

# LEGAL STUDIES

## Themes and challenges:

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- Changes to family law as a response to changing values in the community- How has changing values in the community impacted on the recognition of same-sex?
- The role of law reform in achieving just outcomes for family members and society
- The effectiveness of legal and non-legal responses in achieving just outcomes for family members.

## Question:

**Identify and investigate same-sex relationships relating to family law and evaluate the effectiveness of legal and non-legal responses to these issues.**

People in same-sex relationships have only recently been given recognition under the law. In fact, until the 1970's and 1980's, homosexual activity, particularly for males, was a criminal offence. *The Marriage Act 1961 (Cth)* and various legislation give heterosexual couples a number of rights and obligations from which same-sex couples are excluded, and although the *Sex discrimination Act 1984 (Cth)* and state anti-discrimination Acts protect de-facto's against discrimination on the basis of marital status, same-sex couples do not enjoy the same protection because their marital status remains 'single'. This is because, under the Marriage Act, a marriage is 'the union of a man and a woman', which comes from the significant *Hyde V Hyde and Woodmansee (1866)* case. In short, same-sex couples are not protected against discrimination from society as they are discriminated against from the government. For same-sex couples, legal recognition of their marriage can mean more than the right to be married. It also signifies the removal of institutionalised discrimination. In 2001, the Netherlands became the first country to recognise same-sex relationships, followed by Belgium, Spain and then Canada. In Australia, almost all states give recognition to same-sex couples in their laws. However, there are still many improvements which need to occur.

## Legal responses:

However, as the values in society changed, so did Family Law. After the introduction of the Australian Human Rights Commission's report in 2008 *Same-Sex: Same Entitlements*, the Australian government introduced reforms with the aim of removing discrimination and providing same-sex couples the same entitlements as heterosexual de facto couples. The *Same-Sex Relationships Act* was amended in 2008 by extending definitions such as 'de facto partner', 'child', 'parent', 'couple' and 'family' to include same-sex relationships. This occurred due to cases such as the *Young V Australia* case (1999), where Edward Young was not permitted pension on the basis of his sexual orientation until "The Committee found that Mr Young had been discriminated against under Article 26 of the ICCPR", and the definition of "couples" was therefore amended by the government. This illustrates the effectiveness of law reform in achieving just outcomes for same-sex couples and their potential families. Another example of just outcomes for same-sex couples is the *Health Insurance Act 1973 (Cth)*, which now allows a same-sex couple and their children to register as a family for Medicare and receive the same entitlements as a heterosexual couple and their children. Additional areas amended have been tax, social security, family law, superannuation, workers' compensation and child support.

Previously, if a same-sex couple had a child, a partner of the same sex had no legal standing and could not make decisions about the day-to-day care of the child unless the Family Court had so ordered. However, the *Miscellaneous Acts Amendment (Same-Sex Relationships) Act 2008 (NSW)* granted equal parenting rights for the female partners of mothers, and are both listed as mothers on the child's birth certificate. This change gives children born into same-sex relationships equal rights

to inheritance from both 'parents' and protects the rights of both matters involving the children if the relationship were to end. In addition to this, the NSW parliament passed the Adoption Amendment (same sex couples) Act 2010, meaning that same-sex couples are now permitted to adopt children in NSW.

Lastly, under the *Family Law Amendment (De Facto Financial Matters and Other Measures) Act 2008* (cth), property and maintenance matters for separating homosexual couples are determined by the Family Court or the Federal Magistrates' court. **This is highlighted through the Howard V Andrews Case (1999)**, where Mathew Howard was not recognised as 'next of kin' after his partner who he lived with passed away. Mathew had to apply to the court as a 'dependent' under NSW Family Provisions and was then granted the apartment and a sum from the estate. However Matthew had to spend three years fighting the case, and was still granted significantly less than a heterosexual partner would have automatically inherited. Since the 1999 reforms, a partner such as Matthew automatically inherits his partner's estate. **All of these factors are examples of the law changing in order to reflect society's values, and achieve just outcomes for same-sex couples.** They are also examples of the effectiveness of the legal responses in achieving just outcomes for same-sex couples.

### **Non-legal responses:**

In contrast to the legal responses, non-legal responses can be seen as less effective in their attempt to achieve just outcomes for same-sex couples. However, they have pressured the government to make reforms. Non Legal responses to the reform range from complete support of same-sex couples, to individuals who are highly critical of any added protection of the rights of same-sex couples. Some groups that actively lobby and campaign for the legal rights and social equality of gay and lesbian couples include Australian Marriage Equality and the Gay and Lesbian Rights Lobby. Australian Marriage Equality argues that the legally recognised institution of marriage should not exclude same-sex couples. Justice requires changing the law to make marriage available to all Australians who choose it as opposed to only allowing heterosexual couples to marry. The Gay and Lesbian Rights Lobby involves advocacy, lobbying government and the media to address discrimination, hosting consultations, educating the gay and lesbian community on their rights and providing referrals to legal and welfare services. **This is an effective non-legal response, as educating the gay and lesbian community will allow for further support and amendments to the law, in order to achieve just outcomes for themselves and society.**

In contrast to the support of same-sex relationships, some sections of the media have been critical of these changes and have resorted to ridicule. For example, in 2003 two radio program hosts made comments 'capable of inciting severe ridicule of homosexual men' and therefore were held to have breached the vilification provisions of *the Anti-Discrimination Act 1977 (NSW)*. Additionally, most of the lobby groups that oppose equal rights for homosexual couples have a religious affiliation, such as the Australian Christian Lobby. Under the current discrimination laws, religious groups continue to be able to discriminate on the basis of sex, sexuality, race, disability and age. This allows these organisations to withhold services to individuals. **Therefore, this is a clear example of the ineffectiveness of the legal responses, as the law excludes some from the non-discrimination of same-sex couples. If religious group continue to discriminate against the gay, those who they are educating on religion may also adopt this same view, consequently restricting same-sex couples from achieving equality among society.**

### **Responsiveness of the legal system:**

In order to **change the law to reflect societal values** and **achieve just outcomes for same-sex couples**, courts have to be willing to act, a significant number of politicians must support legislation reform, and there also needs to be a societal change.

The Anti-Discrimination Board of NSW handles complaints of discrimination, and also informs the public of how individuals can prevent and deal with discrimination, through consultations, education programs, seminars, talks, community functions and publications. The Board also functions to advise the government and make recommendations, making a number of submissions to both the state and federal governments concerning changes to current legislation that are necessary to provide same-sex couples the same legal rights and protections as married couples.

However, arguments against the recognition of same-sex relationships continue to exert an influence in the public sphere. For example, although the Rudd government made legislative to the de facto entitlements, there was still a continuing refusal to amend the Marriage act to permit same-sex marriage. In addition, in 2009 Prime Minister Rudd stated 'I fully accept the integrity of same-sex relationships... but in terms of the policy, it's a matter to which we have been committed for some time'. This suggests that although the government encourages discrimination-free relationships of same-sex couples, they still believe in the foundations of a marriage as a union of a man and a woman.

### **Conclusion:**

Therefore, it is evident that the law is effective in achieving some just outcomes for same-sex couples, such as being able to adopt children. However, it is also evident that the law is ineffective in preventing complete discrimination against same-sex couples, as it is still a large issue today. Both the state and federal governments take note of and continue to respond to issues surrounding discrimination. In Australia today, marriages between two people of the same gender remain illegal in Australia. However, they are now allowed to marry in other countries, which will be recognised as a de facto relationship in Australia. The online article 'Marriage made easier for same-sex couples' states that several nations that allow gay marriage, however a person must produce a Certificate of No Impediment, which proves they are at least 18, unmarried and that there is no other barrier to them taking part in a marriage ceremony. On February 1 2012, The Attorney-General, Nicola Roxon announced that same-sex couples will be able to apply for these certificates. Additionally, Nicola states "This important change will allow same-sex couples to take part in overseas marriage ceremonies, and be considered married according to the laws of that country,".

Furthermore, it is probable that the law will continue to change to reflect society's changing values. In addition, it is the law's responsibility to ensure that their law reforms are effective in achieving just outcomes for society and same-sex couples.