THE CASE AGAINST SAME-SEX MARRIAGE

Submission to

THE SENATE OF THE AUSTRALIAN PARLIAMENT INQUIRY

in relation to

THE MARRIAGE EQUALITY AMENDMENT BILL 2010

by

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The Senate's Inquiry is described as relating to "the private senator's bill, introduced by Senator Hanson-Young, [which] seeks to remove all discriminatory references from the Marriage Act 1961 to allow all people, regardless of sex, sexuality and gender identity, the opportunity to marry."

In short, should same-sex marriage be legalized in Australia? I propose that responding to that question requires us to respond, first, to another question: What about the children?[1] Whose rights or claims, those of children or of homosexual adults, should prevail when there is a conflict between them, as there is with same-sex marriage? In this submission, I want to outline the case for giving priority to children and their needs and rights. Stated another way, I believe that decision making about same-sex marriage should be, first, child-centred and only, second, adult-centred.

Same-sex marriage creates a clash between upholding the human rights of children with respect to their coming-into being and the family structure in which they will be reared[2,3], and the claims of homosexual adults who wish to marry a same-sex partner. It forces us, as societies, to choose whether to give priority to children's rights or to

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[1] For a more extensive version of the arguments outlined in this submission see Margaret Somerville, "What about the Children?", in Daniel Cere and Douglas Farrow (eds), *Divorcing Marriage*, McGill-Queen's University Press, Montreal, 2004, 63-78 (Appendix A.)

[2] Margaret Somerville, "Children's Human Rights to Natural Biological Origins and Family Structure", HeinOnline IJJF library 2011, http://heinonline.org/HOL/Page?handle=hein.journals/ijjf1&id=1&collection=journals; (2011) 1 *International Journal of the Jurisprudence of the Family*, 35-54. (Appendix B).

[3] See also, Margaret Somerville, "Scholars turn their minds to marriage" Review Essay on *The Jurisprudence of Marriage and Other Intimate Relationships,* Scott Fitz Gibbon, Lynn D. Wardle, and A. Scott Loveless (Eds.). Buffalo, NY: William S. Hein & Co., 2010. 330 pages. ISBN 9780837738123, $70.00 (cloth), HeinOnline IJJF library 2011; (2011) 1 *International Journal of the Jurisprudence of the Family*, 289-296 (Appendix C)

homosexual adults' claims. This problem does not arise with opposite-sex marriage, because children's rights and adults claims with respect to marriage are consistent with each other.

Reasons matter

Many people who oppose extending the definition of marriage to include same-sex couples do so on religious grounds or because of moral objections to homosexuality. In contrast, my arguments are secularly based and, to the extent that they involve morals and values, they are grounded in ethics, not religion.

Moreover, I oppose discrimination on basis of sexual orientation and believe that civil partnerships, open to both opposite-sex and same-sex couples, are the most ethical compromise in terms of balancing respect for children's rights and fulfilling adults' claims to mutually protect each other, for instance, with respect to inheritance, property rights and so on. Legally recognizing civil partnerships, as has been done, for example, in France and the United Kingdom, also neutralizes any claim – although, as I explain below, I do not agree it is a valid one - that legalizing same-sex marriage is necessary to avoid discrimination. That said, I continue to believe that, in order to maintain respect for children's human rights, the definition of marriage as being between a man and a woman should not be changed to include same-sex couples.

In other words, I am against discrimination on the basis of sexual orientation and against legalizing same-sex marriage. This is a position that same-sex marriage advocates refuse to acknowledge is possible. One of their strategies for promoting same-sex marriage is to allow only two possibilities: one is either for same-sex marriage and against discrimination on the basis of sexual orientation, or against same-sex marriage and, thereby, necessarily for such discrimination.

My reasons for opposition go to the nature of marriage as the societal construct that institutionalizes, symbolizes and protects the inherently reproductive human relationship which exists between a man and a woman, and, in doing so, establishes children's human rights with respect to their biological origins and the family structure in which they are reared.

Ethical reasons to give priority to children's rights over homosexual adults' claims include that children are the more vulnerable persons and ethics demands that decision making is based on a presumption in favour of the most vulnerable; they cannot give their informed consent to participation in the unprecedented social experiment that same-sex marriage would constitute; and we cannot establish children's "anticipated consent", that is, we cannot reasonably assume they would consent to the mode of their coming-into being or family structure, when their conception is other than between a man and a woman.

Marriage as culture only or biology plus culture

A central issue in the same-sex marriage debate is whether the institution of marriage is a purely cultural construct, as same-sex marriage advocates argue, and therefore open to redefinition as we see fit, or whether it is a cultural institution built around a central biological core, the inherently procreative relationship of one man and one woman. If it is the latter, as I believe, it cannot accommodate same-sex relationships and maintain its current functions.

A common riposte of same-sex marriage advocates to making procreation an essential feature of marriage is that we recognize opposite-sex marriages that do not or cannot result in children, so why not same-sex ones? The answer is that the former do

not negate the norms, values and symbolism established for society by opposite-sex marriage with respect to children's human rights in regard to their natural parents and families, as same-sex marriage necessarily does.

Advocates of same-sex marriage also argue that we should accept that the primary purpose of marriage is to give social and public recognition to an intimate committed relationship between two people and, therefore, to exclude same-sex couples is discrimination. They are correct if that is the primary purpose of marriage. But they are not correct if its primary purpose is to protect an intimate relationship because of its procreative potential. (Note that there is no inherent reason to limit same-sex marriage to two people, as there is in opposite-sex marriage. Moreover, as in a current Canadian case, it can be argued that if it's discrimination not to recognize same-sex marriage as legal, likewise, it's discrimination not to recognize polygamous marriage.)

The right to found a family and children's human rights

Marriage is a compound right in both international and domestic law: it's the right to marry *and* to found a family. Giving the right to found a family to same-sex couples necessarily negates the rights of all children, not just those born into a same-sex marriage, with respect to their biological parents and a natural family structure[4].

Indeed, the Canadian Parliament implemented this change in the second section of the Civil Marriage Act 2005[5] which legalized same-sex marriage. It provides that in certain legislation where the term "natural parent" appears, it is to be replaced by "legal

[4] Somerville, supra note 2.
[5] *Marriage for Civil Purposes Act*, S.C. 2005, c.33

parent"[6] In short, the adoption exception - that who is a child's parent is established by legal fiat, not biological connection - becomes the norm for all children.

In the same vein, in Canada we now have provincial legislation that replaces the words "mother" and "father" on a birth certificate with "Parent 1" and "Parent 2". And the Ontario Court of Appeal has ruled that a child can have three legal parents: her biological mother and her lesbian partner, and her gay biological father who donated sperm[7].

Children's human rights and reproductive technologies

The dangers of same-sex marriage to children's human rights are amplified by reprogenetic technoscience. Developments such as IVF, cloning and surrogacy pose unprecedented challenges to maintaining respect for the transmission of human life and the children who result, because they open up unprecedented modes of transmission, which are sometimes referred to as "collaborative non-coital reproduction". When the institution of marriage is limited to opposite-sex couples, it establishes a social-sexual ecology of human reproduction and symbolizes respect for the transmission of human life through sexual reproduction, as compared, for example, to asexual replication (cloning) or same-sex reproduction (for instance, the future possibility of making a sperm from one woman's stem cell and using it to fertilize another woman's ovum).

[6] Ibid, Consequential Amendments §§ 5–15. For example, the amendment to the Income Tax Act states: 'The amendments to sections 56.1 and 60.1 of the *Act replace the existing term 'natural parent' with the term 'legal parent'* to ensure that support amounts paid under a court order or written agreement involving both opposite-sex and same-sex couples and their children will be recognized equally in federal law' (emphasis added).

[7] AA v. BB and CC, Ontario Court of Appeal File No. C39998, Court File No. FD 200/03.

It merits noting, in this regard, that the Canadian Assisted Human Reproduction Act 2004[8], for instance, provides that "persons who seek to undergo assisted reproduction procedures must not be discriminated against, including on the basis of their sexual orientation or marital status". I assume that the same approach could well apply in Australia.

If we believe that, ethically, there should be limits on the use of new reproductive technologies, we now need the natural procreation symbolism established by opposite-sex marriage more than in the past. In the past, the only mode of transmission of human life was sexual reproduction in vivo. Now we must ask what is required for respect for the mode of transmission of human life to the next generation. And what is it required we not do with reproductive technologies if we are to respect the children who would result from the use of these technologies?

If the response to possibilities, such as I mention above, is that we should prohibit them, we must keep in mind that if exclusion of same-sex couples from marriage is found to be discrimination by way of comparison with opposite-sex couples, not providing same-sex couples with the means for procreation — that is, excluding the couple from procreating with each other — when such procreation is possible, is a related discrimination. In Halpern et al.[9] the Court of Appeal of Ontario expressly ruled that same-sex couples' inability to reproduce together naturally was not an argument against same-sex marriage, because they could use assisted reproductive technologies (ARTs) to found a family, as the right to marry contemplates. Some provisions of the Canadian Assisted Human Reproduction Act 2004 have already been found to be

[8] *Assisted Human Reproduction Act*, S.C. 2004, c. 2.
[9] Halpern v. Canada (Attorney General), (2003)225 D.L.R. (4th) 529 (Ont. Ct. App.).

unconstitutional by the Supreme Court of Canada[10], so a challenge to the legal validity of any prohibitions would not be novel.

Respect for the transmission of human life

Recognizing that a fundamental purpose of marriage is to engender respect for the transmission of human life provides a corollary insight: excluding same-sex couples from marriage is not related to those people's homosexual orientation, or to them as individuals, or to the worth of their relationships. Rather, the exclusion of their relationship is related to the fact that it is not inherently procreative, and, therefore, if it is encompassed within marriage, marriage cannot institutionalize and symbolize respect for the transmission of life. To recognize same-sex marriage (which is to be distinguished from same-sex partnerships that do not raise this problem, because they do not entail the right to found a family) would unavoidably eliminate this function of marriage.

The alternative view is that new reproductive technoscience means that same-sex couples will be able to reproduce as a couple, so they should be included in marriage as the institution that institutionalizes, recognizes and protects procreative relationships.

Child-centred reproductive decision-making

Same-sex marriage is symptomatic of adult-centred reproductive decision-making, a stance that our Western democratic societies have largely adopted. But reproductive decision-making should be child-centred. This means, among other requirements, that we should work from a basic presumption that children have an absolute right to be conceived from natural biological origins, that is, an untampered-with ovum from one,

[10] Reference re Assisted Human Reproduction Act, 2010 SCC 61, [2010] 3 S.C.R. 457

identified, living, adult woman and an untampered-with sperm from one, identified, living, adult man. This, I propose, is the most fundamental human right of all[11].

Children also have valid claims, if at all possible, to be reared by their own biological parents within their natural family. If not raised by them, they have a claim to know who those parents and their other close biological relatives are[12]. And society should not be complicit in intentionally depriving children of a mother and a father. We must consider the ethics of deliberately creating any situation that is otherwise.

A common riposte by those advocating same-sex marriage and same-sex families is to point out the deficiencies of traditional marriage and natural families.

The issue is not, however, whether all or even most opposite-sex couples attain the ideals of marriage in relation to fulfilling the needs of their offspring. Neither is the issue whether marriage is a perfect institution — it is not. It is, rather, whether we should work from a basic presumption that children need a mother and a father, preferably their own biological parents. I believe they do. The issue is, also, whether society would be worse off without the aspirational ideals established by traditional marriage. I believe it would be.

Discrimination

As mentioned already, the reason for excluding same-sex couples from marriage matters: if the reason for denying same-sex marriage is that we have no respect for

[11] Somerville, supra, note 2

[12] Margaret Somerville, "Children's Human Rights and Unlinking Child-Parent Biological Bonds with Adoption, Same-sex marriage and New Reproductive Technologies", *Journal of Family Studies,* 2007; 13: 179-201 (Appendix D)

homosexuals and their relationships, or want to give the message that homosexuality is wrong, then, the exclusion of same-sex couples from marriage is not ethically acceptable from the perspective of respect for homosexuals and their relationships. It is also discrimination.

On the other hand, if, as I have argued, the reason is to keep the very nature, essence and substance of marriage intact, and that essence is to protect the inherently procreative relationship for the sake of the children who result, then excluding same-sex couples from marriage is ethically acceptable from the perspective of respect for them and their relationships. And such a refusal is not discrimination.

A useful comparison can be made with the discrimination involved in affirmative action. That shows that sometimes discrimination - in the sense of not treating all people in exactly the same way - and the harm it involves, can be justified when it is to achieve a greater good that cannot otherwise be achieved.

It is also argued by those advocating same-sex marriage, that excluding same-sex couples from marriage is the same act of discrimination as prohibiting interracial marriage. This has rightly been recognized as a serious breach of human rights. But this argument is not correct. Because an interracial marriage between a man and a woman does symbolize the procreative relationship, its prohibition is based on racial discrimination which is wrong. In contrast, not extending the definition of marriage to include same-sex couples is not based on the sexual orientation of the partners, but the absence of a feature of their relationship which is an essential feature of marriage.

Some same-sex marriage advocates argue, as well, that any “privileging” (as they see it) of opposite-sex marriage is, in itself, a form of discrimination they call heterosexism.

They see traditional marriage as the flag-bearer for such discrimination and believe that if they can eliminate traditional marriage, which they see the legalization of same-sex marriage as achieving, they will eliminate heterosexism.

Wider effects of legalizing same-sex marriage

We also need to consider the wider effects of legalizing same-sex marriage. It can result in restrictions on freedom of conscience and religion, and freedom of speech, as we've seen happen in Canada. Complaints have been filed before Human Rights tribunals or courts, and sometimes they have resulted in substantial penalties. Those targeted have included civil marriage celebrants for refusals to conduct same-sex marriages; a teacher and an author of a letter to the editor questioning the morality of homosexuality; a Roman Catholic organization which rescinded an agreement to rent a church hall for a reception when it discovered it was to be used for a lesbian wedding; and school trustees for their decision not to include books on homosexual families on a recommended reading list for kindergarten students.

Holding on trust our metaphysical ecosystem

My understanding is that in the Australian political context, the Australian Greens, as is true of groups in other countries who see themselves as supporting what they call "progressive values", are strong advocates of the legalization of same-sex marriage.

The Greens have made an important contribution in raising people's sensitivity to the idea that we can irreparably damage our physical ecosystem and the need to avoid further damage and hold that system in trust for future generations. We have to take care not to leave them with anything less than we inherited and, if possible, in a better situation.

We also have a metaphysical ecosystem - the values, principles, beliefs, attitudes, myths and so on that create the glue that binds us together as families, communities and a society (the societal-cultural paradigm) which for some people includes religion, but for others does not[13]. Like our physical ecosystem that can also be irreparably damaged and, likewise, has to be held in trust for future generations. I urge your Inquiry to examine the impact that same-sex marriage would have, in that light.

In conclusion, legalizing same-sex marriage would be a very powerful statement against the horrible wrong of discrimination on the basis of sexual orientation. We clearly need such statements. But, in order to uphold children's human rights with respect to their biological origins and the family structure in which they are reared, they should be made in other ways than legalizing same-sex marriage.

Society needs to maintain traditional marriage in order to continue to establish cultural meaning, symbolism and moral values around the inherently procreative relationship between a man and a woman, and thereby protect that relationship and the children who result from it. This is even more necessary than in the past, when alternatives to sexual reproduction were not available.

Redefining marriage to include same-sex couples would affect its cultural meaning and function and, in doing so, damage its ability and, thereby, society's capacity, to protect the inherently procreative relationship and the children who result from it, whether those children's future sexual orientation proves to be homosexual or heterosexual.

[13] Margaret Somerville, *The Ethical Imagination: Journeys of the Human Spirit*, House of Anansi Press, Toronto, 2006

ATTACHMENTS:

Appendix A:

Margaret Somerville, "What about Children?", in Daniel Cere and Douglas Farrow (eds), *Divorcing Marriage*, McGill-Queen's University Press, Montreal, 2004, 63-78

Appendix B:

Margaret Somerville, "Children's Human Rights to Natural Biological Origins and Family Structure", HeinOnline IJJF library 2011, http://heinonline.org/HOL/Page?handle=hein.journals/ijjf1&id=1&collection=journals (2011) 1 International Journal of the Jurisprudence of the Family, 35-54.

Appendix C:

Margaret Somerville, "Scholars turn their minds to marriage" Review Essay on *The Jurisprudence of Marriage and Other Intimate Relationships,* Scott Fitz Gibbon, Lynn D. Wardle, and A. Scott Loveless (Eds.). Buffalo, NY: William S. Hein & Co., 2010. 330 pages. ISBN 9780837738123, $70.00 (cloth), HeinOnline IJJF library 2011; (2011) 1 *International Journal of the Jurisprudence of the Family*, 289-296

Appendix D:

Margaret Somerville, "Children's Human Rights and Unlinking Child-Parent Biological Bonds with Adoption, Same-sex marriage and New Reproductive Technologies", *Journal of Family Studies,* 2007; 13: 179-201