

Discussion Paper
Same-Sex Couples and the Law

Ministry of Justice

Te Manatū Ture

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Same-sex couples and the law

Why a debate now?

- We want to know what you think about the way our laws treat same-sex couples, and whether you think anything should change.
- The Human Rights Act has outlawed discrimination on the grounds of sexual orientation since 1993. However, the Human Rights Act does not override other legislation. In recent years, a considerable amount of work has been carried out considering the consistency between the Human Rights Act and other legislation in a project called *Consistency 2000*.
- The *Consistency 2000* project brought out a number of situations in which various New Zealand laws treated same-sex couples differently. This discussion paper highlights the more significant inconsistencies that have been identified.
- This is an opportunity to think about whether we want to keep or remove some or all of these inconsistencies.
- The status of same-sex couples has recently been tested in court in several cases. The High Court had to rule whether a same-sex partner should have to pay maintenance for the children she and her ex-partner cared for together during their relationship. The Court of Appeal had to decide whether same-sex couples could legally marry. The Court of Appeal ruled that allowing same-sex couples to marry was such a fundamental change in social policy it should only be initiated by Parliament.
- The status of same-sex couples has also come up before Parliament recently in submissions relating to the property regime for de facto couples.
- When issues such as this come before Parliament, advice is required. Therefore, we seek your views to assist in providing advice that reflects the views of the community. Public discussion of the issues will also help Parliament decide how same-sex couples should be treated.

The international scene

- New Zealand isn't the only country grappling with same-sex couple issues. Cases are coming before the courts in Australia, Canada and the UK, and the issues are being publicly debated there too, although the speed of change varies.
- New South Wales recently passed legislation which grants same-sex couples the same property rights as opposite-sex de facto couples upon breakdown of the relationship. This legislation also changed a number of other statutes to more closely align the rights and responsibilities of same-sex couples with those of married and opposite-sex de facto couples in a number of areas of the law.

- There is no international consensus on the issue and consensus may be difficult to achieve. Some countries believe homosexuality is fundamentally wrong for cultural or religious reasons. Others take a different view.
- New Zealanders need to consider what is right for New Zealand.

About this booklet

- This booklet has been prepared by the Ministry of Justice. It sets out issues relating to same-sex couples that the Ministry believes are most significant. But you're also welcome to give your views on any related issues you think are important.
- The booklet isn't an exhaustive analysis of New Zealand law relating to same-sex couples. In fact, same-sex couples tend to be invisible right across the statute book, probably because most New Zealand law was developed without considering them at all. In the same way, many areas of law don't treat opposite-sex de facto couples the same way as married couples.
- The booklet outlines issues in terms of rights and responsibilities. When weighing it all up, we must think about whether rights and responsibilities in particular areas of the law could be better balanced.
- The booklet looks at issues to do with domestic partnerships, children, entitlements, relationship breakdown and death. Each issue is preceded by a simple statement about the current situation, and ends with one or more questions. You might like to use these questions as a way of organising and presenting your feedback - the questions are numbered and it would be helpful if you could indicate which question or questions you are responding to.
- Please note that any submission you make may be the subject of a request under the Official Information Act 1982. The withholding of particular submissions on the grounds of privacy, or for any other reason, will be determined in accordance with that Act. If you feel there is any part of your submission which you consider could be properly withheld under that Act (eg for reasons of privacy), please indicate this clearly in your submission.
- A more detailed analysis of the issues covered in this booklet is available from the Ministry of Justice website - <http://www.justice.govt.nz>. The document is called *Same-Sex Couples and the Law - Backgrounding the Issues*. Further copies of this booklet can also be obtained through this website.
- The deadline for submissions is **31 March 2000**.

Send your written comments to:
Same-Sex Couples and the Law
Public Law Group
Ministry of Justice
PO Box 180
WELLINGTON

Or email them to:
Reception@justice.govt.nz

Thank you for your help.

1 Domestic partnerships

MARRIAGE

Same-sex couples can't legally marry

- No other country currently allows same-sex couples to marry as at the date of publication.
- As many rights and responsibilities arise from legal marriage, not allowing same-sex couples to marry has flow-on effects in other areas of the law.

QUESTION 1 - What are your views about same-sex couples being able to marry?

REGISTRATION

One way of formally recognising same-sex partnerships?

- Some European countries allow same-sex couples to register their relationship. Once registered, the relationship entails specific rights and responsibilities.
- Registration in these countries works a lot like marriage - people who want their relationship registered mustn't be already married or in a registered relationship, and mustn't be related in a way that would prevent them marrying.
- Opposite-sex de facto couples who don't want to marry could be allowed to register their relationships in the same way.

REGISTRATION

There are some advantages

- The rights and responsibilities legally granted to married couples could be extended to same-sex couples.
- Registration is a straightforward way of granting these rights and responsibilities - we wouldn't need criteria or tests to determine if people were eligible.
- Registration would entitle same-sex couples to State recognition of their relationship.
- Same-sex couples would have a choice about whether to formalise their relationship - registration wouldn't be forced on them.

REGISTRATION

There are some disadvantages

- A registration system might create a relationship hierarchy, putting marriage at the top and making registration seem less significant. This would be more likely to happen if same-sex couples only were allowed to register their relationships.
- Same-sex couples would still have fewer options than opposite-sex couples. Opposite-sex couples could choose to marry, register, or live together without marriage or registration. Same-sex couples would only have the choice of living together or registering.
- Those needing legal protection most might not get it from registration. Since it would be something you could choose to do or not, more vulnerable people without much influence in their relationships might find it impossible to persuade their partners to register the relationship.

QUESTION 2 - If same-sex couples can't marry, what do you think about same-sex couples being able to formalise their relationship in some other way (eg registration)?

QUESTION 3 - How do you think registration should work?

QUESTION 4 - What are your views about opposite-sex de facto couples being able to formalise their relationships in some other way (eg registration)?

2 Children

ADOPTION/JOINT PARENTING

Same-sex couples can't be joint legal parents or adopt children together

- Married people may adopt a child together. So may a child be adopted by his or her natural parent and step-parent. The Adoption Act 1955 doesn't define spouse, but it's usually taken to mean an opposite-sex partner in a traditional marriage.
- This means same-sex couples can't apply to adopt a child together. Nor can opposite-sex de facto couples. There's nothing to stop one partner applying, but if the adoption is granted, the other partner won't legally be the child's parent.
- Many same-sex couples currently have children where one of the parents is a birth parent. Under the current law, the other parent cannot legally adopt the child.
- Through the Guardianship Act 1968, the court can appoint a guardian for a child - a sole guardian, or as well as another guardian. A same-sex couple could formalise their relationship to a child by becoming its guardians, but that's not the same as being a parent.
- You'll see further on that same-sex partners can only apply for Court-ordered access to a child if they're the child's parent. Being the child's guardian isn't enough to entitle them to apply for access even though a Court might impose child support obligations on them in these circumstances.

QUESTION 5 - Do you think same-sex couples should have the same rights as opposite-sex couples to jointly adopt children?

QUESTION 6 - In what circumstances do you think a same-sex couple ought to be able to have joint legal parent status?

ASSISTED HUMAN REPRODUCTION

Same-sex couples can't both be parents of a child born from assisted human reproduction (eg sperm or egg donation, surrogacy)

- Same-sex couples might have children through the use of donated sperm or eggs, or by having someone else be a surrogate mother.

- The Status of Children Amendment Act 1987 applies to children born this way, and says the child's social parents are its actual parents, not those who donated the sperm or egg.
- The Act applies to married and opposite-sex de facto couples, but not to same-sex couples. So if a same-sex couple decide to have a child together this way, they don't become the child's joint legal parents.

QUESTION 7 - What are your views about same-sex couples being able to be joint parents of a child born from an assisted human reproductive procedure that they both agree to?

PARENTAL LEAVE
If same-sex couples have a child, they're not both entitled to parental leave

- The Parental Leave and Employment Protection Act 1987 allows men and women employees to take unpaid parental leave, and protects their employment rights during the pregnancy and leave.
- Women who've been with the same employer for at least 10 hours a week for the 12 months before the expected date of birth or adoption are entitled to maternity leave if they give birth or adopt a child. The husband or opposite-sex partner of a pregnant woman, or an adoptive father, is allowed up to two weeks unpaid leave in one stretch, around the time of the birth or adoption if he has worked for the same employer for at least 10 hours a week for the 12 months before the expected date of birth or adoption.
- A woman and her husband or opposite-sex partner can share the right to extended leave for day-to-day care of a child in its first year.
- It's not the same for same-sex couples. When a same-sex couple has a child (through adoption or assisted conception), the partner not giving birth or adopting the child isn't entitled to the parental leave and employment protections granted by the Parental Leave and Employment Protection Act.

QUESTION 8 - What is your opinion of a same-sex couple both having the right to parental leave if one of them gives birth or adopts a child?

3 Entitlements

INCOME SUPPORT
Same-sex couples aren't recognised when it comes to deciding what income support one or both of them are entitled to

- The law on giving income support to those who need it treats legally married and opposite-sex de facto couples differently from all other kinds of domestic partnerships, including same-sex couples.
- This non-recognition affects eligibility for financial help. Opposite-sex couples face a joint income test or a joint income and asset test before they're entitled to various types of support. But same-sex partners are treated as two single people, whether or not they're both on a benefit, and are tested individually.
- A partner in a same-sex relationship could apply for a benefit while the other partner was in full employment, and the working partner's income wouldn't be taken into account.
- Eligibility criteria for some kinds of support focus on opposite-sex couples. To get Domestic Purposes Benefit (DPB), a woman must have 'lost the support of or [be] inadequately maintained by her husband.' *Husband* means 'a man with whom the woman has entered a relationship in the nature of marriage.'
- Not recognising same-sex relationships affects how much financial help people are entitled to. Same-sex partners are paid at the single person rate. If both are on a benefit, their combined payments will be more than the married rate paid to opposite-sex couples (whether they are married or de facto).

QUESTION 9 - What are your views about same-sex and opposite-sex couples being assessed in the same way for income support purposes?

TAX

Same-sex couples aren't recognised when it comes to working out what family assistance people are entitled to

- Families responsible for caring for children are entitled to tax credits, depending on their household income and taking both spouses' incomes into account. But spouse means only opposite-sex couples (whether they are married or living together).
- When someone in a same-sex relationship is assessed for a tax credit, their partner's income won't be taken into account the way it would if they were an opposite-sex couple.

QUESTION 10 - What are your views about same-sex and opposite-sex couples being assessed in the same way for tax credit entitlement?

LEGAL AID

Same-sex couples aren't recognised when it comes to deciding if people are entitled to legal aid

- The Legal Services Act 1991 makes legal aid available to people who can't afford to pay for it themselves. Those who apply are means tested, and their disposable income and disposable capital taken into account. If the person is living with their spouse, the spouse's resources are taken into account too (except if the spouses have conflicting interests in the dispute).
- As we've seen, spouse means married people or opposite-sex couples living together in an arrangement like a marriage. It doesn't include same-sex couples. So if one partner in a same-sex relationship applies for legal aid, the other partner's income and assets won't be taken into account as they would with an opposite-sex couple.

QUESTION 11 - What are your views about same-sex couples being assessed in the same way as opposite-sex couples when it comes to deciding whether people are eligible for legal aid?

4 Relationship breakdown

PROPERTY

There's no legal basis for dividing property when a same-sex relationship breaks down

- The Matrimonial Property Act 1976 deals with dividing up property owned by married or once-married couples. It assumes matrimonial property should be equally shared when a marriage ends.
- The Act applies to married couples only, not to opposite-sex de facto couples. But if the De Facto Relationships (Property) Bill, currently before Parliament, is passed, that too will assume the family home and chattels should be shared when the relationship breaks down. Other property would be shared according to how each partner contributed to it.
- As it stands now, the De Facto Relationships (Property) Bill doesn't apply to same-sex couples.

QUESTION 12 - What do you think about there being a law on dividing property when same-sex relationships break down?

CHILD SUPPORT

Same-sex partners may be liable to support any children they assumed responsibility for during their relationship

- The High Court recently found a former partner in a long-standing lesbian relationship was a 'stepparent' in the eyes of the Child Support Act. The woman had financially supported the three children of the relationship (born through artificial insemination) for nine years from the birth of the first child. The Court ruled she must support them.
- The Court decided the Act's underlying policy - the right of children to be financially maintained - would be undermined by excusing same-sex couples from liability.

CHILD CUSTODY AND ACCESS

The right to apply for custody of or access to a child is limited

- Not everyone can apply for custody of or access to a child. Same-sex couples are limited by the fact that they can't legally marry or jointly parent a child. Parents, stepparents and guardians have a clear right to apply to the Court for child custody. Everybody else must get the permission of the Court to do so.
- A same-sex partner wanting custody of a child after a relationship has broken down may apply if they are the child's parent or guardian. Otherwise, they will have to ask for the Court's permission.
- Court-ordered access to children is also limited. A former partner in a same-sex relationship in which there were children may only apply for Court-ordered access if they are the child's parent.

QUESTION 13 - What are your views on the law on custody and access being changed to take account of same-sex relationships?

5 Death

INHERITANCE

Same-sex couples aren't recognised in the way married couples are when it comes to inheritance

- There's nothing to stop a same-sex partner being a beneficiary to their partner's will.
- But if one partner dies without a valid will (intestate), same-sex partners aren't recognised in the way married people are. When someone dies intestate, their estate is distributed according to the Administration Act 1969. The Act doesn't recognise same-sex relationships (or opposite-sex de facto relationships), which means that unless a couple is married, the surviving partner has no right to inherit from the intestate partner's estate.
- The Family Protection Act 1955 allows certain people to claim from a dead person's estate on the basis that their relationship with the dead person gives them a moral right to be maintained.
- The Act doesn't recognise same-sex (or opposite-sex) defacto couples. So if a same-sex partner dies without properly providing for their partner, the survivor has no right to claim against the estate, even if they were mainly or completely financially dependant on the dead partner.
- Opposite-sex de facto couples face the same problem.

QUESTION 14 - What is your opinion of the law being changed to recognise same-sex couples when a partner dies without a valid will?

QUESTION 15 - What are your views about same-sex partners being able to make claims against the estate of a dead partner who hasn't properly provided for them?

LACK OF RECOGNITION WHEN A SAME-SEX PARTNER DIES

Same-sex relationships aren't always recognised the way married and/or opposite-sex de facto relationships are when a partner dies

- Several laws don't recognise the death of a same-sex partner or treat the relationship in the way they treat the relationship of a married or opposite-sex couple. Here are some of those laws:
 - The **Holidays Act 1981** - entitles employees to special leave from work when their spouse is sick or dies. But spouse means married and opposite-sex de facto couples only, so the Act doesn't entitle same-sex partners to special leave if their partner dies.
 - The **Coroners Act 1988** - recognises that dead people's families have an interest in post-mortem examinations and inquests. The Act recognises various relationships as 'immediate family,' and includes married and opposite-sex de facto couples. But it doesn't recognise same-sex relationships. So the wishes of a same-sex partner about a post-mortem exam or inquest won't be considered. Plus, if a coroner wants to say something negative about a dead person, the protections given to the 'immediate family' won't apply to the same-sex partner.
 - **Jury duty** - a jury may be discharged or carry on with one less person if a juror's spouse dies. But the Court can't excuse a juror because their same-sex partner has died.

QUESTION 16 - In your opinion, what areas of the law need to be changed so that same-sex relationships are recognised in the way opposite-sex relationships are when a partner dies?

RIGHTS TO COMPENSATION

Same-sex couples will soon have the same entitlements as opposite-sex couples after the accidental death of their partner

- Under the Accident Rehabilitation and Compensation Insurance Act 1992, only a legally married spouse or opposite-sex de facto partner was entitled to a survivor's grant and weekly compensation. But under the Accident Insurance Act 1998 which came into force on 1 July 1999, same-sex couples and their children are entitled to fatal injury compensation in the way opposite-sex couples are. These changes came about during the select committee process in response to public submissions on the issue.

Quick Guide to Questions

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The deadline for submissions is **31 March 2000**.