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## National Report: New Zealand

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# NATIONAL REPORT: NEW ZEALAND

KENNETH MCK. NORRIE\*

## 1. Legal Framework

New Zealand is a parliamentary democracy, modelled on that of the United Kingdom, and subscribing to the principle of Parliamentary Sovereignty. This means that in New Zealand there is no higher law than an Act of Parliament. There is no written constitution in a codified or entrenched form: New Zealand's constitution is, instead, made up of a number of Acts of Parliament with legal and political significance. In particular, the Statute of Westminster Adoption Act 1947 was the formal acceptance by the Parliament of New Zealand of the offer of full independence from the United Kingdom, contained in the UK's Statute of Westminster 1931; the Constitution Act 1986 sets out the roles of the various branches of government; the New Zealand Bill of Rights Act 1990 enumerates the rights of citizens against the state and state organs; and the Human Rights Act 1993 consolidates various existing anti-discrimination provisions and brings in sexual orientation as a prohibited ground of discrimination. None of these provisions is entrenched, or law of a higher order, and so each can be amended or repealed by simple majority in the unicameral New Zealand Parliament. The New Zealand Bill of Rights Act 1990 has far less significance in New Zealand than the UK's Human Rights Act 1998 has in the United Kingdom. Though the New Zealand courts are statutorily obliged to interpret legislation in way that is consistent with the norms set out in that Act and in the Human Rights Act 1993 (1990 Act, s 6), they are also expressly prohibited from holding any provision in any enactment to be impliedly repealed or revoked, to be in any way invalid or ineffective, or from declining to apply any provision (1990 Act, s 4). New Zealand courts do not stretch the meaning of legislative provisions to achieve consistency with the Bill of Rights Act, in the way that UK courts do in order to achieve consistency with the European Convention on Human Rights.

## 2. Constitutional Regulations Applicable to Same-Sex Partnerships

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The New Zealand Bill of Rights Act 1990 has no constitutional status, and is in essence little more than guidance to the judges. Nevertheless, non-discrimination on the basis of sexual orientation, guaranteed by the Human Rights Act 1993, has become fairly pervasive throughout New Zealand law, but at present neither the 1990 Act nor the 1993 Act are interpreted to give any support to same-sex marriage. The introduction of civil union in 2004 is regarded as having satisfied the requirement for non-discrimination in domestic relationships. There is no legislation seeking to immunise New Zealand from the threat of foreign same-sex marriage, such as is found (for example) in Australia: indeed a bill seeking to do so—the Marriage (Gender Clarification) Amendment Bill 2005—was rejected by the New Zealand Parliament.

### 3. Legal Statutes on Same-Sex Marriage

Marriage in New Zealand is limited to opposite-sex couples: Marriage Act 1955, as interpreted by the Court of Appeal in *Quilter v. Attorney General* [1998] 1 NZLR 523 (discussed at (12) below).

### 4. Differences Between Same-Sex Marriage and Opposite-Sex Marriage

Not applicable.

### 5. Civil Union Regulation (Especially Entry into and Exit from Union)

Civil union has been created by Act of Parliament, the highest form of law in New Zealand. The Civil Union Act 2004 came into force in April 2005 and creates a statutory institution for the legal recognition and regulation of same-sex relationships, which is distinct from but equivalent to the existing institution of marriage, a common law institution that has for many centuries recognised and regulated opposite-sex relationships.

The conditions for entering a civil union are modelled on, but not precisely identical to, the conditions for entering a marriage. Termination of a civil union before death is by judicial dissolution, following the same process as divorce (for the termination of marriage) and granted on the same ground.

The conditions for entering a civil union, laid down in the Civil Union Act 2004, ss 7 and 19, are that the parties:

- ❖ are both over the age of sixteen
- ❖ are neither married nor in a civil union already
- ❖ are not within the forbidden degrees of relationship with each other
- ❖ if over the age of sixteen but under the age of eighteen have obtained the consent of each of their guardians.

The ground for dissolution of both marriage and civil union is that the relationship has broken down irretrievably, which is shown in only one way: by living apart for at least two years (Family Proceedings Act 1980, s 39).

### 5A. Differences Between Civil Union and Marriage

Most of the differences between civil union and marriage relate to the rules for entering the institution.

- ❖ Marriages contracted when one of the parties is under sixteen are not invalid (Marriage Act 1955, s 17(2)), but civil unions contracted when one of the parties is under sixteen are absolutely void ab initio (Civil Union Act 2004, s 23(2)(a)).
- ❖ If either of the parties to a marriage is between 16 and 18, the consent of one or more of that party's parents is required, though that consent may be dispensed with by the court (Marriage Act 1955, s 18). If either of the parties to a civil union is between sixteen and eighteen, the consent of *all* of that party's guardians is required, and the court has no power to dispense with that consent (Civil Union Act 1955, s 19).
- ❖ Marriage without the required parental consent remains valid (Marriage Act 1955, s 18(7)); civil union without the required guardianship consents is absolutely void ab initio (Civil Union Act 2004, s 23(2)(b)).
- ❖ Parental consent to marriage is not required if the parent is overseas (Marriage Act 1955, s 18(5)); there is no equivalent rule with civil union.
- ❖ Proxy marriages are sometimes permitted in New Zealand (Marriage Act 1955, s 34), and service marriages may be contracted overseas according to New Zealand forms between members of the New Zealand armed services (Marriage Act 1955, s 44). Proxy civil unions are not permitted and there is no provision for service civil unions.

Though most of the consequences of being married are extended to the parties in a civil union, some are not.

- ❖ The presumption of paternity arising from the birth of a child to a married woman (Status of Children Act 1969, s 5) does not apply in the case of civil union (though same-sex joint parenthood is achieved if the child is born by means of artificial human reproduction procedures (1969 Act, s 18, as amended by Status of Children Act 2004, s 14)).
- ❖ Joint adoption is permitted only by "spouses" (Adoption Act 1955, s 3(2)) and this was not extended to include civil union

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partners. There are, however, conflicting lower court decisions as to whether “spouses” can include de facto couples (cf *Re D (Adoption)* [2000] NZFLR 529 and *Re C (Adoption)* [2008] NZFLR 141).

- ❖ Under-age sexual activity is rendered lawful if the parties are married (Crimes Act 1961, s 134(4)), but not if the parties are civil union partners.

## 6. Opposite-sex Civil Unions

Civil union in New Zealand is available to both same-sex and opposite-sex couples (Civil Union Act 2004, s 4). Indeed, opposite-sex couples who are already married to each other are eligible to enter into a civil union without first dissolving their marriage (2004 Act, ss 17 and 18): they may convert from one to the other, and indeed back again. In any situation in which the duration of the civil union is in issue, the duration of the earlier marriage is treated as part of the duration of the civil union (2004 Act, s 18(4)). So in New Zealand, opposite-sex couples wishing to register their relationship have the choice of either marriage or civil union, while same-sex couples have no choice and, if they wish to register their relationship, may do so only as a civil union.

## 7. Differential treatment for opposite-sex civil unions

The partners in an opposite-sex civil union are treated for all purposes of the law, except one, in the same way as the partners in a same-sex civil union. The exception is that opposite-sex couples, but not same-sex couples, may convert their relationship into a marriage without first bringing the existing civil union to an end (2004 Act, ss 17 and 18). In any situation in which the duration of the subsequent marriage is in issue, the duration of the earlier civil union is treated as part of the duration of the marriage (2004 Act, s 18(3)).

## 8. Specific Purpose Recognition

One of the unique features of New Zealand law is the extent to which the legal position of informal (unregistered) relationships has been equated to that of formal (registered) relationships. “De facto couples” are in many important respects treated in the same way as married couples and civil union couples. This is true for property rules on the termination of the relationship, whether during life or on death (Property (Relationships) Act 1976, as amended by the Property (Relationships) Amendment Act 2001), domestic violence protection (see Domestic Violence Act 1995), tax and social security.

### **9. Future Developments with Marriage**

The New Zealand Parliament voted in favour of civil union in 2004, but did so, to a large extent, along party lines. Since then the Government has changed and the more socially conservative National Party is presently in power. It is highly unlikely to amend the marriage legislation to include same-sex couples. There is little call for this amongst LGBT campaigning groups in New Zealand.

### **10. Future Regulation of Civil Union**

Some of the differences between married couples and civil union couples listed at Part 5A above may well be addressed in the future, though the present Government (elected in November 2008) is unlikely to make this a priority. However, the Adoption Act 1955 is widely considered to be desperately in need of review and updating and, given (i) that same-sex joint parentage is already accepted in the legislation dealing with artificial reproduction and (ii) that the New Zealand courts have granted adoption orders in favour of single gay people (see *Adoption Application by T* [2008] NZFLR 185) it is likely that, when the Adoption Act is finally amended, civil union partners will be included.

### **11. Non-Legislative Regulations**

Not applicable.

### **12. Judicial Construction of the Law**

The most important (but hardly edifying) judicial discussion of same-sex couples is contained in the decision of the New Zealand Court of Appeal in *Quilter v. Attorney General* [1998] 1 NZLR 523, where an attempt was made to persuade the court to extend the traditional understanding of marriage in the Marriage Act 1955 to include same-sex couples, on the ground that the interpretative obligation in section 6 of the New Zealand Bill of Rights Act 1990 required an interpretation of the 1955 Act that did not differentiate between same-sex and opposite-sex couples. The attempt failed. The majority of the court held that there was no discrimination since there was no differential treatment (gay and lesbian people can marry just as much as non-gay and non-lesbian people can—neither gay nor straight people can marry partners of the same sex). Thomas J, in dissent, held that there was indeed discrimination because gay people could not, unlike straight people, marry whom they wished; further, the argument defining marriage as necessarily opposite-sex was circular since it assumes what it sets out to prove. But nevertheless he agreed with his brethren that even if there was discrimination in the way the 1955 Act operated, it was for Parliament and not the courts to remove that discrimination.

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*Quilter* was distinguished in *P v. M* [1998] 3 NZFLR 246, where the domestic violence legislation, which protects “family members,” was interpreted to include same-sex families. It was pointed out that the Domestic Violence Act 1995 had a deliberately broader scope than the Marriage Act 1955. In *A v. R* [1999] NZFLR 249 it was held that the same-sex partner of a mother could be held to be the child’s step-parent for the purpose of the obligation of child support because the relationship between the women was “in the nature of marriage,” which was the formulation used in the Child Support Act 1991. And in *King v. Church* [2002] NZFLR 555 a same-sex couple were held to be subject to the same common law rules for the distribution of property on separation as opposite-sex couples. The same result was reached in cases based on constructive trusts: *Hamilton v. Jurgens* [1996] NZFLR 350 and *Julian v. McWatt* [1998] NZFLR 257.

Since these cases, the Property (Relationships) Amendment Act 2001 and the Civil Union Act 2004 have been passed, which together have removed the sting from the issue to a large extent. Unregistered relationships, of whatever gender-mix, are now treated in most important respects in the same way as marriage, and same-sex couples are now able to register their relationships as civil union. This (together with the well-established timidity of the New Zealand courts in applying the New Zealand Bill of Rights Act 1990) probably explains why there have been no subsequent decisions on the issue in New Zealand. Arguments based on the social/symbolic significance of “marriage” have little purchase in a country like New Zealand where de facto relationships are regarded as no less worthy of respect and legal protection.

### 13. Other Relevant Issues

#### *Recognition of Overseas Relationships*

New Zealand’s Civil Union Act 2004 is peculiarly restrictive in its rules for the recognition of relationships from outwith New Zealand. The Governor-General is given power to make regulations specifying the countries whose civil union regimes will be recognised (2004 Act, s 35(1)), but he is prohibited from specifying any country whose laws do not consist with certain core New Zealand rules, relating to age requirements, forbidden degrees, consent, the need for procedural divorce, and monogamy (2004 Act, s 35(2)). Even if a country satisfies all of these requirements, the Governor-General is not obliged to specify that country and he has specified only five. The Civil Unions (Recognised Overseas Relationships) Regulations 2005 (SR 2005/125) lists the following jurisdictions: Finland, Germany, the United Kingdom, New Jersey and

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Vermont. Section 5 of the Civil Union Act 2004 provides that in any enactment a reference to “civil union” is to civil unions from New Zealand or any of these specified jurisdictions. It follows that civil unions from any other jurisdiction is not a “civil union” for the purposes of any New Zealand domestic legislation.

The 2004 Act is studiously silent on the recognition of overseas marriages involving same-sex couples: it defines only the circumstances in which overseas civil unions will be recognised. The choice is therefore left open to the New Zealand courts: to recognise such marriages on the same basis as overseas marriages involving opposite-sex couples are recognised (basically, recognised in New Zealand so long as they are procedurally valid in the country they were entered into, and the parties had capacity according to their ante-nuptial domiciles), or to refuse to recognise such marriages as “marriages” at all. *Quilter* (discussed at (12) above) defines marriage to exclude same-sex couples, but that is a definition for domestic law and does not answer the international recognition point. But that, together with the fact that couples from abroad will be treated, as a minimum, as de facto couples in New Zealand, might persuade the cautious New Zealand courts to depart from the normal marriage rule when the overseas marriage involves a same-sex couple, and refuse recognition.