Introduction

The New Zealand Human Rights Commission formally endorses marriage equality and a non-discriminatory approach to adoption that gives primacy to the best interests of the child.

This short paper starts by summarising the case law and legislative debates around same-sex marriage in New Zealand. It summarises two recent members’ Bills that would enable two people to marry regardless of each person’s sexual orientation, sex or gender identity.

The paper then considers marriage equality within the context of the right to found a family, as set out in principle 24 of the Yogyakarta Principles. The Yogyakarta Principles were developed by a distinguished group of human rights experts in November 2006. They address a broad range of international human rights standards and their application to issues of sexual orientation and gender identity.

Case law – same-sex marriage

In the 1998 Court of Appeal case Quilter v Attorney-General three couples in long-term lesbian relationships appealed a decision by the High Court affirming that the Marriage Act 1955 did not allow for marriages between persons of the same sex. The case arose when the Registrar refused to accept their notices of intended marriage under section 23 of the Marriage Act, and then refused to issue them licences under section 24 on the basis that the Act did not provide for marriage between persons of the same sex.

In Quilter the Court of Appeal held that it is matter for Parliament to decide whether marriage should be available to any couple other than a man or a woman.

Subsequently, the approach to interpreting discrimination has changed as a result of the recent Ministry of Health v Peter Atkinson decision by the full bench of the Court of Appeal. However this does not alter any of the substantive issues raised in Quilter. Atkinson has affirmed points made by Tipping J in Quilter v Attorney-General and reiterated at the Supreme Court in Air New Zealand v McAlister. Namely, while not all difference is discriminatory, the question of whether there is discrimination is distinct from whether it is justified.

Legislative change - Civil Union Bill 2004

In August 2004 the Human Rights Commission made a joint submission on the Civil Union Bill and the Relationships (Statutory References) Bill. This welcomed the Civil Union Bill “in both its form and intention, as a mechanism for same sex couples to formally solemnise their relationship, as well as providing different sex couples with an alternative to marriage”. The submission also clearly stated the Commission’s support for same-sex marriage. It noted “the Commission is disappointed, however, that the Government has not chosen to remedy the exclusion of same-sex couples by a simple amendment to the Marriage Act to make it available to both homosexual a well as heterosexual couples”. Citing the preamble to the Universal Declaration of Human Rights, the Commission concluded that “the Bills fall short of complete recognition of the inherent dignity and equal and inalienable rights of all members of the human family”.

1 Accessible online at: http://www.yogyakartaprinicples.or
2 [1998] 1 NZLR 523
3 Paragraph 3.13. This submission is accessible online at: S:\03-Policy\Projects and Programmes\SOGI July 2011 onwards\Civil Union Bill Submission 2004.doc
4 Paragraph 3.12
Marriage Equality – members’ Bills

Since 2001 ten countries have amended their laws to allow same-sex marriage. These are Canada, the Netherlands, Belgium, Norway, Sweden, Spain, Portugal, Iceland, South Africa and Argentina. In addition same-sex marriage has been legislated in some parts of the United States and in Mexico City.

In May and June 2012 respectively, Labour MP Louisa Wall and Green Party MP Kevin Hague have submitted marriage equality bills that have been accepted into the members’ ballot. Louisa Wall’s Marriage (Definition of Marriage) Amendment Bill would amend the Marriage Act to clarify that a marriage is between two people regardless of their sex, sexual orientation or gender identity.

5 It was drawn from the ballot in late July and is likely to have its first reading in August 2012. Kevin Hague’s Marriage (Equality) Amendment Bill provides explicitly for same-sex couples in New Zealand to marry. It includes a proposed amendment to the Births, Deaths, Marriages and Relationships Registration Act 1995 to allow someone who identifies as transgender or transsexual to marry.

6 The Marriage (Gender Clarification) Amendment Bill 2005

The Marriage (Gender Clarification) Amendment Bill was introduced in 2005 as a members’ Bill. It sought to add a provision to the Marriage Act 1955, stating that marriage means a union between a man and a woman and not between two persons of the same sex. The bill also sought to amend the New Zealand Bill of Rights Act 1990 to specify that measures taken in good faith for the purposes of assisting or advancing marriage do not constitute discrimination. The bill was defeated at its first reading by 73 votes to 47.

Human Rights in NZ 2010

The sexual and gender minorities’ chapter in the Commission’s December 2010 report noted:

Anything less than full legal recognition of same-sex relationships is of particular concern for vulnerable couples, including older people in residential care and/or when power of attorney is being exercised on their behalf.

In addition, the chapter highlighted the impact that the restriction of marriage to being between ‘a man and a woman’ has on trans or intersex people because their eligibility to marry, or to stay married, alters if their sex changes. This is further complicated as judicial decisions about the threshold for changing sex details on a birth certificate are diverging from older 1995 case law on the threshold for being recognised as male or female under the Marriage Act. Nor is it clear if someone whose sex is recorded as indeterminate on a birth certificate is able to marry either a man or a woman.

Human Rights in NZ 2010 concluded that the relevant priority area for action was legal equality:

• Completing the legislative steps required for formal legal equality, including rights to found and form a family, regardless of sexual orientation or gender identity.

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Case law - Adoption

The Adoption Act 1955 provides that ‘two spouses’ or any individual, regardless of their sexual orientation, are eligible to adopt in New Zealand. The term ‘spouse’ has been interpreted as enabling only married couples to adopt jointly.

In June 2010, the High Court had to consider whether the expression ‘spouses’ in section 3 of the Adoption Act 1955 can include a man and a woman who are unmarried but in a stable and committed relationship. It decided that such an interpretation was permissible and that reading ‘spouses’ to mean that only married couples may adopt jointly seemed to discriminate against other types of relationships which were commonplace in New Zealand. However, the court limited its consideration of the issue to heterosexual opposite-sex couples, the status of the applicants in this case.7 The current legal position, therefore, is that same-sex couples are unable to jointly adopt a child. In Human Rights in New Zealand 2010 the Commission concluded:

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7 Re AMM [2010] NZFLR 629
Given that a lesbian woman or gay man can apply to adopt a child as a sole applicant, and that same-sex couples can share the parenting of a child as legal guardians, it is anomalous and discriminatory under the Human Rights Act and the Bill of Rights Act that a same-sex couple cannot adopt a child jointly.

Other countries have changed their law to permit same-sex couples to adopt a child jointly. In England and Wales, the Adoption and Children Act 2002 broadened the eligibility criteria to allow unmarried couples, including same-sex couples, to adopt a child. Scotland subsequently followed the same path. The Commission concluded:

It is time for New Zealand to follow suit by amending the Adoption Act to permit same-sex couples to jointly adopt a child, as part of reforms to this act making the best interests of the child the paramount consideration.

Adoption equality – members’ Bills

Two member’s bills are currently being proposed that would give effect to the Commission’s recommendation.

In August 2011 Labour MP Jacinda Ardern tabled a Care of Children Law Reform Bill that requires the Law Commission to review and update adoption law and put the interests of children at the heart of any decision-making about their future.\(^8\)

Ardern’s 29 July 2011 media release noted “the Human Rights Commission has confirmed that a review of adoption law is long overdue”.\(^9\) It also mentioned the campaign by Adoption Action Inc to overhaul current adoption legislation including its complaint to the Human Rights Commission that current laws breach the NZ Bill of Rights Act and the Human Rights Act.

Since the last parliamentary term, Green Party MP Kevin Hague has been publically attempting to draft legislation to amend the Care of Children Bill 2004 based on a previous Law Commission report that looked at guardianship and adoption. This would include extending eligibility to adopt to couples other than those who are married. This work is now being progressed jointly with National Party MP Nikki Kaye and would include whānau adoption, surrogacy and age of adoption as well as same-sex adoption.\(^10\) A private member’s bill to this effect is expected this year.

New Zealand Human Rights Commission’s position

In order to ensure formal legal equality, including the right to found and form a family regardless of sexual orientation or gender identity, the Commission formally:

• endorses marriage equality – namely the right to marry, form a civil union or a de facto partnership regardless of one’s sexual orientation, sex or gender identity.

• endorses adoption equality - ensuring primacy is given to the best interests of the child irrespective of each person’s sex, gender identity, sexual orientation, or disability or the couple’s marital status.

For more information, contact the Human Rights Commission

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or visit our website


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\(^8\) Accessible online at: http://www.parliament.nz/NR/rdonlyres/A3A03E0E-D8C2-429B-879A-3EDCE7448E4C/211289/CareofChildrenLawReformBill_1.pdf

\(^9\) Accessible online at: http://jacinda.co.nz/index.php/2011/07/time-for-adoption-laws-need-shake-up/

\(^10\) A NZ Herald news report about this proposed amendment to the Care of Children Act 2004 can be accessed online at; http://www.nzherald.co.nz/nz-national-party/news/article.cfm?o_id=266&objectid=10808932