

LEGAL STUDIES

Essay 3

Over the last twenty years, same sex relationships have sought controversial arguments over numerous human rights issues. The predicament still exists today, with numerous human rights, listed in the Declaration Of Human Rights, still being violated. For instance, in the case of *Hope & Brown v Nib Health Fund Ltd 1995*, Andrew Hope and William Brown successfully demonstrated that *Nib Health Fund Ltd* had discriminated against them on the basis of their sexual orientation. This is a clear example of a same sex couple being discriminated against, which is a part of the International Declaration Of Human Rights in article 26, it states 'the right to non-discrimination', which is clearly being violated in this case and amongst numerous examples in today's society. Furthermore, in 'The Age' 23/07/07, it is mentioned '*federal MPs are lagging behind state and territory governments in removing discrimination against same sex couple* said Chris Evans.'

Same sex couples are being denied countless human rights, for instance; 'the right of freedom of expression', which is stated in article 19, 'the right to recognition before the law', which is expressed in article 16, and 'the right to privacy', in section 17.

'recent publications shown by the Australian Human Rights and Equal Opportunity Commission, identified 58 federal laws that denied same sex couples and families basic financial and work related entitlement' as seen in 'The Age' 23/07/07. This section of article clearly indicates that federal laws are particularly Discriminatory towards same sex couples, as stated in the newspaper article. '*gays denied human rights- study*'; this article from the *Hobart Mercury* goes on to state '*significant inequality and discrimination still persisted, particularly at the federal level*' which is stated by *Dr Madison* and goes on to show case reliability thought numerous sources searched.'

The Federal Government officially recognized same sex couples as families, with the inclusion of homosexual households, in the 1996 Census which showed Australia's morals and ethics were changing, along with breaking down discrimination barriers for the first time.

New South Wales offers same sex relationships some protection under '*The Property Relationships Legislation Amendment Act 1999 NSW*'. The reform relates to all relationships now, to include homosexual relationships in which they have lived together in a de facto relationship for two or more years, access to the district court to divide property or claim financial maintenance when a relationship diminishes.

In recent years there has been little change to federal law concerning same sex relationships. In 2004 '*The Marriage Act 1961 (CTH)*' was amended to explicitly include the common law definition of marriage as 'union of a man and a woman to the exclusion of all others, voluntarily entered into for life'. This amendment was intended to ensure the Australian courts could not in the future redefine marriage to include same sex couples as a way of not discriminating them. Also, in 2004, two other laws were passed which did give same sex couples limited rights in federal law.

The '*Superannuation Legislation Amendment Act 2004*' was a landmark in expanding the category of dependents entitled to inherit assets if a member of a fund dies.

The 'Anti Terrorism Act 2004' amended the definition of 'close family member' to recognize same sex partners. This change was passed on the same day as the 'marriage ban' to homosexuals, which showed a conflict with certain rights clashing within the homosexual category.

The Australian constitution sets out the areas that the federal government can make laws on. If an area is not included in the constitution as a federal power, then it is taken to be a residual power which is then taken care of by different state governments. The constitution grants power to the

federal government concerning laws regarding 'marriage'. Therefore, the state government has the residual power of dealing with 'unmarried couples', which include heterosexuals and homosexuals. This is a case of discrimination which can be seen in the 'Melbourne Courier Mail' on the 14-5-07 'human rights and equal opportunity commission report that found more than 20,000 gay Australian couples face systematic discrimination.' This shows same sex couples are widely discriminated against.

Homosexual couples are disadvantaged and discriminated extensively throughout the world as seen in some examples above. They are particularly discriminated in, in matters concerning financial rights and marriage. They are also still being disadvantaged in numerous pieces of legislation to this day. The Aboriginals Councils and Associations Act 1976 (Cth) still discriminates against same sex couples by the definition of spouse, which excludes same sex partners. This clearly affects section 49 of the constitution. The Civil Aviation Act 1959 (cth) once again, has no definition of spouse and no definition of de facto spouse. As well as federal legislation, state legislation also has numerous acts which disadvantage homosexual couples, including ; '*The Local Government Act 1993 NSW*', '*Rural Lands Protection Act 1998 NSW*' and the '*Testator's Family Maintenance and Guardianship of Infants Act 1916 NSW*.'

Many International Human Rights may be breached by a state or nation because the enforcement of international law is at the nation states discretion. The nation has jurisdiction over its country to make laws freely. Like many other countries, Australia doesn't have a Bill Of Rights that outlines the rights that citizens are entitled to in that country. The Australian constitution contains only minimal references to basic human rights such as; freedom of religion (section 166), the right to vote (section 24), and the right to acquisition of property by the Commonwealth on just terms in section 51.

A nation state may have some Human Rights protected under common law, but this may be reversed anytime by legislation, as legislation powers over common law findings, as numerous common law finding show discrimination towards homosexual couples.

There are numerous cases which showcase same sex relationships not being able to access equality. For example, in the Young v Australia case, where a gay man was denied eligibility to apply for a widows pension after his male war veteran partner of 38 years passed away., Mr. Young stated that his right in article 26 to equality, and article 17, the right to his privacy was in breach. The United Nations committee agreed that both these rights were being overlooked and that the ICCPR extends equality to gay lesbians and homosexual relationships. The committee held that although rights weren't expressed to unmarried couples, once they decided unmarried heterosexual couples were able to gain rights, homosexuals may also gain the same right in accordance.

The following case of Karner v Australia 2003 will also showcase discrimination through current Australian legislation. This case is concerned with a male who had lost his other male partner die. The remaining partner wishes to still live in the premises, but under Australian legislation same sex couples are not entitled to automatically inherit property.

As discussed above, as time moves on, society cannot lag behind with old laws. As society's composition and moral values changes, this should been shown through numerous law reforms.

Same sex relationships have slowly moved with time from not getting any recognition, to becoming recognized as de facto couples, which provides homosexual couples more human rights that they are entitled to which were overlooked previously due to strict moral and social values upheld by society. As seen with the introduction of the '*Property Relationships Act*' and the '*Family Law Act*', same sex couples are getting increasing recognition as society moves ahead. Previous governments hadn't changed the laws because there was no need as very few people were in a homosexual binding as in those days it was seen as wrong to be in a relationship with the same sex. The definition of marriage today still exists as a 'union between a man and a woman', which has on numerous occasions, been placed into the spot light on whether or not it is being

discriminative towards homosexuals. *The Age Melbourne 1-5-2008 'A decade ago I was a criminal in my home state of Tasmania because I was in a same sex relationship. Now my same sex relationship is about to have near equal entitlements at a state and national level'* this article shows how laws are introduced as time moves ahead.

There are many contemporary international human rights being violated the issue of abortion being one. Women's access to safe and legal abortions is restricted in law or in practice in many countries in the world. In most countries women may only have limited access to safe abortion services which represents a human right currently being breached internationally. Many human rights are being violated in protecting either the mother or the baby; some include, 'The right to life', 'The right to health and health care', 'the right to non discrimination and equity', 'The right to liberty', 'The right to information', 'The right to decide the number and spacing of children' and 'The right to enjoy the benefits of scientific process' just to name a few of the rights being breached.

Upon the denial of a pregnant woman's right to make an independent decision regarding abortion violates a wide range of human rights.

Within the human right struggle against abortion it isn't just taking into account one person it is defining when an individual believe a fetus is a living human being. And then needs to take into account up to two people in the one right which deems sometimes to be impossible.

The abortion laws in Australia changes from state to state, New South Wales laws are based upon the Levine ruling of 1971 which declared abortion to be legal if a doctor could see 'any economic, social or medical ground or reason.' That an abortion could be justified to prevent any serious danger to the pregnant women's life or to her physical or mental health. This was then expanded by the Kirby ruling of 1994 which extended the period where health concerns were taken into account during pregnancy to maximize them to any period during a women's life.

In 2006 abortionist Sumna Mood was convicted of two counts of performing an illegal abortion. She failed to recognize the reason for the abortion she was performing at the time.

In the 'Crimes Act 1900 Nsw' section 42, it states maliciously inflict grievous bodily harm on a child during or after its delivery is a crime which can imply up to 14years imprisonment. This law only applies to situation where the baby is being delivered alive which is the case in some late term abortions where the baby is treated as a prematurely born baby.

This can also be seen in *The age Melbourne 15-08-08 'Because abortion in Australia still comes under the criminal code in most states, including Victoria, we do not have good figures on the abortion rate.'*

Also as stated in the *Courier Mail Brisbane on the 30-10-2007 'Queensland's criminal code abortion is still a crime punishable by up to 14 year imprisonment.'*

As seen above numerous laws concerning abortions clearly depend on the different jurisdictions in different counties and states.

The 'Humans rights watch commission' consider the area of abortion an area which falls under certain rights mentioned in the International Declaration of Human Right. They organization puts forward that all women have the right to make individual decisions when it comes to reproduction.

Upon denial of an abortion the following human rights struggles are seen when numerous rights may be overlooked; the right to life applies both to the mother and the baby. When a fetus is alive, is the common question asked when discussing the human rights of a baby? Furthermore, a mother's right to her life, if the full term pregnancy may serve a threat to life.

The right to health care is another right which may be breached when denying women proper health care in the situation of a life threatening pregnancy which may end in death.

Freedom from discrimination is another right that is breached when discusses abortion; the group of women in focus has the right not to be discriminated against when choosing whether or not abortion is the right opinion in the long term.

There are numerous more right which individuals may need to take into account, some which include; the right to security, the right to liberty, the right to privacy, the right to information, the right to be free from cruel, inhuman or degrading treatment, the right to decide the number and spacing of children (reproductive right, the right to freedom of thought and the right to freedom of religion.

In the Courier Mail Brisbane 30-10-2007 it argues 'Life is indeed sacred and should be valued. Which is why women should be allowed the legal right to choose when to bring a new life into this world.'

A nation state may breach these international human rights by not taking them into account when making laws in either federal or state government. This enables nations to have the right to govern themselves and to determine their own destiny and laws. Other nations or organization such as the human rights commission have no right to interfere in the internal affairs of another nation making that nation have there own state sovereignty.

As society's composition changes new law reforms need to be introduced. Previous government held very high, strict moral values which were seen through the laws passed of that time. Religion was a big part of society compared to today's society, which showcased a presumption that abortion was not acceptable under any circumstances due to the strict bible teachings or that era.

Today there is still much controversy over the abortion debate, whether or not it is breaching the mother or babies human rights they are entitled to.

As seen in The Age Melbourne 15-08-08 'Even today 72% of Catholics support a women's right to choose to terminate her pregnancy.' As some people may misread this statement, it is saying every woman has the RIGHT to choose to have an abortion without any one interfering, it isn't saying that they believe in abortions taking place, they are only commenting on the rights of women.

In a landmark case in the Supreme Court, a Queensland judge has been asked to determine the termination of a minor's child. The Queensland state government had taken the matter to the Supreme Court as they were being held the supreme parent of the 12 year old girls. The girl's mental health and child bearing dangers were taken into account before the judge made a ruling. It was stated the minor 'had the maturity of a nine year old' was allowed to have an abortion under government doctors. The girl stated she wanted an abortion and both separated parents also agreed however 'it was considered their consent was beyond their powers and a judge's declaration was needed' this case was analyzed in the daily telegraph on September the 26th 2008

There are numerous avenues for addressing person's rights which are being violated. These avenues may be used to address both same sex relationship right and abortion rights which are in breach.

Victims who believe a their human rights are being violated by a sate may use the following bodies to express there complaints; The human rights committee, The committee on the Elimination of Racial Discrimination, The Committee Against Torture or The Committee on the Elimination of Discrimination Against Women. Individuals may only make complaints to these treaty bodies if they have exhausted all domestic remedies.

Numerous treaty bodies have been established to monitor if a state is complying with the human rights, these bodies include; the Human Rights Committee monitors State Parties compliance with the ICCPR, the Committee on Economic, Social and Cultural Rights monitors State Parties compliance with the ICESCR, the Committee on Migrant Workers monitors State Parties compliance with the International Convention on the Protection of the Rights of Migrant Workers and their Families, the Committee on the Elimination of Discrimination against Women monitors State Parties compliance with CEDAW, the Committee on the Rights of the Child monitors State Parties compliance with the CRC.

The Australian Human rights commission is also another body which complaints can make a complaint to which will be followed up accordingly and addressed.

The 1994 *'Toonan v Australia'* showcases how the United Nations Human Rights Committee operates in bring human rights to the individual. This case shows the committee protecting citizens and making appropriate actions to ensure human rights aren't being overlooked.

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