship in the nature of marriage', however, do not contain such limiting words. It is unclear whether such provisions include same-sex couples.
- Arguably, same-sex couples are excluded unless explicitly referred to. This approach is consistent with that of the majority of the Court of Appeal in *Quilter*. Keith J considered Parliament was working from the accepted meaning of marriage (legal marriage between two people of the opposite sex), and deciding on a case-by-case basis whether to extend this meaning to include different groups - polygamous, de facto or same-sex - within it. This indicates that same-sex couples living together will only qualify as a 'relationship in the nature of marriage' where the statute explicitly includes them.
- In its determinations⁹ of conflicts with the Human Rights Act for the *Consistency 2000* project, the Human Rights Commission found the reference to marriage to be the key to such situations. It found, for example, that there was a conflict in the definition of 'relative' in the Protection of Personal and Property Rights Act 1988. The definition includes a spouse or any other person with whom the person has a relationship in the nature of marriage. The Commission determined that this conflicted with the Human Rights Act on the ground of sexual orientation because '...following the Court of Appeal's decision in *Quilter*, same-sex partners are excluded from the regime of marriage'.¹⁰ This suggests the reference to marriage is enough to require the couple to be of the opposite sex.
- But in its recent decision on the Child Support Act 1991 (*A v R* High Court, Hamilton AP93/96, 10 February 1999) the High Court held that the phrase 'a person who is living with another person and who, although not legally married to the other person, has entered into a relationship in the nature of marriage with the other person' applies to same-sex relationships, so that same-sex partners may be 'step-parents' under the Act. A key reason for this conclusion was the fact that the Child Support Act is strongly protective of the right of children to be maintained. Failure to include same-sex couples would undermine that right.

⁹ A determination, in the context of *Consistency 2000*, has no legally binding effect, but rather, reflects the opinion of the Human Rights Commission.

¹⁰ Human Rights Commission *Report to the Minister of Justice Pursuant to Section 5(i)(k) of the Human Rights Act 1993*, at page 66.

- The emphasis on children's rights in this case distinguishes it from other situations where benefits or entitlements resulting from a 'relationship in the nature of marriage' come to the parties in the relationship themselves. But the case does suggest the courts may be prepared to interpret 'relationship in the nature of marriage' to include same-sex couples if that is consistent with a particular statute's underlying policy.
- Examples of legislative references to a 'relationship in the nature of marriage' which do not specify whether the provision applies to same-sex couples include:
 - **Companies Act 1993** – 'spouse' is defined to include a person living in a 'relationship in the nature of marriage'.
 - **Education Act 1989** – the 'immediate caregiver' of a student includes a parent's spouse; 'spouse' is defined as someone married to the person or who 'has a relationship in the nature of marriage with the person'.
 - **Residential Tenancies Act 1986** – a 'member of the landlord's family' is defined to include a person with whom the landlord has entered into 'a relationship in the nature of marriage'.

Protections and immunities based on marital status

- Some legislative provisions provide protections or immunities based on the marital relationship. These are not available to unmarried couples, whether opposite-sex or same-sex. Examples include:
 - **Crimes Act 1961** – a married person will not be an 'accessory after the fact' in circumstances that would normally constitute being so, if they did the prescribed acts to enable their spouse, or the spouse and any other person who was a party to the offence, to escape after arrest or avoid arrest or conviction.
 - **Crimes Act 1961** – if someone charged with an offence refrains from calling their husband or wife as a witness, no adverse comment will be made about it.
 - **Evidence Act 1908** – husbands and wives cannot be compelled during proceedings to disclose communications made to each other during the marriage.

'Conflicts of interest' arising from marital relationship

- A number of legislative provisions apply to married couples where an action by one would be inappropriate because of their marital relationship. Such provisions do not put the same restrictions on same-sex couples. Examples include:
 - **Wills Act 1837 (UK)** – gifts to an attesting witness or his or her husband or wife will be void.
 - **Alcoholism and Drug Addiction Act 1966** – a husband or wife may not sign a medical certificate to be used as evidence so a court may determine whether an order for detention and treatment of their spouse should be made.
 - **Sale of Liquor Act 1989** – the husband or wife of someone who carries on business as a brewer, wine or spirit merchant, maltster, distiller or importer for sale of or dealer in fermented or spirituous liquors, is disqualified from being a member of a licensing trust.

Property issues

- The law treats married people's property differently because of their status and assumptions of sharing, dependence and common interests that go along with it. Two areas of the law where this different treatment has the greatest impact are in applying a legislative property-sharing regime when a relationship breaks down, and inheritance rights.

Property sharing

- The Matrimonial Property Act 1976 provides for the division of property belonging to married or formerly married people. It is based on the assumption of equal sharing of all matrimonial property when a marriage is dissolved, and limited to legally married persons.
- The De Facto Relationships (Property) Bill currently before Parliament provides clear statutory rules for dividing property when an opposite-sex de facto relationship breaks down. The Bill assumes equal sharing of the family home and chattels, with other property shared according to the parties' contributions. The Bill does not apply to same-sex couples.¹¹
- Without a statutory property-sharing regime, same-sex couples rely (as do opposite-sex de facto couples until the Bill is made law) on other legal mechanisms to deal with property issues when their relationships break down. The starting point for determining de facto partners' property rights is legal title. But this may not necessarily reflect beneficial ownership, and the non-titleholder may invoke equity to secure an interest in property. In particular, constructive trusts are often invoked on the breakdown of a de facto relationship. *Hamilton v Jurgens* [1996] NZFLR 350 involved two men who lived and worked together. The plaintiff was held to have demonstrated an equitable entitlement to an interest in the defendant's orchard property. The Court concluded that:

'Neither the fact that they are of the same gender, nor the absence of sexual activity with each other, takes their case outside the equitable principles developed and elucidated in, for example, *Gillies v Keogh* ...'

¹¹ However, a Supplementary Order Paper that would extend the Bill to same-sex relationships has been tabled. The issue is, therefore, likely to arise at a later stage in the legislative process.

This case shows that equitable remedies are available to same-sex couples if they can establish the elements of a claim.

- The law of contract may also help unmarried couples, whether opposite- or same-sex. Partners in a de facto relationship may enter into a contract setting out their respective rights and obligations.

Inheritance rights

- Nothing prevents a partner in a same-sex relationship succeeding as a beneficiary under their partner's will. But if one partner dies intestate, the survivor has no rights under the Administration Act 1969, nor any right to apply under the Family Protection Act 1955. Both these regimes are limited to legal spouses and do not protect either de facto opposite-sex or same-sex couples.
- Legal spouses, children and grandchildren alive when the deceased died, have rights to claim under the Family Protection Act 1955. The rights of legal spouses continue until the marriage is dissolved, so someone merely separated from their spouse may also lodge a Family Protection Act claim on the spouse's death. Parents and stepchildren may also make claims in limited circumstances. A successful Family Protection Act claim effectively reduces each beneficiary's share of the estate, so it is possible that the share left to a same-sex partner could be reduced if claims from other parties under the Family Protection Act are upheld.
- The Law Reform (Testamentary Promises) Act 1949 may also apply, since its rights do not depend on any recognised form of relationship with the deceased. Someone may claim against an estate for services rendered or work done for the deceased in their lifetime, if the claimant can prove an express or implied promise by the deceased to reward their services. But the Act is quite limited in its application and claims must normally be corroborated.

Relationships with children

- A number of issues relate to legal relationships between same-sex couples and children. While adoption is a high profile issue, there are others and these are also set out below.

Adoption

- An application for an adoption order may be made by two spouses jointly, or by the mother or father of the child, either alone or jointly with his or her spouse. When one person only applies, the applicant's spouse must consent before the Court makes an interim or adoption order. 'Spouse' is not defined in the Act, but the Human Rights Commission determined (in the *Consistency 2000* project) that it does not cover parties to a same-sex relationship.¹² This means same-sex couples cannot jointly apply to adopt a child. Neither is the consent of the other partner in a same-sex relationship needed where one partner applies to adopt. Nothing would prevent an adoption application from one party to a same-sex relationship, however.

¹² Human Rights Commission *Report to the Minister of Justice Pursuant to Section 5(i)(k) of the Human Rights Act 1993*, at page 61.

- In *Re an Application by T* [1998] NZFLR 769, the High Court considered an application under the Adoption Act involving a lesbian couple with three children born from artificial insemination. All three had been borne by the same woman who was accordingly their legal mother. The other partner had been appointed guardian of the eldest two by order of the Family Court. The adoption application was made in respect of the youngest child only and was intended by the parties to:
 - (i) provide the child with rights of succession
 - (ii) provide additional security for the family
 - (iii) equalise the balance of power between the parents
 - (iv) reduce the risk, should the natural mother die or become incapacitated, of her family removing the child from the care of the other ‘mother’.The application was declined, although the Court based its decision on the conclusion that in this case adoption was not in the child’s best interests, rather than on the sexual orientation of the applicants.

Assisted human reproduction

- The Human Rights Act applies to assisted human reproductive services, making discrimination in the provision of such services on the ground of sexual orientation unlawful. But the Ministerial Committee on Assisted Reproductive Technologies (MCART) took the view that discrimination and refusal to provide fertility services is justifiable and lawful on the basis of sound medical reasons, or if refusal of services would be in the best interests of potential offspring (eg. where one of the parties has a record of child abuse). MCART also noted that lesbian couples may become pregnant without using professional infertility services. Gay men may become parents through some form of surrogacy.
- The Status of Children Amendment Act 1987 applies to children born from assisted human reproductive procedures using donated material. The Act deems the ‘social parents’ to be child’s legal parents. It excludes donors of sperm and ova from legal parenthood and its rights and obligations. The Act applies to married and opposite-sex de facto couples. It does not apply to same-sex couples, so that, in the event of a same-sex couple jointly deciding to undergo assisted human reproductive procedures (such as artificial insemination by donor, in the case of a lesbian couple), the couple would not become joint legal parents in the way an opposite-sex couple would, notwithstanding their common intentions.

Child support

- The recent High Court decision in *A v R* is referred to above. The court found a former partner in a longstanding lesbian relationship was a ‘stepparent’ for the purposes of the Child Support Act. This meant she was liable to pay child support for the children of the relationship. Of particular importance to the court was the Act’s underlying policy that children have a right to be maintained, and this would be undermined if same-sex couples were excluded. The court also noted that on the facts before it, the appellant had taken responsibility for the children’s material support from the time they were born (a nine-year period). She had also, through other means (such as legal documents), attested to her responsibility for the children.

Guardianship Act

- The Guardianship Act 1968 allows the Court to appoint a guardian for a child, either a sole guardian or in addition to another. Same-sex partners might seek to formalise their relationship with children in this way, which is what happened in *Re an Application by T* referred to above.

- When it comes to custody, only a parent, stepparent or guardian of a child has a clear right to apply. But others may apply for custody with the leave of the court. On the breakdown of a same-sex relationship involving day-to-day care of children, the non-custodial partner would have to seek the court's leave to apply for custody, unless they were already the child's parent or guardian.
- The Guardianship Act limits who may apply for access. A former partner in a same-sex relationship involving the care of children would be able to apply for court-ordered access only if they were the child's parent.

Benefit entitlement

Income support

- The law on providing income support¹³ to those needing it contains many provisions treating legally married and opposite-sex de facto couples differently from all other domestic relationships, including same-sex couples.
- The underlying premise of the income support system is reflected in a broad range of key provisions which:
 - define words and phrases that are used repeatedly (eg. 'spouse' is defined by the Social Security Act 1964 to mean the husband or wife of an applicant or beneficiary)
 - establish broad powers and discretions across the system (eg. determining whether a man and a woman are in a relationship in the nature of marriage)
 - establish eligibility requirements for financial assistance (eg. opposite-sex couples face a joint income or joint income and asset test to be eligible for many forms of financial assistance; same-sex partners are treated as two single people, whether or not they are both on a benefit, and are tested individually. So one partner of a same-sex couple could apply for a benefit while the other is in full employment, and the second partner's income would not be taken into account when assessing eligibility. A separate but related issue is that some forms of assistance may have specific eligibility criteria focusing on opposite-sex couples - Domestic Purpose Benefit provisions require a woman to have 'lost the support of or is being inadequately maintained by her husband'. 'Husband' is defined as 'a man with whom a woman has entered a relationship in the nature of marriage')
 - set the rates for all kinds of financial assistance - same-sex partners are usually each paid at the single person rate, and if both are on a benefit, the combined amount will be more than the married rate paid to opposite-sex couples
 - provide for determining a person's financial means or liability - opposite-sex couples face a joint income and asset test, whereas same-sex couples are treated as two single people and are tested individually

¹³ 'Income support' includes any allowance, benefit, pension, superannuation, supplement, or other kind of financial assistance or determination of financial means or liability, under the Social Security Act 1964, Disabled Persons Community Welfare Act 1975, War Pensions Act 1954, Social Welfare (Transitional Provisions) Act 1990, and Part XXV of the Education Act 1989.

- set out a range of processes and obligations (eg. the benefit is paid jointly to an opposite-sex couple, both on a benefit, and usually apportioned between them; same-sex partners both on a benefit each receive it in their own right).

Accident compensation

- The Accident Rehabilitation and Compensation Insurance Act 1992 defines ‘spouse’ as a legally married spouse or a person of the opposite sex with whom the deceased was in a relationship in the nature of marriage immediately before his or her death. This means same-sex couples and their children are ineligible for entitlements available to opposite-sex ‘spouses’, such as survivor’s grants and weekly compensation for a surviving spouse.
- The Accident Insurance Act 1998, however, has changed the definition of ‘spouse’ to include a same-sex partner with whom the deceased was living in a relationship in the nature of marriage immediately before his or her death. From 1 July 1999, same-sex partners will be eligible for entitlements arising from fatal injuries in the same way as opposite-sex spouses are. These changes to the definition of ‘spouse’ were recommended by the select committee considering the Accident Insurance Bill in response to public submissions.

Legal aid

- The Legal Services Act 1991 makes legal assistance and services available to those who cannot afford them. Since it is aimed at people with insufficient means, the Act provides for ‘means testing’ of applicants. When assessing if an applicant has the means to pay for legal assistance, their disposable income and disposable capital are taken into account. To determine these, the resources of the applicant’s spouse are taken into account if the applicant is living with them (the spouse’s resources will not be taken into account, though, if the couple have conflicting interests in the dispute to which the proceedings relate).
- When assessing entitlement to legal aid, ‘spouse’ is defined as legally married persons and opposite-sex couples living together in a relationship in the nature of marriage. It does not include same-sex partners. This means that when one same-sex partner applies for legal aid, the other partner’s income and assets will not be taken into account the way they would with an opposite-sex couple.

Tax credits

- Tax credits are available to taxpayers responsible for caring for children. Entitlement to tax credits depends on the level of household income, and the income of both spouses is taken into account. But income tax legislation defines ‘spouse’ to include opposite-sex couples only (whether married or living in a relationship in the nature of marriage). When assessing the eligibility of a same-sex partner for such a tax credit, the income of that person’s partner will not be taken into account the way it is for opposite-sex couples.

Immigration

- In December 1998, Cabinet decided to amend the Government Residence Policy, aligning recognition of same-sex relationships with that of opposite-sex de facto relationships. The Government Residence Policy has recognised same-sex relationships under the Family Category since 1988 by granting residence rights to partners of New Zealand citizens and residents. But the policy subjected same-sex relationships to more demanding requirements than those applying to opposite-sex de facto relationships. Cabinet's decision means the Government Residence Policy will soon treat same-sex couples in the same way as opposite-sex de facto couples.

Conclusion

- The Government is committed to encouraging public debate on the legislative treatment of same-sex couples. This background paper summarises the major ways in which same-sex couples are treated differently from married and opposite-sex de facto couples across New Zealand law. It complements the discussion paper *Same-Sex Couples and the Law - A Discussion Paper*.
- Differential treatment of same-sex couples is widespread, extending across a range of legal rights/entitlements and responsibilities. The need to consider legal issues for same-sex couples arises partly from the fact that most New Zealand legislation was developed without regard to its relevance or application to same-sex couples.
- The justifications for treating same-sex couples differently in particular instances must be carefully considered. The following questions may help in doing so:
 - Is there a substantive reason for differing treatment (is it based simply on personal characteristics, such as sexual orientation or marital status, or does it involve assessing need, capacity or merit)?
 - Are there other 'public interest' considerations to be weighed against the anti-discrimination principles underpinning human rights legislation?
 - What are the aims of the particular policy, and is different treatment of same-sex couples consistent/inconsistent with these?
 - Does an instance of different treatment result from legislation or policy that is outdated in the context of current social policy objectives and social structures?
 - The Government considers that public debate and feedback on these issues will help develop policy responses in particular areas of differing treatment.