

Explainer: what legal benefits do married couples have that de facto couples do not?

Written by Hannah Robert, Lecturer in Law, La Trobe University



De facto couples still often have to go to great lengths to prove their relationship, unlike married couples, who need only furnish a marriage certificate.shutterstock

Opponents of marriage equality often say that married and de facto couples already have the same rights. To what extent is this true? And, in legal terms, how much do the differences matter?

In an opinion piece last week, former prime minister [Tony Abbott](#) claimed:

Already, indeed, same-sex couples in a settled domestic relationship have exactly the same rights as people who are married.

This isn't true.

At the most fundamental level, same-sex couples do not have the right to marry and therefore do not have "marriage equality". While de facto couples may be able to assert some of the same rights as married couples, they often have to expend significant time, money and unnecessary heartache to do so.

Marriage allows people to access a complete package of rights simply by showing their marriage certificate or ticking a box, and is based on their mutual promises to one another rather than proving their relationship meets particular interdependency criteria.

Unlike de facto relationships, marriage is recognised nationally and internationally.

Differences under law

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The laws regarding de facto couples differ between states and the Commonwealth, and from one right to another.

For [Centrelink](#) purposes, you are a de facto couple from the moment you start living together; for [migration law](#) it is after 12 months of cohabiting (unless you have a child together or de facto relationships are illegal in your country of origin).

Under [family law](#) it is different again: a minimum of two years (unless you have a child together, have registered your relationship, or have made significant contributions to the relationship).

Where married couples use IVF, [both spouses](#) are automatically legal parents. But for [de facto](#) couples using reproductive technologies, their child's parentage depends on whether a de facto relationship is [proven to exist](#).

Couples who are or were married must file for property and/or spousal maintenance proceedings in the Family Court within one year of finalising a divorce, but have the option to agree to an extension of time in which to file. No such provision exists for de facto couples; they must file proceedings within two years.

In many states, a new marriage nullifies an existing will, unless that will was quite specifically worded. This is not the case when you enter a new de facto relationship. In the latter situation, if you die before making a new will, a court might need to decide how your assets are allocated (with costs borne by your estate).

In all contexts, de facto relationships require significant proof, which means partners may have to [provide evidence](#) about their living and child care arrangements, sexual relationship, finances, ownership of property, commitment to a shared life and how they present as a couple in public. These criteria can be absent from a heterosexual marriage, but it is still deemed a marriage.

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Despite the wording in the [marriage ceremony](#) that marriage “is the union of a man and a woman to the exclusion of all others, voluntarily entered into for life”, it is up to married partners whether or not they share their finances, their housework, their childcare responsibilities, their homes or their beds, and how long they want to stay married.

‘Registered relationships’ – separate but equal?

Many states and territories have legislation permitting couples to register their domestic relationships – the exceptions are the Northern Territory and Western Australia.

To register, you first [need to prove](#) that you meet the criteria – for example, providing “personal or financial commitment and support of a domestic nature for the material benefit of the other”. Where marriage delivers rights based on a couple’s promises to one another, registered relationships still require proof that a relationship meeting the criteria already exists.

Such registered relationships are not reliably recognised overseas.

When does it matter?

While married and de facto relationships largely have equal standing before the law, only marriage is immediate and incontrovertible.

Difficulties for de facto couples arise from the complex inter-relationship between the “burden of proof”, institutionalised homophobia, and the sticky situations that can often arise in interpersonal or family conflict.

For example, a person in a de facto relationship might need to prove their relationship:

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if their partner is very ill, in order to make decisions about their care and treatment (this can be prevented by having another piece of paper – a medical enduring [power of attorney](#) equivalent document depending on your state or territory);

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if their partner who has died, in order to be listed as their spouse on a death certificate or to be involved in funeral planning (being listed on a death certificate is critically important when it comes to claiming [superannuation](#) payouts and myriad other issues); or

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if their partner has died without leaving a will.

Sadly, the times when marital status matters most are likely to be times of grief, or high stress. To compound this, there are many examples of a couple's "de facto" status being challenged by one partner's family of origin. Marriage, on the other hand, is undeniable.

Unmarried de facto couples often experience difficulties attaining residency and/or working rights overseas. Married couples rarely experience these problems.

Same obligations, without the same right to wed

Same-sex couples have all the same obligations as married couples – to pay taxes, child support and so on. But they don't have the ability to marry – to enjoy the symbolic and emotional effects of entering into a legal union with their partners before friends and family, or enjoy the legal security of having one document to confirm the legal status of their relationship.

Many heterosexual couples in Australia choose to live in de facto relationships. This is their right. Same-sex couples do not get to choose – they have no alternative.

Marriage equality is about giving couples genuine choice about how they structure their relationships.

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The authors do not work for, consult, own shares in or receive funding from any company or

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organisation that would benefit from this article, and have disclosed no relevant affiliations beyond the academic appointment above.

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