



**Submission to the
Legal and Constitutional Affairs Legislation Committee
Concerning the Marriage Equality Amendment Bill 2010**

April 2012

ACL National Office

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Executive Summary

The Australian Christian Lobby (ACL) welcomes the opportunity to make a submission to the Senate on the *Marriage Equality Bill 2010*.

ACL represents a significant constituency in the Australian community. Its supporters are mainly Christians who come from a wide range of Christian denominations across the Catholic, Orthodox, evangelical, and Pentecostal traditions.

ACL supports the definition of marriage as it is currently defined in the *Marriage Act 1961*:

“marriage” means the union of a man and a woman to the exclusion of all others, voluntarily entered into for life.¹

This definition is not new, though it was inserted into the *Marriage Act* in 2004. It enshrines in legislation the common law definition that has existed since at least 1866, when Lord Penzance said in *Hyde v Hyde and Woodmansee*:

Marriage as understood in Christendom is the voluntary union for life of one man and one woman, to the exclusion of all others.²

This did not create a new definition of marriage, but codified its historic meaning, one that has been held in the Christian tradition for millennia.

This definition is not exclusively a Christian one, or indeed a religious one. Marriage as a heterosexual union has retained its meaning throughout history, transcending time, religions, cultures, and people groups. Even in those societies which accepted or even encouraged homosexuality, marriage has always been a uniquely male-female institution.

This submission will argue for the long-held understanding of marriage as the union of a man and a woman. It will argue that man-woman marriage, as the foundation of society’s most fundamental unit – family – is itself a social good, providing the best environment for family to flourish, and in particular, for children to be raised and nurtured. It must be preserved and encouraged for the common good.

The second part of this submission addresses some of the consequences that will flow from redefining marriage. In particular, it addresses concerns about consequences to children, to religious freedom, to education, and to the institution of marriage itself.

The third part addresses some common claims made in favour of same-sex marriage and demonstrates that many of these claims are unfounded, and many are simply untrue. Accusations of homophobia and discrimination are unfounded, and the argument that marriage is a human right which same-sex couples are denied has been dismissed by the highest international courts as well as many of the highest national courts. Claims that same-sex marriage is a pressing issue for homosexuals, and indeed for the general population, are also rebutted.

¹ Section 5, *Marriage Act 1961*.

² *Hyde v Hyde and Woodmansee (1866)*, [LR] 1 P&D 130.

Introduction

Marriage is a unique male-female relationship. This has been the position of all Christians, and indeed of all civilisations, throughout history. It remains the position of the overwhelming majority of Christian denominations today.

The position that marriage is a male-female relationship is not uniquely a Christian one. In fact, same-sex marriage is a recent development, and is still limited to a very small number of jurisdictions throughout the world. Only ten countries,³ seven US states,⁴ and Mexico City – a very small proportion of the world’s states, and an even smaller proportion of its population – have currently redefined marriage as the “union of any two people”. At the same time, some countries are confirming marriage as an opposite-sex union,⁵ while 30 US states have done likewise, either amending their constitutions or their legislation. Many jurisdictions, particularly in the United States, have held referenda on marriage. Nowhere has same-sex marriage been supported in a referenda.

Marriage has been understood throughout history and across all cultures, religions, and people groups as being a male-female union. Even in cultures which tolerated and even celebrated homosexuality, such sexual unions have never been regarded as marriage.

Thus, our position is not only a Christian one; it is a broadly held position with deep historical roots, one that transcends all cultures and religions. It is a position held dearly by many Australians.

³ The Netherlands, Belgium, Spain, Canada, South Africa, Norway, Sweden, Portugal, Iceland, and Argentina.

⁴ Massachusetts, Connecticut, Iowa, Vermont, New Hampshire, New York, and Washington.

⁵ E.g. Poland in Article 18 of its Constitution and Hungary in Article L(1) of its Constitution.

Marriage as a public good

Marriage predates church and government regulation of marriage. Law professor Bruce Hafen described “patterns of marriage and kinship” as “[d]omestic patterns universally accepted before the dawn of law and government”.⁶ Church, and then state, saw fit to regulate marriage because of its importance to society and social wellbeing.

The modern state does not usually regulate interpersonal relationships among its citizens. One of the few exceptions is marriage. Its interest in regulating marriage stems from the importance of marriage as a foundational unit in society, of upholding marriage as an ideal. The state has an interest in encouraging and regulating relationships which are inherently predisposed towards procreation, and encouraging permanency and exclusivity in those relationships.

The social sciences demonstrate the good of marriage both to married people and to society. Studies show that marriage provides many benefits for individuals. White and Kaplan state that the “benefits of marriage for adults, children, and society are well documented”.⁷ Married people “live longer and are healthier”, and are less likely to suffer from psychological illnesses,⁸ alcoholism, and drug abuse.⁹

Writing in the *Harvard Journal of Law & Public Policy*, Monte Stewart identifies six valuable social goods of marriage, saying it is:

1. Society’s best and perhaps only effective means to **secure the right of a child to know and be raised by her biological parents** (with exceptions justified only when they are in the **best interests of the child**).
2. The most effective means yet developed to maximize the **private welfare provided to children**... [which includes not only basic requirements such as food and shelter but also “education, play, work, disciplines, love, and respect”].
3. The **indispensable foundation for that child-rearing mode**... that correlates... with the **optimal outcomes deemed crucial for a child’s, and therefore society’s, well-being**.
4. Society’s primary and most effective means of bridging the male-female divide.
5. Society’s only means of transforming a male into husband-father, and a female into wife-mother[...]
6. Social and official endorsement of the form of adult intimacy – married heterosexual intercourse – that society may rationally value above all other forms.¹⁰

The first three points in particular are central to the present debate. Marriage provides the best environment for children, and redefining marriage to allow for two men or two women to marry necessarily disregards, and removes, the rights of children to know and be raised by their biological parents.

The importance of marriage to children has been thoroughly supported by the social sciences.

⁶ Bruce Hafen (1983), *The Constitutional Status of Marriage, Kinship, and Sexual Privacy: Balancing the Individual and Social Interests*, 81 Michigan Law Review 463, 472.

⁷ Danielle White and Jan Kaplan (June 2003), *The State’s Role in Supporting Marriage and Family Formation*, Welfare Information Network Issue Notes, The Finance Project, <http://76.12.61.196/publications/supportingmarriageandfamilyformationIN.htm>.

⁸ Chris M Wilson and Andrew J Oswald (2005), *How Does Marriage Affect Physical and Psychological Health? A Survey of the Longitudinal Evidence*, Institute for the Study of Labor, p 22, <http://ftp.iza.org/dp1619.pdf>.

⁹ White and Kaplan (June 2003), *The State’s Role in Supporting Marriage and Family Formation*.

¹⁰ Monte Stewart (2008), *Marriage Facts*, 31 Harvard Journal of Law & Public Policy 313, 321. Emphasis added.

Children do best with married, biological parents

Because marriage is primarily about family formation, it is necessary that any discussion on same-sex marriage examines the potential consequences for children.

Married, biological parents provide by far the best environment in which to nurture and raise children, and this should be encouraged wherever possible by the government. Sociologist David Popenoe states that:

*The two sexes are different to the core, and each is necessary – culturally and biologically – for the optimal development of a human being.*¹¹

This view is confirmed by the social sciences.

Evidence from the social sciences

There is an “extensive body of research [which] tells us that children do best when they grow up with both biological parents”.¹²

In research carried out by Professor Patrick Parkinson of the University of Sydney, the benefits of married, biological parents were made clear. Speaking in the context of the importance of biological parents for children, Professor Parkinson stated:

*The **overwhelming evidence** from research is that children do best in two-parent married families.*¹³

In the *Journal of Marriage and Family*, Professor Susan Brown stated that:

*Children residing in two-biological-parent married families tend to enjoy better outcomes than do their counterparts raised in other family forms. The differential is modest but consistent and persists across several domains of well-being. Children living with two biological married parents experience better educational, social, cognitive, and behavioral outcomes than do other children, on average.*¹⁴

These benefits “not only are evident in the short-term but also endure through adulthood.”¹⁵

Significantly, Professor Paul Amato suggests that these benefits are not only correlated to family structure but are a result of family structure:

Research clearly demonstrates that children growing up with two continuously married parents are less likely than other children to experience a wide range of cognitive, emotional, and social problems, not only during childhood, but also in adulthood. Although it is not possible to demonstrate that family structure is the cause of these

¹¹ David Popenoe (1996), *Life Without Father: Compelling New Evidence That Fatherhood and Marriage are Indispensable of the Good of Children and Society*, New York, The Free Press, p 197, cited in Glenn T Stanton, ‘Are Children with Same-Sex Parents at a Disadvantage?’, *Facts About Youth*, <http://factsaboutyouth.com/posts/are-children-with-same-sex-parents-at-a-disadvantage/>.

¹² Kristin Anderson Moore, Susan M Jekielek, and Carol Emig (June, 2002), *Marriage from a Child’s Perspective: How Does Family Structure Affect Children, and What Can We Do about It?*, Child Trends Research Brief, p 1, <http://www.childtrends.org/files/marriagerb602.pdf>.

¹³ Professor Patrick Parkinson (July 2011), *For Kids’ Sake: Repairing the Social Environment for Australian Children and Young People*, The University of Sydney, p 48. Emphasis added.

¹⁴ Professor Susan Brown (2010), ‘Marriage and Child Well-Being: Research and policy perspectives’ 72 *Journal of Marriage and Family* 1059-1077, 1062 (references omitted), cited in Parkinson (2011), *For Kids’ Sake*, p 48.

¹⁵ Susan Brown (2010), ‘Marriage and Child Well-Being: Research and policy perspectives’ 72 *Journal of Marriage and Family* 1059-1077, 1062 (references omitted), cited in Parkinson (2011), *For Kids’ Sake*, p 48.

*differences, studies that have used a variety of sophisticated statistical methods, including controls for genetic factors, suggest that this is the case.*¹⁶

Anderson Moore, Jekielek, and Emig, in a study conducted for the American research centre Child Trends, agree that “[r]esearch findings linking family structure and parents’ marital status with children’s well-being are very consistent”.¹⁷

Children growing up in homes where both biological parents are present have “higher educational achievement and better cognitive and emotional development” than children in single-parent households.¹⁸ Those growing up in homes with only one parent present are at greater risk of a range of negative outcomes including “poverty, juvenile delinquency, teen pregnancy, and school failure”.¹⁹

This is the case for children growing up in homes with only one biological parent and one step-parent.²⁰ Anderson Moore, Jekielek, and Emig conclude that:

*it is not simply the presence of two parents, as some have assumed, but the presence of **two biological parents** that seems to support children’s development.*²¹

One reason for this advantage is the different effects male and female parenting offers to children, both boys and girls. Grossmann et al, writing in the journal *Social Development*, find that “both parents shape their children’s psychological security but each in his or her unique way”.²² They explain:

*mothers’ longitudinal influence seem to rest on their functioning as a haven of safety and a secure base from which to explore. In contrast, fathers’ formative influence was found in their functioning as a sensitive, supporting, and gently challenging companion during exploration “out there”.*²³

Renowned paediatrician Kyle Pruett agrees that the gender of the father and the gender of the mother each play distinct roles in the development of the child through early childhood and adolescence. The father’s “masculine gender emerge[s] as a central attribute in his ongoing relationship with his child on the threshold of adolescence”, while the mother’s “femininity also assumes new salience” for the preteen.²⁴

The essential combination of the importance to children of the stability of marriage, its protection of their biological identity, and the modelling of the male and female roles in their lives are explicit in the definition of marriage and worth protecting.

¹⁶ Professor Paul Amato (2010), ‘Research on Divorce: Continuing trends and new developments) 72 *Journal of Marriage and Family* 650-666, 653, cited in Parkinson (2011), *For Kids’ Sake*, p 49.

¹⁷ Anderson Moore, Jekielek, and Emig (June, 2002), *Marriage from a Child’s Perspective*, p 1.

¹⁸ White and Kaplan (June 2003), *The State’s Role in Supporting Marriage and Family Formation*.

¹⁹ White and Kaplan (June 2003), *The State’s Role in Supporting Marriage and Family Formation*; Anderson Moore, Jekielek, and Emig (June, 2002), *Marriage from a Child’s Perspective*, p 1.

²⁰ Anderson Moore, Jekielek, and Emig (June, 2002), *Marriage from a Child’s Perspective*, p 1.

²¹ Anderson Moore, Jekielek, and Emig (June, 2002), *Marriage from a Child’s Perspective*, pp 1-2. Emphasis in original.

²² Karin Grossmann, Klaus E Grossmann, Elisabeth Fremmer-Bombik, Heinz Kindler, Hermann Scheuerer-Englisch, and Peter Zimmerman (2002), *The Uniqueness of the Child-Father Attachment Relationship: Fathers’ Sensitive and Challenging Play as a Pivotal Variable in a 16-year Longitudinal Study*, *Social Development*, 11, 3.

²³ Grossman et al (2002), *The Uniqueness of the Child-Father Attachment Relationship*, p 327.

²⁴ Kyle D Pruett (November 1, 1998), *Role of the Father*, *Pediatrics*, Vol 102 No Supplement E1, pp 1253-1261.

The importance of fathers

The particular importance that fathers have on their children's development has been emphatically reinforced by social science. Conversely, since the absence of fathers has become a widespread social problem, studies show many negative outcomes for children who grow up without their biological father present, with one study saying "father love is the sole significant predictor of specific outcomes after controlling for the influence of mother love".²⁵

Writing in the leading journal *Pediatrics*, Coleman and Garfield state "father involvement is of a different nature than mother involvement".²⁶ Fathers spend more time "playing with their children", "engage in more tactile and stimulating activities" when they are young, and in "more recreational activities such as walks and outings as well as private talks" when they are in middle school.²⁷ A father has a strong influence on their child's gender role development and provides an "important role [model] for both girls and boys".²⁸ Fathers, as "teachers, disciplinarians, and role models" impart to children "what they need to know for life-survival skills and for school learning".²⁹

In the *Review of General Psychology*, Rohner and Veneziano review evidence from various types of studies that "[show] the powerful influence of fathers' love on children's and young adults' social, emotional, and cognitive development and functioning".³⁰ They find that "father love" is "as heavily implicated as mother love" in children's "psychological well-being and health [and] an array of psychological and behavioral problems".³¹

Even though fathers generally spend less time with their children than mothers, the time they do spend is "independently associated with improved academic performance", and children who perceive their fathers as encouraging and involved "have higher college entrance examination scores, reach higher economic and educational attainment, show less delinquent behavior, and possess greater psychologic well-being".³² They also have a "stronger sense of social competence" and "fewer depressive symptoms".³³

The importance of fathers for girls

Fathers play an essential role in the development of both boys and girls, but in different ways.

Father absence is associated with alarming outcomes for girls, including "early sexual activity, teenage pregnancy, behavioural difficulties and life adversity".³⁴ Other negative outcomes include poor academic performance and lower self-esteem.³⁵ In one Australian study, participants reported difficulties in relating to men, including distrust and fear of abandonment, while also revealing "a

²⁵ Ronald P Rohner and Robert A Veneziano (December, 2001), *The Importance of Father Love: History and Contemporary Evidence*, Review of General Psychology, Volume 5(4).

²⁶ William L Coleman, Craig Garfield, Committee on Psychosocial Aspects of Child and Family Health (May 1, 2004), *Fathers and Pediatrics: Enhancing Men's Roles in the Care and Development of Their Children*, *Pediatrics*, Vol 113 No 5, pp 1406-1411.

²⁷ Coleman and Garfield (May 1, 2004), *Fathers and Pediatrics*.

²⁸ Coleman and Garfield (May 1, 2004), *Fathers and Pediatrics*.

²⁹ Coleman and Garfield (May 1, 2004), *Fathers and Pediatrics*.

³⁰ Rohner and Veneziano (December, 2001), *The Importance of Father Love*.

³¹ Rohner and Veneziano (December, 2001), *The Importance of Father Love*.

³² Coleman and Garfield (May 1, 2004), *Fathers and Pediatrics*.

³³ Coleman and Garfield (May 1, 2004), *Fathers and Pediatrics*.

³⁴ Leah East, Debra Jackson, Louise O'Brien (January, 2007), 'I Don't Want to Hate Him Forever': Understanding Daughter's Experiences of Father Absence, *Australian Journal of Advanced Nursing*, Vol 24 No 4, pp 14-18, 14.

³⁵ East, Jackson, and O'Brien, 'I Don't Want to Hate Him Forever', p 14.

sense of ‘craving’ male attention and male affection”. These problems were associated with father absence and lack of father affection.³⁶

Flaws in methodology of studies favouring same-sex parenting

Despite the studies showing the importance of a mother and a father, advocates of same-sex marriage or same-sex adoption or surrogacy often claim that the social sciences demonstrate that there is no difference between same-sex parenting and opposite-sex parenting. However, the studies that do assert this have been criticised as having serious methodological flaws.

Same-sex parenting is a recent phenomenon, as is its public consideration. There has, therefore, been neither enough time nor enough children raised in same-sex households for the effects of same-sex parenting to be adequately assessed, either by the wider community or by the social sciences.

Dr Robert Lerner and Dr Althea Nagai, experts in quantitative analysis, have evaluated studies on same-sex parenting and concluded that they are “gravely deficient”, with problems including unclear hypotheses, missing or inadequate comparison groups, unreliable measurements, non-random or small samples, and inadequate statistical analysis.³⁷ They conclude that each of the 49 studies they examined was “so flawed” they did not prove anything.³⁸

More recently, William Meezan and Jonathan Rauch highlighted some of the difficulties in studying same-sex parenting.³⁹ Although they conclude that studies do not show large differences in outcomes for children, they echoed many of Lerner and Nagai’s concerns. Meezan and Rauch highlighted a number of flaws in the studies, including small sample sizes and lack of appropriate comparison groups. Sample often lacked within-group homogeneity, meaning participants came from a wide range of family structures. Participants were predominantly from higher education and income backgrounds, meaning samples were “not at all like” the wider population of same-sex parents.⁴⁰

Meezan and Rauch also highlighted measurement and statistical issues with the studies,⁴¹ and noted that much less is known about male same-sex parents than about lesbian parents.⁴² Much more research needs to be done into the effects of same-sex parenting on children, and any assessment needs to include male same-sex parenting as well as lesbian parenting.

As Professor Tom Frame states:

there is no substantial body of evidence supporting the claim that same-sex couples are just as effective as heterosexual couples with respect to a range of measures over a

³⁶ East, Jackson, and O’Brien, ‘I Don’t Want to Hate Him Forever’, p 16.

³⁷ Dr Robert Lerner and Dr Althea K Nagai (2001, January), *No Basis: What the Studies Don’t Tell Us About Same-Sex Parenting*, Marriage Law Project, Washington, D.C.

³⁸ Lerner and Nagai (2001, January), *No Basis*, p. 6.

³⁹ William Meezan and Jonathan Rauch (2005), *Gay Marriage, Same-Sex Parenting, and America’s Children*, *Future of Children Journal*, Vol 15 no 2, 97-115, p 101.

⁴⁰ Meezan and Rauch (2005), *Gay Marriage, Same-Sex Parenting, and America’s Children*, *Future of Children Journal*, p 101.

⁴¹ Meezan and Rauch (2005), *Gay Marriage, Same-Sex Parenting, and America’s Children*, *Future of Children Journal*, p 102.

⁴² Meezan and Rauch (2005), *Gay Marriage, Same-Sex Parenting, and America’s Children*, *Future of Children Journal*, p 103.

*longer period of time. Same-sex parenting is a recent phenomenon. It is still untried and untested in all respects that are relevant to the care and nurture of children.*⁴³

Marriage as a social good - Conclusion

Marriage, as a social good, goes far beyond meeting the relational needs of adults. The positive effects of marriage on adults are real, but marriage also promotes the optimal environment for the rearing and raising of children. The research demonstrates the benefits of opposite-sex parenting for children, and particularly of married, biological parenting.

It is in this context that government has an interest in promoting and protecting marriage. Redefining marriage to remove reference to gender would sever its biological link to children. It is the adverse effect already seen by placing the rights of activists above those of children in demands for same-sex adoption and surrogacy. The result has been even a single man is now able to obtain a child through surrogacy, and the compromise of the very purpose of adoption to provide a child with a mother and a father.

ACL acknowledges that there are many children without married, biological parents, usually as a result of death or desertion of one or both of the parents. There are many single parents and parents in same-sex relationships doing a good job of raising children. ACL's support for heterosexual marriages as the ideal environment for children is not a denial that other family structures exist and that many children grow up healthy and happy in such environments, nor is it a judgement on the love and competence of other types of parents.

However, married, biological parents demonstrably provide the ideal environment in which to raise children, and the government should promote and encourage this ideal to the greatest extent possible. The state should encourage that environment which is *best* for children, and which indeed nature dictates is best for children, and policy should seek to encourage this and restore families broken by tragedy to this model as much as possible. Thus, maintaining the definition marriage in the law and upholding it as a social ideal is in the interests of children, families, and society in general.

⁴³ Frame (2008), *Children on Demand*, p 101.

The Consequences of Redefining Marriage

The social good of marriage is of itself sufficient reason for the government to uphold it as an ideal in the law. However, the redefinition of marriage would not simply result in an expansion of this good, as is claimed. On the contrary, redefining marriage would have a range of serious and negative consequences.

Not only would it sever the natural connection between marriage and children, with significant effects on the wellbeing of children and on the family unit; it would have far-reaching consequences in other areas of life. In particular, it would have profound consequences religious freedom, for education, and for the institution of marriage itself.

Consequences of same-sex marriage for children

Best interests of children

It follows from the previous discussion that the first serious consequence of redefining marriage would be to remove the ideal of biological mother-father parenting. Not only would this ideal be removed from the law, but it would send the message more broadly that our society does not value motherhood and fatherhood, at least not highly enough to protect in law.

As Girgis, George, and Anderson argue in the *Harvard Journal of Law and Public Policy*:

*If same-sex partnerships were recognized as marriages, however, that ideal would be abolished from our law: no civil institution would any longer reinforce the notion that children need both a mother and father.*⁴⁴

The best interests of the child should be paramount in public policy discussion of any family issue, and marriage must be included. The possible effects on children must be considered before contemplating such a significant social change.

The principle of “best interests of the child” is fundamental in family law, both in Australia and internationally. Article 3 of the Convention on the Rights of the Child states:

*In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.*⁴⁵

The Australian *Family Law Act 1975* also emphasises this principle.⁴⁶ In situations involving children, the best interests of the child is considered to be “**the paramount consideration**”.⁴⁷ Section 60B defines how the best interests of children are to be met, including:

*ensuring that children have the benefit of **both of their parents** having a meaningful involvement in their lives, to the maximum extent consistent with the best interests of the child.*⁴⁸

This echoes Article 7 of the Convention on the Rights of the Child, which emphasises a child’s “right to know and be cared for by his or her parents”.⁴⁹

⁴⁴ Sherif Girgis, Robert P George, and Ryan T Anderson (2010), *What is Marriage?*, Harvard Journal of Law and Public Policy, Vol 34, No 1, pp 245-287, p 263.

⁴⁵ Article 3(1), *Convention on the Rights of the Child*.

⁴⁶ E.g., section 61DA requires the court to consider the best interests of the child when deciding whether to make a parenting order.

⁴⁷ See sections 60CA, 65AA, 67V, 67L, *Family Law Act 1975*. Emphasis added.

⁴⁸ Section 60B, *Family Law Act 1975*. Emphasis added.

⁴⁹ Article 7(1), *Convention on the Rights of the Child*.

Same-sex parenting

Proponents of redefining marriage believe it will establish legal equivalence of same-sex and opposite-sex couples, but this has already been achieved. However, redefining marriage would inevitably result in an assumed equivalence of same-sex and opposite-sex parenting in terms of the benefit to children.

It is an inescapable reality that a complementary union of male and female is required to create human life. For a same-sex couple to parent a child, the child must at some stage have been separated from one or both of his or her biological parents. ACL submits that this practice represents the commodification of children to meet the needs and desires of adults, ignoring the interests of children and the state's explicit responsibility to protect their best interests.

Last year's inquiry by the Australian Senate into donor conception practices in Australia was instigated by people, now adults, who were conceived using ART. While most of these people grew up in a family with a mother and a father, the pain of having their biological identity hidden from them forced the inquiry. Compounding their sense of genetic bewilderment was the inability to know the medical history of their donor father. As a result of public submissions and public hearings, the Senate's Legal and Constitutional Affairs References Committee unanimously recommended that there be a ban on donor anonymity.⁵⁰

Similarly, a Victorian Parliamentary inquiry in recommended in February, 2012 that donor conceived adults be given the right to track their donor father.⁵¹

The state should not permit children to be deliberately created in an adult arrangement that deliberately denies them an upbringing with their biological parents. As prominent medico-legal ethicist Margaret Somerville states:

*the most fundamental human right of every person is the right to be born from natural human origins that have not been tampered with by anyone else. Children's human rights also include the right to know their biological parents and, if at all possible, to be reared by them within their immediate and wider biological family.*⁵²

Unfortunately, not every child has this opportunity. Tragedy often intervenes so that children cannot grow up with both their parents. In these cases the state should act to ensure the best interests of those children are still met to the greatest degree possible. To *intentionally* create such a situation is never in the child's best interests and is not legitimately within the prerogative of government.

⁵⁰ The Senate Legal and Constitutional Affairs References Committee (February, 2011), *Donor Conception Practices in Australia*, p xi.

⁵¹ AAP (March 28, 2012), 'Sperm donors should be identified, a Victorian parliamentary committee says', *The Australian*, <http://www.theaustralian.com.au/news/nation/sperm-donors-should-be-identified-a-victorian-parliamentary-committee-says/story-e6frg6nf-1226312537703>.

⁵² Margaret Somerville (2007), *Children's human rights and unlinking child-parent biological bonds with adoption, same-sex marriage and new reproductive technologies*, *Journal of Family Studies*, 13(2), 179-201, p 180.

Although same-sex couples currently have access to surrogacy and reproductive technologies already in some jurisdictions, redefining marriage would further legitimise family formation practices that deliberately remove children from their biological parents. This includes complex surrogacy arrangements that can see as many as six adults holding a biological or emotional claim to parentage. The best interests of children are not served when denied, prior even to conception, an upbringing within their “immediate and wider biological family”.

As Professor Tom Frame argues:

*There are some contributions that are necessary for a child’s nurture that flow from femininity and others from masculinity. The critical issue is not, therefore, whether homosexuals or lesbians have the capacity to be loving and caring parents. It is the belief that same-sex couples cannot provide for a child’s need to experience both male and female parental love.*⁵³

Same-sex parenting, by definition, severs and redefines a child’s relationship to his or her biological parents. A child’s best interests are not served if he has multiple “parents”. Rather, this leads to confusion of identity and genetic bewilderment. A child’s best interests are served by being brought up by his genetic parents wherever possible. It involves the least complicated arrangement and the least fracturing of the natural relational connection between conception, birth, and parenting.

Complications arising from same-sex parenting

A number of recent Australian cases highlight the controversial and emotional fragility that characterises complex same-sex parenting arrangements. In 2010, Queensland decriminalised surrogacy, at the same time making it possible for same-sex parents to acquire a child through surrogacy. One year after the birth of the first child under the new regime, the birth mother expressed profound regret at having entered into the surrogacy arrangement, saying:

*I was crying in hospital when he was having his first bath, I couldn’t watch, I thought what the hell have I done? I never thought having a child and giving him away would make me feel like this. I regret everything, I don’t regret Connor, I regret the decision very much, I just wish I’d never done it.*⁵⁴

The two men in this case refuse to allow the woman to have involvement with the child, saying they “went into this just wanting to be parents and not having a third parent”.⁵⁵

In 2011, a sperm donor from Sydney had his name struck off his child’s birth certificate in favour of the lesbian ex-partner of the child’s birth mother.⁵⁶ This incident prompted the New South Wales

⁵³ Tom Frame (2008), *Children on Demand: The Ethics of Defying Nature*, University of New South Wales Press, p 101.

⁵⁴ Sophie Elsworth (May 11, 2011), ‘Gay parents of Queensland’s first surrogate baby are rapt, but birth mother has bitter regrets’, *The Courier-Mail*, http://www.news.com.au/gay-parents-of-queenslands-first-surrogate-baby-are-rapt-but-birth-mother-has-bitter-regrets/story-e6freoof-1226052841543?from=public_r.

⁵⁵ Elsworth (May 11, 2011), ‘Gay parents of Queensland’s first surrogate baby are rapt, but birth mother has bitter regrets’, *The Courier-Mail*.

⁵⁶ Natasha Wallace (August 3, 2011), ‘Sperm donor could lose his status’, *The Sydney Morning Herald*, <http://www.smh.com.au/national/sperm-donor-could-lose-his-status-20110802-1i9wg.html>.

Legislative Committee on Law and Safety to initiate an inquiry into whether sperm donor's details should be included on birth certificates.

In an ongoing case in the United Kingdom, a lesbian couple is accusing the sperm donor father of "betraying a pact" made prior to the child's conception which would have limited his parental rights.⁵⁷

In another British case, a homosexual man and his partner took to court a lesbian couple, one of whom was the mother of the first man's children. Justice Hedley of the High Court warned about "the traumatic effects on children when complicated homosexual parenting arrangements unravel". One social worker commented that one of the daughters was caught in "a horrendous tangle of emotion and conflict" and "is being made to carry the responsibility of the failure of the adults".⁵⁸ This trauma is the result of the selfishness of adults being put ahead of a child's needs and the failure of government to act in children's best interests.

Famously, Sir Elton John and his partner obtained a baby through surrogacy who they admit will never know his biological mother as the egg was from an anonymous donor.⁵⁹ Commenting on the issue, homosexual journalist Andrew Pierce, who is also adopted, decried the selfishness of John and his partner, stating that "by and large, a child needs a loving mother and father". Pierce added that "a child needs to know where he or she comes from and what their identity is".⁶⁰

The biological identity and best interests of children are not trivial issues, and the government has a responsibility to protect them. When marriage is so fundamental to the protection of both, there would have to be an overwhelming case proving substantive discrimination in entitlements for same-sex couples to justify redefining marriage, and no such situation has been proven.

Consequences of same-sex marriage for religious freedom

ACL notes that Senator Hanson-Young's bill has no provision for the protection of religious freedom. In contrast, Stephen Jones' bill and Andrew Wilkie and Adam Bandt's bill are both claimed to protect ministers or religion who object on religious grounds to marry same-sex couples.

Despite assurances from proponents of same-sex marriage that religious conscience will be respected, and churches, ministers, and marriage registrars will not be forced to marry same-sex couples if it violates their conscience, many Christians remain concerned that threats to religious freedom are inevitable. Around the world, those who believe in marriage are increasingly subject to ridicule, abuse, and even legal persecution.

⁵⁷ Rebecca Evans (February 6, 2012), 'Very modern custody battle: Gay father in court battle with lesbians over access to boy of two', *Daily Mail*, <http://www.dailymail.co.uk/news/article-2097279/Very-modern-custody-battle-Gay-father-court-battle-lesbians-access-boy-two.html>.

⁵⁸ Steve Doughty (October 10, 2011), 'High Court judge's blast for four gay parents fighting over two little sisters', *Daily Mail*, <http://www.dailymail.co.uk/news/article-2047671/High-Court-judges-blast-gay-parents-fighting-little-sisters.html?printingPage=true>.

⁵⁹ David van Gend (March 19, 2011), 'Same-Sex Marriage: Elton John and the new stolen generation', *News Weekly*, <http://www.newsweekly.com.au/article.php?id=4497>.

⁶⁰ Andrew Pierce (December 30, 2010), 'The Mail's ANDREW PIERCE is both adopted and gay. But that doesn't stop him saying... Why I'm repelled by Elton and his partner's grotesque selfishness', *Daily Mail*, <http://www.dailymail.co.uk/debate/article-1342650/Elton-Johns-baby-Why-Im-repelled-David-Furnish-grotesque-selfishness.html>.

Commenting on a decision of the European Court of Human Rights (ECHR) made in March of this year, discrimination law expert Neil Addison said that in countries that have redefined marriage:

*the partners... are entitled to exactly the same rights as partners in a heterosexual marriage. This means that if same-sex marriage is legalised in the UK it will be illegal for the Government to prevent such marriages happening in religious premises.*⁶¹

This is being interpreted as an indication that, in any country under ECHR jurisdiction that redefines marriage, churches will be forced “to fall into line and perform the wedding ceremonies” of same-sex couples.⁶² Certainly it is cause for concern that churches choosing to exercise their religious freedom and marry only opposite-sex couples could be subject to litigation.

Although Australian courts may initially rule differently from those in Europe, it is prudent to look to parts of the world where marriage has been redefined to determine the effects such a move would have in Australia.

Even with legal provisions protecting ministers of religion, by legislating for same-sex marriage the state is defining marriage, enshrining in law that marriage *is* a particular union and that same-sex and opposite-sex unions are equivalently marriages. The state would be compelled to restrict the circumstances in which a person was allowed to hold a traditional view of marriage. Over time such circumstances would be defined more and more narrowly.

Not only would supporters of marriage be on perilous legal ground, culturally they would be subject to increasing marginalisation. Opposing the societal norm of same-sex marriage for any reason – including reasons of conscience or faith – would be tolerated less and less.

We have seen growing intolerance of opposing views in jurisdictions in which same-sex marriage has been legislated. Even where marriage is still defined as between a man and a woman, supporters of this definition are facing more and more persecution. Some of these cases are documented below in this section, as well as in Appendix 1, while courts are making legal judgements that can give no confidence to those who believe in marriage that any protection is possible if marriage is redefined.

Evolving civil partnerships law in the United Kingdom

The United Kingdom’s *Civil Partnerships Act 2004* originally disallowed civil partnership ceremonies from being conducted in “religious premises” or for a “religious service” to be used while the registrar was officiating at the signing of the civil partnership.⁶³ This was to avoid pressure on the churches to conduct or participate in ceremonies which breached their religious conscience or theology, and was meant to give them confidence in the passing of the law. However, predictably, campaigning by activists has now led to the law being changed so that churches may participate in the ceremonies.⁶⁴

In a predictable consequence of this accommodation, Conservative MP Mike Weatherley immediately claimed that the law remains “unfair”, and that it must be changed to compel churches to register civil partnerships. Mr Weatherley said “[a]s long as religious groups can refuse to preside

⁶¹ Donna Bowater (March 21, 2012), ‘Gay marriage is not a human right, according to European ruling’, *The Telegraph*, <http://www.telegraph.co.uk/news/religion/9157029/Gay-marriage-is-not-a-human-right-according-to-European-ruling.html>.

⁶² Steve Doughty (March 20, 2012), ‘Gay marriage is not a ‘human right’: European ruling torpedoes Coalition stance’, *Daily Mail*, <http://www.dailymail.co.uk/news/article-2117920/Gay-marriage-human-right-European-ruling-torpedoes-Coalition-stance.html>.

⁶³ See e.g. sections 2, 6, 93, and 137 of the *Civil Partnerships Act 2004* (UK).

⁶⁴ Section 202, *Equality Act 2010* (UK).

over ceremonies for same-sex couples, there will be inequality".⁶⁵ He added that "[s]uch behaviour is not tolerated in other areas, such as adoption, after all."⁶⁶

Many prominent Britons are concerned about attitudes such as those expressed by Mr Weatherley. They fear the amendments will pose serious threats to religious freedom. The Bishop of Winchester, Right Reverend Michael Scott-Joynt, stated:

*I believe that it will open, not the Church of England, but individual clergy, to charges of discrimination if they solemnise marriages as they all do, but refuse to host civil partnership signings in their churches.*⁶⁷

The Bishop of Bradford, Right Reverend David James, also warned of "unintended consequences".⁶⁸

Several politicians have likewise expressed concern at the development. Lord Waddington, backed by Lord Tebbit, argued that it "would only be a matter of time before it was argued that it was discriminatory" for clergy to refuse same-sex ceremonies when the law allowed it. He added that clergy who would register marriages but not civil partnerships would "be accused of discrimination on grounds of sexual orientation in the provision of services".⁶⁹

As discussed above, lawyer Neil Addison agrees redefining marriage would threaten the religious freedom of churches.⁷⁰

Calls for removal of religious exemptions in Australia

Concerns surrounding religious freedom are already surfacing in the marriage debate in Australia.

David Marr is a prominent critic of religious exemptions in anti-discrimination legislation. Marr has taken aim at the freedom of religious organisations to choose employees who subscribe to the ethic of the organisation, as in a February, 2011 article,⁷¹ and later at the Festival of Dangerous Ideas in Sydney.⁷² Marr told the *Gay News Network*:

⁶⁵ Simon Caldwell (September 8, 2011), 'Tory MP urges Cameron to crack down on churches that refuse to hold same-sex ceremonies', *Catholic Herald*, <http://www.catholicherald.co.uk/news/2011/09/08/tory-mp-urges-cameron-to-crack-down-on-churches-that-refuse-to-hold-same-sex-ceremonies/>. See also Tim Ridgway (September 2, 2011), 'MP calls for churches to be stripped of licences for refusing to marry gays', *The Argus*, http://www.theargus.co.uk/news/9228930.MP_calls_for_churches_to_be_stipped_of_licence_for_refusing_to_marry_gays/. A copy of the letter is included in Jessica Geen (September 2, 2011), 'Tory MP calls for churches to be banned from holding marriages if they refuse gay couples', *Pink News*, <http://www.pinknews.co.uk/2011/09/02/tory-mp-calls-for-churches-to-be-banned-from-holding-marriages-if-they-refuse-gay-couples/>.

⁶⁶ Caldwell (September 8, 2011), 'Tory MP urges Cameron to crack down on churches that refuse to hold same-sex ceremonies', *Catholic Herald*.

⁶⁷ Martin Beckford and Heidi Blake (March 3, 2010), 'Clergy could be sued if they refuse to carry out 'gay marriages', traditionalists fear', *The Telegraph*, <http://www.telegraph.co.uk/news/religion/7361378/Clergy-could-be-sued-if-they-refuse-to-carry-out-gay-marriages-traditionalists-fear.html>.

⁶⁸ Beckford and Blake (March 3, 2010), 'Clergy could be sued if they refuse to carry out 'gay marriages', traditionalists fear', *The Telegraph*.

⁶⁹ Beckford and Blake (March 3, 2010), 'Clergy could be sued if they refuse to carry out 'gay marriages', traditionalists fear', *The Telegraph*.

⁷⁰ Donna Bowater (March 21, 2012), 'Gay marriage is not a human right, according to European ruling', *The Telegraph*, <http://www.telegraph.co.uk/news/religion/9157029/Gay-marriage-is-not-a-human-right-according-to-European-ruling.html>.

⁷¹ David Marr (February 14, 2011), 'Faiths rule on sex from staffroom to bedroom', *The Sydney Morning Herald*, <http://www.smh.com.au/national/faiths-rule-on-sex-from-staffroom-to-bedroom-20110214-1asj0.html>. First published in a shorter version by *The Age*: David Marr (February 13, 2011), 'Holy unrest over

*church organisations... don't, in my view, have a right to be exempted from anti-discrimination law.*⁷³

Marr asserts, according to the article, that “religious exemptions from anti-discrimination laws represent the biggest threat to substantive equality [homosexuals] face”.⁷⁴

The prevalence of this attitude is demonstrated by examining submissions to the recent inquiry into the consolidation of anti-discrimination laws.⁷⁵ A submission from the Discrimination Law Experts’ Group recommended that “the religious exceptions be repealed”.⁷⁶ They said further:

*We believe that the religious exceptions should be removed because we do not accept that religious rights should prevail over the rights of individuals to be treated in a non-discriminatory way in public sphere activities.*⁷⁷

Equality Rights Alliance recommended in their submission that exceptions “for religious organisations which would enable them to discriminate on the basis of sexual orientation or gender identity should not be included in the consolidated [anti-discrimination] Act”.⁷⁸

Organisation Intersex International similarly recommended that religious “persons, bodies or organisations” not be able to discriminate on “grounds of sex, sexual orientation or gender identity”.⁷⁹

The Human Rights Law Centre was particularly harsh on religious exemptions.⁸⁰ It acknowledged “with disappointment... the Government’s pre-determined position on the maintenance of permanent exemptions for religious bodies” and said such exemptions are “manifestly inappropriate and inconsistent with Australia’s human rights obligations and international best-practice”.⁸¹ Remarkably, this is despite recommending that “religious belief or activity” be included as a protected attribute.⁸²

With these kinds of views being submitted by “mainstream” human rights organisations, the concern among many Christians that same-sex marriage would ultimately curtail their right to religious freedom appears well-founded. If the state defines marriage as being the union of two people “regardless of the sex, sexual orientation or gender identity”, as Senator Hanson-Young’s bill is phrased, then this agenda to limit religious freedom will doubtless be extended to the freedom of individuals and organisations who hold beliefs about marriage and wish to act and speak in accordance with those beliefs.

religious right to discriminate’, *The Age*, <http://www.theage.com.au/national/holy-unrest-over-religious-right-to-discriminate-20110212-1areb.html>.

⁷² David Marr & Jim Wallace: *Gays and Lesbians Do Not Belong in the Classroom*, <http://play.sydneyoperahouse.com/index.php/media/1535-gays-and-lesbians-do-not-belong-in-the-classroom.html>.

⁷³ Garrett Bithell (September 30, 2011), ‘Marr’s Attack’, *Gay News Network*, <http://gaynewsnetwork.com.au/feature/feature/1701-marr-s-attack.html>.

⁷⁴ Garrett Bithell (September 30, 2011), ‘Marr’s Attack’, *Gay News Network*, <http://gaynewsnetwork.com.au/feature/feature/1701-marr-s-attack.html>.

⁷⁵ Submissions published on the Attorney-General’s website: http://www.ema.gov.au/www/agd/agd.nsf/Page/Humanrightsandanti-discrimination_AustraliasHumanRightsFramework_ConsolidationofCommonwealthAnti-DiscriminationLaws.

⁷⁶ Discrimination Law Experts’ Group (13 December, 2011), Submission, Recommendation 6, p 4.

⁷⁷ Discrimination Law Experts’ Group (13 December, 2011), Submission, p 16.

⁷⁸ Equality Rights Alliance (December 19, 2011), Submission, Recommendation 20, p 3; also paragraph 22, p 20.

⁷⁹ Organisation Intersex International Australian Limited, Recommendation 27, pp 4-5.

⁸⁰ Human Rights Law Centre (January 2012), ‘Realising the Right to Equality’, pp 40-41.

⁸¹ Human Rights Law Centre (January 2012), ‘Realising the Right to Equality’, p 39.

⁸² Human Rights Law Centre (January 2012), ‘Realising the Right to Equality’, Recommendation 11, p 4.

Despite assurances from Mr Wilkie and others, Christians and churches have every reason to remain concerned that religious freedom, and with it freedom of conscience, will be eroded.

Examples of same-sex marriage infringing religious freedom

In jurisdictions that have legislated for same-sex marriage, freedom of conscience is already coming into conflict with marriage laws.

Canada

Canada redefined marriage in June 2005 under then Prime Minister Paul Martin.

In the same year, Saskatchewan marriage commissioner Orville Nichols refused to perform a wedding for two men. Taken to court, it was declared that he did not have the right to refuse to perform the wedding, and he was ordered to pay \$2,500 to one of the men. In July 2009, Nichols lost his appeal, with Justice McMurty ruling that the Saskatchewan Human Rights Commission had correctly “established discrimination” and that:

*accommodation of Mr. Nichols’ religious beliefs was not required.*⁸³

In 2011, the Saskatchewan Court of Appeal rejected proposed amendments from the Saskatchewan government that would have allowed commissioners such as Mr Nichols to refuse to marry same-sex couples for reasons of conscience.⁸⁴ One of the proposals was that only those commissioners who were employed before the law changed to allow same-sex couples to marry would be exempt; this proposal was also dismissed. The Court of Appeal said that giving marriage commissioners the ability to refuse to marry same-sex couples would be “contrary to fundamental principles of equality in a democratic society”.⁸⁵

It appears that same-sex marriage legislation ensures that even fundamental rights such as religious freedom, guaranteed under the International Covenant on Civil and Political Rights and Canada’s Human Rights Charter, are not safe.

The United States of America

Marriage has been redefined in seven of the 50 US states, starting with Massachusetts in 2004, as well as the District of Columbia. Washington State and Maryland have passed laws allowing same-sex marriage, but the laws are not yet active. New Jersey passed a bill redefining marriage that Governor Chris Christie later vetoed.⁸⁶

California allowed same-sex marriages for a brief period in 2008 before a referendum (“Proposition 8”) amended to Californian Constitution to ensure that only marriage between a man and a woman is recognised in that state. Proposition 8 is currently being challenged in the courts.

Particularly in these states, but also throughout the country, freedom of conscience is being limited for religious organisations or individuals who support traditional marriage.

In 2006, Catholic Charities in Boston were forced to close because of a law that would have obliged the adoption agency to place children with same-sex couples. The redefinition of marriage in

⁸³ CBC News (July 23, 2009), ‘Commissioner who refused to marry same-sex couple loses appeal’, *CBC News*, <http://www.cbc.ca/news/canada/saskatchewan/story/2009/07/23/marriage-ruling.html>.

⁸⁴ *Re Marriage Commissioners Appointed Under The Marriage Act* (2011) SKCA 3.

⁸⁵ *Re Marriage Commissioners Appointed Under The Marriage Act* (2011) SKCA 3, [161].

⁸⁶ Kate Zernike (February 17, 2012), ‘Christie Keeps His Promise to Veto Gay Marriage Bill’, *The New York Times*, <http://www.nytimes.com/2012/02/18/nyregion/christie-vetoes-gay-marriage-bill.html>.

Massachusetts meant that Catholic Charities would have had to go against clear Catholic teaching. As one observer stated, “the only losers are the kids”.⁸⁷

In Iowa, where the state’s Supreme Court redefined marriage in 2009, a baker was threatened with legal action when she declined to provide a wedding cake for two women. The women have publicly called her a “bigot” for her decision.⁸⁸

In Vermont, which also redefined marriage in 2009, two women are suing an inn run by devout Catholics because they declined to host their wedding reception.⁸⁹

In New Mexico, which still defines marriage as a man-woman union, photographer Elaine Huguenin was found guilty of unlawful discrimination by the New Mexico Human Rights Commission when she declined to photograph a “commitment ceremony” for two women. Huguenin, who runs her photography business from home, was ordered to pay over \$6,000.⁹⁰

New Jersey has also not redefined marriage, but does have a same-sex civil unions scheme. Ocean Grove Camp Meeting Association, a Christian retreat, refused a request from two women to use the resort for a civil union ceremony. Judge Solomon A Metzger ruled that it was not a religious freedom issue, and that “some intrusion into religious freedom” is necessary to “balance” other goals.⁹¹

Jim and Beth Walder of Illinois are also facing a lawsuit for refusing to host a civil union ceremony at their bed and breakfast.⁹²

The Netherlands

The Netherlands redefined marriage through its legislature in 2001. Until recently, registrars who did not wish to carry out same-sex marriages for religious reasons were legally able to refuse. However, in November, 2011, the Dutch Parliament voted to amend the law to force civil servants to conduct same-sex marriages.⁹³ On the same day, Christian civil servant Wim Pijl was fired by his employer, the city of The Hague, simply for stating his desire not to perform same-sex marriages.⁹⁴ According to one Dutch politician, Pijl, who did officiate at a same-sex wedding, was not dismissed “because he

⁸⁷ The Washington Times (March 14, 2006), ‘Catholic Charities pulls out of adoptions’, *The Washington Times*, <http://www.washingtontimes.com/news/2006/mar/14/20060314-010603-3657r/>.

⁸⁸ Kathleen Gilbert (November 16, 2011), ‘Lesbian couple mulls action against Christian wedding cake baker’, *LifeSiteNews.com*, <http://www.lifesitenews.com/news/lesbian-couple-mulls-action-against-christian-wedding-cake-baker/>.

⁸⁹ Katie Zezima (July 19, 2011), ‘Couple Sues a Vermont Inn for Rejecting Gay Wedding’, *The New York Times*, <http://www.nytimes.com/2011/07/20/us/20vermont.html>.

⁹⁰ Sara Israelson-Hartley (February 12, 2012), ‘Colliding causes: Gay rights and religious liberty’, *Deseret News*, <http://www.deseretnews.com/article/700224421/Gay-Liberty.html>.

⁹¹ Ben Johnson (January 13, 2012), ‘Judge Rules Christian facility cannot ban same-sex civil union ceremony on its own premises’, *LifeSiteNews.com*, <http://www.lifesitenews.com/news/judge-rules-christian-facility-cannot-ban-same-sex-civil-union-ceremony-on/>.

⁹² Kathleen Gilbert (March 7, 2011), ‘Gay couple files complaint against Christian B&B owners for refusing civil union ceremony’, *LifeSiteNews.com*, <http://www.lifesitenews.com/news/gay-couple-files-complaint-against-christian-bb-owners-for-refusing-civil-u/>.

⁹³ Dutch News (November 15, 2011), ‘MPs vote to stop civil servants refusing to carry out gay weddings’, *DutchNews.nl*, http://www.dutchnews.nl/news/archives/2011/11/mps_vote_against_gay_marriage.php.

⁹⁴ Stefan J Bos (November 15, 2011), ‘Dutch Christian Civil Servant Fired For Opposing Gay Marriage’, *BosNewsLife*, <http://www.bosnewslife.com/19058-news-alert-dutch-christian-civil-servant-fired-for-opposing-gay-marriage>.

concretely refused to preside over a gay marriage, but because he expressed his views on same-sex marriage".⁹⁵

Consequences of same-sex marriage for education

A large number of educational organisations, including schools, colleges, and universities, are run by religious groups. The freedom of these organisations to hire staff who adhere to the ethos and beliefs and purpose of the school is already in jeopardy, as the anti-discrimination consolidation submissions show. The danger to freedom of conscience goes further than that, however. A school's freedom to teach about the traditional understanding of the family unit, about mothers and fathers, about marriage and sex, in accordance with its own principles, is severely threatened by the redefinition of marriage.

United Kingdom

In the United Kingdom, education secretary Michael Gove is at the centre of controversy surrounding how faith-based schools can discuss sex education. Gove is being attacked by the Trade Unions Congress, among others, for his comments that provisions in the Equality Act 2010 "do not extend to the content of the curriculum", so material used in "sex and relationship education lessons... will not be subject to the discrimination provisions of the act".⁹⁶ Gove is essentially being attacked for arguing that schools can choose what to teach.

A Department for Education document is proposing "transgender equality" be taught in the curriculum to children as young as five.⁹⁷ The document aims to promote awareness of "gender variant children".⁹⁸

United States – Massachusetts

In Massachusetts, parents are unable to remove their children from sex education classes that teach views on sexuality that differ from their own. Since legalising same-sex marriage in 2004, teachers are increasingly likely to normalise homosexuality in sex education, and teach its equivalence to heterosexuality. In a National Public Radio interview, eighth-grade teacher Deb Allen, a lesbian, said "[i]n my mind, I know that, 'OK, this is legal now.' If somebody wants to challenge me, I'll say 'Give me a break. It's legal now.'"⁹⁹

Allen said she would teach her eighth graders "different kinds of intercourse":

⁹⁵ Stefan J Bos (November 16, 2011), 'Dutch Town Urk Supports Officials Opposing Gay Marriage', *BosNewsLife*, <http://www.bosnewslife.com/19075-dutch-town-urk-supports-officials-opposing-gay-marriage>.

⁹⁶ Jamie Doward (February 18, 2012), "Anti-gay' book puts Gove at centre of faith school teaching row", *The Guardian*, http://www.guardian.co.uk/education/2012/feb/18/anti-gay-book-gove-row?CMP=tw_t_gu.

⁹⁷ Jack Doyle (December 9, 2011), 'Transgender lessons for pupils aged five: Classes will 'overload children with adult issues', say critics', *Daily Mail*, <http://www.dailymail.co.uk/news/article-2071915/Transgender-lessons-pupils-aged-Classes-overload-children-adult-issues-say-critics.html>.

⁹⁸ Home Office (December 2011), *Advancing transgender equality: a plan for action*, <http://www.homeoffice.gov.uk/publications/equalities/lgbt-equality-publications/transgender-action-plan?view=Binary>, p 6.

⁹⁹ National Public Radio (September 13, 2004), *All Things Considered*, transcript available here: http://www.massresistance.org/docs/a8a/general/NPR_091304.htm.

*[I will ask], Can a woman and a woman have vaginal intercourse, and they will all say no. And I'll say, 'Hold it. Of course, they can. They can use a sex toy. They could use' – and we talk – and we discuss that. So the answer there is yes.*¹⁰⁰

The appropriateness of this content for 12 and 13-year-olds aside, parents should be able to know what their children are being taught. But in Massachusetts, the courts have dismissed a suit filed by a parent arguing that he has that right.

Two families whose kindergarten-aged children were being taught from a book called “King and King”, which promotes same-sex marriage, sued for the right to exclude their young children from those classes. Their case was dismissed by courts up to the US Supreme Court.¹⁰¹ Federal Judge Mark Wolf said of the parents’ desire to opt out of those classes that such a decision “could... have a damaging effect on those students [gay, lesbian, and children of same-sex parents]”.¹⁰²

The lesson at point here is that where same-sex marriage is legalised it appears to remove the right of other people to determine what they teach their children as right or wrong, or even what they think is right or wrong.

United States – elsewhere

In California, first-graders were visited by Eric Ross, the author of the children’s book, “My Uncle’s Wedding”, promoting same-sex marriage. Ross, who read the book to the children, said “I wish all schools had a more inclusive curriculum that didn’t sensor history or current events” [*sic*].¹⁰³

In Connecticut, principal of Hartford Public High School Adam Johnson, responding to controversy surrounding a school play promoting homosexuality, said “[t]his is as important of a topic to discuss as anything in math, anything in social studies” [*sic*].¹⁰⁴

Canada

In Ontario, the Toronto District School Board (TDSB) has imposed similar restraints on the freedom of parents as those imposed in Massachusetts, forbidding parents from opting their children out of classes which treat sexuality in ways contrary to the core beliefs of parents.

In their document *Challenging Homophobia and Heterosexism*, the TDSB says “this freedom [i.e. from religious discrimination] is not absolute” and says:

*if a parent asks for his or her child to be exempted for any discussions on LGBTQ family issues as a religious accommodation, this request cannot be made because it violates the Human Rights Policy.*¹⁰⁵

¹⁰⁰ National Public Radio (September 13, 2004), *All Things Considered*, transcript available here: http://www.massresistance.org/docs/a8a/general/NPR_091304.htm.

¹⁰¹ Ian B Murphy (October 7, 2008), ‘Public school lawsuit runs out of federal appeals’, *MetroWest Daily News*, http://www.metrowestdailynews.com/state/x282364097/Public-school-lawsuit-runs-out-of-federal-appeals?zc_p=0.

¹⁰² *David Parker et al v William Hurley et al* (2007), United States District Court, District of Massachusetts, <http://pacer.mad.uscourts.gov/dc/cgi-bin/recentops.pl?filename=wolf/pdf/parker+opinion+mlw.pdf>, p 7.

¹⁰³ The Edge (May 26, 2011), ‘First Grader in San Francisco Learn About Marriage Equality for Harvey Milk Day’, *The Edge*, <http://www.edgeonthenet.com/index.php?ch=style&sc=&sc3=&id=120081>.

¹⁰⁴ Vanessa De La Torre (October 16, 2011), *Courant*, <http://www.courant.com/community/hartford/hc-hartford-zanna-1015-20111014,0,7757340.story>.

¹⁰⁵ Toronto District School Board (2011), *Challenging Homophobia and Heterosexism: A K-12 Curriculum Resource Guide*,

Not only is the TDSB trampling parents' freedom of conscience, it is also trampling that of teachers. It asks "Can Teachers Seek Accommodation From Teaching Materials That May Contradict Their Religious Beliefs?" and firmly answers "no", saying that "[t]eachers refusing to create an inclusive classroom that is safe and supportive for all students would create a poisoned learning environment".¹⁰⁶ It does not require endorsement of a lifestyle to encourage inclusiveness and safety in a classroom.

The Toronto curriculum, designed for K-12 students, is particularly aggressive in that it goes beyond highlighting homosexual issues and urges teachers to encourage children to engage in social action on the issue, such as by participating in homosexual pride parades.¹⁰⁷

Elsewhere in Canada the situation is just as onerous. New teachers in Ontario will be required to undergo mandatory "training in sexual orientation and gender diversity", according to Liberal MPP Glen Murray.¹⁰⁸

In Alberta, efforts have been made to clamp down on families and Christian schools teaching on sexuality. An assistant to Alberta's Education Minister Thomas Lukaszuk said

*Whatever the nature of schooling – homeschool, private school, Catholic school – we do not tolerate disrespect for differences.*¹⁰⁹

Clearly disrespect for differences in conscience or belief about sexuality, and how to discuss sexuality with children, is tolerated.

The assistant added that parents could "affirm the family's ideology in your family life, you just can't do it as part of your educational study and instruction".¹¹⁰ Since this time, the Alberta government has backtracked and clarified that parents who home educate their children will not have their rights infringed, however it has made no such clarification for religious schools, and parents remain concerned about the requirement that "all programs of study offered by Alberta schools must respect the Alberta Human Rights Act and the Charter of Rights and Freedoms".¹¹¹

Australia

Some educators in Australia are effectively seeking to normalise homosexuality under the guise of "anti-homophobia" campaigns. ACT Education Minister Andrew Barr opened an anti-homophobia

http://www.tdsb.on.ca/wwwdocuments/programs/Equity_in_Education/docs/Challenging%20Homophobia%20and%20Heterosexism%20Final%202011.pdf, p 10.

¹⁰⁶ Toronto District School Board (2011), *Challenging Homophobia and Heterosexism*, p 10.

¹⁰⁷ Toronto District School Board (2011), *Challenging Homophobia and Heterosexism*, pp 27, 55-56.

¹⁰⁸ Andrea Houston (December 19, 2011), 'New Ontario curriculum on sexuality and gender', *Xtra!*, http://www.xtra.ca/public/National/New_Ontario_curriculum_on_sexuality_and_gender-11269.aspx. See also Patrick B Craine (December 22, 2011), 'All Ontario teachers will be forced to undergo 'diversity' training by 2013: minister', *LifeSiteNews.com*, <http://www.lifesitenews.com/news/all-ontario-teachers-will-be-forced-to-undergo-diversity-training-by-2013-m/>.

¹⁰⁹ Patrick B Craine (February 23, 2012), 'Homeschooling families can't teach homosexual acts sinful in class says Alberta gvmt', *LifeSiteNews.com*, <http://www.lifesitenews.com/news/exclusive-homeschooling-families-cant-teach-homosexuality-a-sin-in-class-sa>.

¹¹⁰ Patrick B Craine (February 23, 2012), 'Homeschooling families can't teach homosexual acts sinful in class says Alberta gvmt', *LifeSiteNews.com*.

¹¹¹ Karen Kleiss (March 15, 2012), 'Alberta bows to home-schoolers' pressure on teaching religion', *Vancouver Sun*, <http://www.vancouversun.com/news/Alberta+bows+home+schoolers+pressure+teaching+religion/6309429/story.html>.

art display at a Canberra school, at which one student's poster read "Love is not dependent on gender, what's your agenda?"¹¹²

In another Canberra incident, a class was divided according to their support or opposition to same-sex marriage.¹¹³

Although no one would object to the condemnation of homophobia, promoting homosexuality in this fashion is something many parents would not be comfortable with. Redefining marriage will increase these incidents, as schools would be required to teach the equivalency of same-sex and opposite-sex relationships.

The principal public school teacher's union, the Australia Education Union, actively promotes homosexuality among its members and in schools. Its policy document, *Policy on Gay, Lesbian, Bisexual, Transgender and Intersex People*, says it is committed to fighting heterosexism, which involves challenging "[t]he assumption that heterosexual sex and relationships are 'natural' or 'normal'".¹¹⁴

Consequences for education – conclusion

Besides the examples of normalisation of homosexuality and same-sex marriage in schools discussed above, some homosexuals admit openly that their aim is to indoctrinate school children.

The prominent North American homosexual newspaper *Queerty* featured an article by Daniel Villarreal titled:

Can We Please Just Start Admitting That We Do Actually Want To Indoctrinate Kids?¹¹⁵

In this article the author proclaimed that "we" want to "deliberately educate children to accept queer sexuality as normal". He taunts: "Recruiting children? You bet we are." His expletive-laden article also included pronouncements such as "I would very much like for many of these young boys to grow up and start f***** men".¹¹⁶

His article is summarised with this sentence:

*I and a lot of other people want to indoctrinate, recruit, teach, and expose children to queer sexuality AND THERE'S NOTHING WRONG WITH THAT.*¹¹⁷

This is not a fringe position. There are indeed "a lot of other people" sharing this view, as evidenced by the curricula and the decisions regarding what schools must teach outlined above. The editor of another prominent homosexual newspaper, Robin Perelle, told man-woman marriage supporters they were "clinging to an outdated moral code".¹¹⁸

¹¹² Jim Wallace (December 3, 2011), 'It's wrong to promote a dangerous lifestyle', *The Australian*, <http://www.theaustralian.com.au/national-affairs/opinion/its-wrong-to-promote-a-dangerous-lifestyle/story-e6frgd0x-1226212590213>.

¹¹³ Wallace (December 3, 2011), 'It's wrong to promote a dangerous lifestyle', *The Australian*.

¹¹⁴ Australian Education Union (2006), *Policy on Gay, Lesbian, Bisexual, Transgender and Intersex People*, http://www.aeuvic.asn.au/gay_lesbian_bisexual_transgender_and_intersex_people_2006.pdf, p 3.

¹¹⁵ Daniel Villarreal (May 12, 2011), 'Can We Please Just Start Admitting That We Do Actually Want To Indoctrinate Kids?', *Queerty*, <http://www.queerty.com/can-we-please-just-start-admitting-that-we-do-actually-want-to-indoctrinate-kids-20110512/>.

¹¹⁶ Villarreal (May 12, 2011), 'Can We Please Just Start Admitting That We Do Actually Want To Indoctrinate Kids?', *Queerty*.

¹¹⁷ Villarreal (May 12, 2011), 'Can We Please Just Start Admitting That We Do Actually Want To Indoctrinate Kids?', *Queerty*. Emphasis added.

¹¹⁸ Robin Perelle (October 20, 2011), 'Left behind', *Xtra!*, http://www.xtra.ca/public/Vancouver/Left_behind-10922.aspx.

Supporters of the historical definition of marriage were told by Perelle:

*your outdated morals are no longer acceptable, and we will teach your kids the new norms.*¹¹⁹

These “outdated morals” are still accepted by the majority of the world’s religions and adhered to by the majority of the world’s people today, including the great majority of Australians. Any support of homosexuality is clearly informed by a wish to be tolerant of it and inclusive of homosexual people, not a wish to embrace it or see their children embrace it.

Increasing marginalisation of traditional marriage supporters

One argument used in favour of redefining marriage is that it will result in a more inclusive and fairer society, which supposedly currently subjects homosexuals to persecution and bullying.

ACL deplores any unkindness and bullying of same-sex attracted people. It supported the removal of legal discrimination in federal law in 2008, discussed below.

However, it is duplicitous to claim that redefining marriage will advance this laudable aim. In fact, it would sharpen and embitter division. Same-sex attracted people are now widely accepted in society, and animosity directed towards homosexuals is decreasing. This is a separate issue from same-sex marriage, and those who unjustly bully homosexuals will, unfortunately, likely continue to do so even if marriage is redefined.

In contrast, Christian and other religious groups are facing an increasingly hostile environment.¹²⁰ While far from being persecuted in the manner that Christians are in other parts of the world, or indeed that homosexuals were half a century ago, Christians are increasingly marginalised, particularly when it comes to their teaching on sexuality.

Defining marriage in law as something contrary to the teaching of most religious traditions will increase the marginalisation of religious people.

In the current review of anti-discrimination legislation, the Government is planning to create more protection for “sexual orientation and gender identity” and define it as a “protected attribute” akin to race or sex.¹²¹

In this environment, Christian teaching on sexuality is increasingly being targeted. Comments or opinions which are “offensive” to homosexuals are successfully prosecuted.

Washington Post writer Jacqueline L Salmon acknowledges this in a 2009 article in which she states:

Faith organizations and individuals who view homosexuality as sinful and refuse to provide services to gay people are losing a growing number of legal battles that they say are costing them their religious freedom... [anti-discrimination] laws have created a clash between the

¹¹⁹ Perelle (October 20, 2011), ‘Left behind’, *Xtra!*. Emphasis added.

¹²⁰ See, for example, the comments of Baroness Warsi – a Muslim – warning against “militant secularisation”, and decrying the sidelining, marginalisation, and downgrading of Christianity: Baroness Warsi (February 13, 2012), ‘We stand side by side with the Pope in fighting for faith’, *The Telegraph*, <http://www.telegraph.co.uk/news/religion/9080441/We-stand-side-by-side-with-the-Pope-in-fighting-for-faith.html>.

¹²¹ Attorney-General’s Department (September 2011), *Consolidation of Commonwealth Anti-Discrimination Laws – Discussion Paper*, pp 6, 7, 21-22.

*right to be free from discrimination and the right to freedom of religion, religious groups said, with faith losing.*¹²²

In addition to the cases cited above, there are many more examples of religious freedom being stifled in the debate about homosexuality, especially in the context of same-sex marriage. In 2011, a British man was demoted for “gross misconduct” after expressing views opposing same-sex weddings in churches on his personal Facebook page in his own time. Earlier in 2011, a respected Canadian sports journalist was dismissed by the television station Sportsnet after making a Twitter comment in support of traditional marriage.

In response to the latter incident and related issues, David Menzies of the Huffington Post in Canada said:

*It appears that tolerance is apparently a one-way street. If someone has problems with gay matrimony, that isn't a matter of having a differing viewpoint. Rather, it's apparently just cause for termination.*¹²³

He added that “the whole gay issue seems to be less about equal rights and more about special rights these days.”¹²⁴

When the United States Supreme Court ruled in a 5-4 decision that the University of California’s Hastings College of Law was able to refuse to recognise a Christian group that regarded homosexuality as against Biblical teaching, Justice Samuel Alito made the dissenting statement:

*Our proudest boast of our free speech jurisprudence is that we protect the freedom [to] express ‘the thought that we hate’ ... Today’s decision rests on a very different principle: **no freedom of expression that offends prevailing standards of political correctness in our country’s institutions of higher learning.***¹²⁵

These are but a few of numerous cases around the world where Christians who adhere to traditional Christian teaching on sexuality are facing increasing threat to their religious freedom. Many more cases are included in Appendix 1.

These cases are not anomalies. They are growing in severity and frequency. They are an inevitable side-effect of the redefinition of marriage, for when the law declares marriage to be the union of any two persons, it is necessarily declaring the traditional definition obsolete. As Girgis, George, and Anderson argue:

*Because the state’s value-neutrality on this question... is impossible if there is to be any marriage law at all, abolishing the [man-woman] understanding of marriage would imply that committed same-sex and opposite-sex romantic unions are equivalently real marriages. **The state would thus be forced to view [man-woman]-marriage supporters as bigots who make groundless and invidious distinctions.***¹²⁶

¹²² Jacqueline L Salmon (April 10, 2009), ‘Faith Groups Increasingly Losing Legal Battles Over Gay Rights’, *Washington Post*, <http://www.washingtonpost.com/wp-dyn/content/article/2009/04/09/AR2009040904063.html>.

¹²³ David Menzies (March 8, 2012), ‘You Can’t Hide Behind the Gay Flag, Brian Burke’, *The Huffington Post Canada*, http://www.huffingtonpost.ca/david-menzies/brian-burke_b_1331929.html.

¹²⁴ Menzies (March 8, 2012), ‘You Can’t Hide Behind the Gay Flag, Brian Burke’, *The Huffington Post Canada*.

¹²⁵ CBS News (June 28, 2010), ‘Court: Group Can’t Bar Gays, Get Univ. Funds’, *CBS News*, <http://www.cbsnews.com/stories/2010/06/28/national/main6626819.shtml>. Emphasis added.

¹²⁶ Girgis, George, and Anderson (2010), *What is Marriage?*, Harvard Journal of Law and Public Policy pp 263-264. Emphasis added.

Consequences of same-sex marriage for marriage itself – the numeracy requirement

Arguments for same-sex marriage centre around notions of equality, equal love, and discrimination. Equality for same-sex couples, it is argued, requires recognition of their relationships as equal to opposite-sex relationships. To exclude a particular type of couple from the legal definition of marriage is unjust discrimination.

If these arguments were used to broaden the range of relationships which may be included, and if marriage were to be granted on the basis of love alone, there would be no basis on which to refuse it to any type of relationship, regardless number, or mixture of people.

Polygamy

Polygamists have fought for legal recognition of their marriages in the past. It was an 1866 polygamy case in which our modern legal definition of marriage, now enshrined in the *Marriage Act*, was first articulated in the common law.¹²⁷ That definition is “the union of a man and a woman to the exclusion of all others, voluntarily entered into for life”.

The recent trend to same-sex marriage in some jurisdictions has predictably resulted in an attempt by practising polygamists to have their multiple marriages legally acknowledged also.

In Canada, a group of people from Bountiful, British Columbia, sued the province for recognition of their polygamous marriages. The case used as a central argument the 2003 *Halpern v Canada* decision of the Ontario Court of Appeals, which ruled that the man-woman definition of marriage violated the dignity of same-sex couples and was discriminatory according to Canada’s Charter of Rights.¹²⁸ The polygamists in this case argued that:

*this new definition discriminates against them because it continues to insist on monogamy in the same way that the previous definition insisted on both monogamy and heterosexuality.*¹²⁹

In dismissing the case, Chief Justice Bauman declared that the case was “essentially about harm”, specifically to women and children, as well as to society and marriage itself.¹³⁰ In an indication the issue might not end there, the decision was criticised by one of the lawyers arguing against British Columbia, who said

*Three consenting adults who are causing no harm ought not to be committing a crime.*¹³¹

In the United States, Kody Brown and his four “wives” came to national attention in the reality television show “Sister Wives”. Mr Brown, a strict Mormon, is arguing that his polygamous marriage should not be illegal, based on *Lawrence v Texas*, the US Supreme Court case which struck down sodomy laws in Texas, and along with it 13 other states, as unconstitutional intrusions into private matters.¹³²

¹²⁷ *Hyde v Hyde and Woodmansee* (1866) [L.R.] 1 P&D 130, per Lord Penzance: “Marriage as understood in Christendom is the voluntary union for life of one man and one woman, to the exclusion of all others.”

¹²⁸ *Halpern v Canada (Attorney general)*, 2003 CanLII 26403 (ON CA), <http://canlii.ca/t/6v7k>, [108], [142].

¹²⁹ Neil Addison (November 30, 2011), ‘Polygamy in Canada: a case of double standards’, *The Guardian*, <http://www.guardian.co.uk/commentisfree/belief/2011/nov/30/heterosexuality-canada-law-monogamy-polygamy>.

¹³⁰ *Reference re: Section 293 of the Criminal Code of Canada*, 2011 BCSC 1588, <http://canlii.ca/t/fnzqf>, [5].

¹³¹ CBC News (November 23, 2011), ‘Canada’s polygamy laws upheld by B.C. Supreme Court’, *CBC News*, <http://www.cbc.ca/news/canada/british-columbia/story/2011/11/23/bc-polygamy-ruling-supreme-court.html>.

¹³² *Lawrence v Texas* (2003), 539 US 558.

Mr Brown's attorney Professor Jonathan Turley said that the fundamental reasoning restricting polygamy is "outdated and has been swept away by cases like Lawrence". Addressing the usual concern that polygamous households may involve abuse, domination, or repression, Professor Turley added that "there are many religious practices in monogamous families that many believe as obnoxious and patriarchal".¹³³

Turley's comments challenge the strength of Chief Justice Bauman's argument in the Bountiful case. Chief Justice Bauman's understanding of marriage as an institution limited to two people is, in Professor Turley's view, "outdated", much as the traditional understanding of marriage is regarded as "outdated" by same-sex marriage advocates. Chief Justice Bauman's concern about the harm caused by polygamy is also at odds with the views of Professor Turley and many polygamists who do not believe polygamy is harmful.

Polyamory

Polygamists are but one of a range of groups who would be left out of a redefinition of marriage that was limited to "two people". Polygamy is specifically one man having multiple marriages to different women, in which the women have no relationship with each other. It is almost always religious, being widespread in Islam and, while no longer as common as it once was, persists in conservative Mormon communities such as Bountiful.

There are other sexual arrangements of multiple partners which have no basis in religion, a relationship type usually referred to as "polyamory". Polygyny describes one woman with multiple husbands. The essential requirement of exclusivity is also challenged as the concept of an "open marriage" is finding growing support. A number of celebrities have been public about their involvement in open marriages, including actors Will Smith¹³⁴ and Tilda Swinton.¹³⁵ Prominent sex columnist Dan Savage¹³⁶ advocates "non-monogamy" in marriages.¹³⁷ However, marriage by definition is not "open".

Polyamory is a broad term to describe relationships involving more than two people. Three, four, and sometimes more people may be involved intimately with each other or with a common individual, and the number may be made up of males, females, and those identifying neither as male or female. Often, but not always, one or more members are bisexual. The groups may be childless or may raise children that result from the relationship or children from previous relationships of one or more of the members.

Awareness of polyamory is increasing along with awareness of homosexuality. There are an estimated 500,000 polyamorous relationships in the United States,¹³⁸ many advocating for legal recognition of the relationship. Polyamorous groups have been involved in the Sydney Gay and Lesbian Mardi Gras for several years, and there was controversy in the 2012 parade when the

¹³³ John Schwartz (July 11, 2011), 'Polygamist, Under Scrutiny in Utah, Plans Suit to Challenge Law', *The New York Times*, <http://www.nytimes.com/2011/07/12/us/12polygamy.html>.

¹³⁴ Simon Reynolds (July 16, 2008), 'Will Smith: 'I have an open marriage'', *Digital Spy*, <http://www.digitalspy.com.au/showbiz/news/a111657/will-smith-i-have-an-open-marriage.html>.

¹³⁵ Alison Boshoff (February 14, 2008), 'Tilda Swinton: Her toyboy, elderly lover and an intriguing ménage a trois', *Daily Mail*, <http://www.dailymail.co.uk/femail/article-513967/Tilda-Swinton-Her-toyboy-elderly-lover-intriguing-m-nage-trois.html>.

¹³⁶ Dan Savage, *Savage Love*, column in *The Stranger*.

¹³⁷ Savage's view is best portrayed in Mark Oppenheimer (June 30, 2011), 'Married With Infidelities', *The New York Times*, <http://www.nytimes.com/2011/07/03/magazine/infidelity-will-keep-us-together.html?pagewanted=1& r=1>.

¹³⁸ Jessica Bennett (July 28, 2009), 'Only You. And You. And You.', *The Daily Beast*, <http://www.thedailybeast.com/newsweek/2009/07/28/only-you-and-you-and-you.html>.

organisers refused to allow the polyamorous float to participate.¹³⁹ The very first same-sex wedding performed in the United States involved the director of the Unitarian Universalist Funding Program,¹⁴⁰ which is closely associated with the Unitarian Universalists for Polyamory Awareness.¹⁴¹

The polyamory movement has traction in Australia as well. Ean Higgins made the following comment in *The Australian*:

*The [polyamorist] agenda now is to seek recognition and the removal of prejudice... perhaps legislation to grant them civil unions and even legalised polyamorous marriage.*¹⁴²

Higgins asks whether:

*those who support gay marriage on the basis of equal rights are hypocritical in not being prepared to even discuss the possibility of committed polyamorists being eligible.*¹⁴³

Psychologist Nina Melksham says the polyamory community has “always been supportive of the values of equality and acceptance” and, regarding the possibility of marriage recognition for polyamorists, says “any change that moves us towards a more loving, open and accepting society can only be a positive”.¹⁴⁴

Niko Antalfy, a sociologist at Macquarie University and a practising polyamorist, calls polyamory “the sweet result of modernity” and claims that monogamy is “neither natural nor common and has never been”.¹⁴⁵

Hardly “sweet”, polyamory is no more inconsistent with the definition of marriage than a definition which includes same-sex relationships. Altering the definition of marriage to include same-sex relationships, on the basis of equality and non-discrimination, would create a vulnerability in the institution of marriage to further charges of discrimination by other minority sexualities.

Australian Katrina Fox, a freelance writer who has “written extensively for the gay and lesbian media locally and internationally for more than a decade and is the editor of three books on sex, gender and sexuality diversity”,¹⁴⁶ penned an article for the mainstream opinion website *The Drum* entitled “Marriage needs redefining”.¹⁴⁷ She argued:

*Surely it makes more sense [than just legalising same-sex marriage] to expand the definition of marriage to include a range of relationship models including polyamory, instead of holding up monogamy as the gold – indeed only – standard.*¹⁴⁸

¹³⁹ Matt Akersten (February 4, 2012), ‘Polyamorists defend parade spot’, *SameSame*, <http://www.samesame.com.au/news/local/7953/Polyamorists-defend-parade-spot.htm>.

¹⁴⁰ New York Times Style (May 23, 2004), ‘Weddings/Celebrations; Hillary Goodridge, Julie Goodridge’, *The New York Times*, <http://www.nytimes.com/2004/05/23/style/weddings-celebrations-hillary-goodridge-julie-goodridge.html>.

¹⁴¹ Unitarian Universalist Association of Congregations, ‘Related Organizations’, <http://www.uua.org/directory/organizations/details.php?id=351111>.

¹⁴² Ean Higgins (December 10, 2011), ‘Three in marriage bed more of a good thing’, *The Australian*, <http://www.theaustralian.com.au/news/features/three-in-marriage-bed-more-of-a-good-thing/story-e6frg6z6-1226218569577>.

¹⁴³ Higgins (December 10, 2011), ‘Three in marriage bed more of a good thing’, *The Australian*.

¹⁴⁴ Higgins (December 10, 2011), ‘Three in marriage bed more of a good thing’, *The Australian*.

¹⁴⁵ Higgins (December 10, 2011), ‘Three in marriage bed more of a good thing’, *The Australian*.

¹⁴⁶ ABC, Katrina Fox, *The Drum*: <http://www.abc.net.au/unleashed/katrina-fox-32758.html>.

¹⁴⁷ Katrina Fox (March 2, 2011), ‘Marriage needs redefining’, *The Drum*, <http://www.abc.net.au/unleashed/44576.html>

¹⁴⁸ Fox (March 2, 2011), ‘Marriage needs redefining’, *The Drum*.

The Netherlands

There is precedent for formal recognition of polyamorous groupings. In The Netherlands – which, not insignificantly, was the first country to redefine marriage – legal recognition of a threesome was given to Victor de Bruijn and his two “brides”. The women are bisexual and are sexually active with each other as well as with Mr De Bruijn. Not technically a marriage, the relationship is a *samenlevingscontract* or “cohabitation contract”,¹⁴⁹ similar to what we might call a civil partnership.

As Stanley Kurtz writes in the *Weekly Standard*, the relationship is a “bisexual marriage”:

*If every sexual orientation has a right to construct its own form of marriage, then more changes are surely due. For what gay marriage is to homosexuality, group marriage is to bisexuality. The De Bruijn trio is the tip-off to the fact that a **connection between bisexuality and the drive for multipartner marriage has been developing for some time.***¹⁵⁰

Academic support for multiple marriage

The push from polygamous and polyamorous groups for legal recognition of their relationships is being actively championed by academics at prominent universities.

New York University Professor of Constitutional Law Kenji Yoshino, writing in the *Stanford Law Review* from the perspective of what he calls “bisexual erasure”, or the ignoring of bisexuals in the discussion about homosexual rights, comments:

*Many gays have rejected marriage in the same way that they have rejected monogamy, as exemplifying heterosexist (and sexist) norms.*¹⁵¹

Columbia University law professor Elizabeth Emens questions why people are willing to concede the sex requirement of marriage but hold on to the numeracy requirement. She asks:

*why mainstream culture seems to accept the numerosity requirement of marriage without question, even while so many people practice nonmonogamy either secretly (adultery) or serially (divorce and remarriage).*¹⁵²

Emens ponders how the “law might be used to *encourage* people to consider non-normative alternatives”,¹⁵³ and argues that:

*To the extent that at least some people may be happier in nonmonogamous arrangements, and others are not harmed by these arrangements, it would seem that **laws should be changed to allow people to find their own path among monogamy and its alternatives.***¹⁵⁴

Emens expands on Charles Krauthammer’s question:

¹⁴⁹ Stanley Kurtz (December 26, 2005), ‘Here Come the Brides’, *The Weekly Standard*, <http://www.weeklystandard.com/Content/Public/Articles/000/000/006/494pqobc.asp>.

¹⁵⁰ Kurtz (December 26, 2005), ‘Here Come the Brides’, *The Weekly Standard*. Emphasis added.

¹⁵¹ Kenji Yoshino (January 1, 2000), *The epistemic contract of bisexual erasure*, *Stanford Law Review*, <http://www.kenjiyoshino.com/articles/epistemiccontract.pdf>.

¹⁵² Elizabeth F Emens (2004), *Monogamy’s Law: Compulsory Monogamy and Polyamorous Existence*, Chicago Public Law and Legal Theory Working Paper No 58, The Law School, The University of Chicago.

¹⁵³ Emens (2004), *Monogamy’s Law*, University of Chicago. Emphasis added.

¹⁵⁴ Emens (2004), *Monogamy’s Law*, University of Chicago. Emphasis added.

*if marriage is redefined to include two men in love, on what possible principled grounds can it be denied to three men in love?*¹⁵⁵

She cites clinical psychologist Joy Singer who, writing for polyamory advocacy group Loving More, opines that societal acceptance of poly lifestyles is more difficult to attain than it was for homosexuals because “our message just hits too much ‘closer to home’ for the largely heterosexual, married opinion leaders who run the country”.¹⁵⁶

This paragraph from Emens is worth reproducing:

*In light of the above discussion, the rhetorical positioning of multi-party marriage at the end of the same-sex marriage slippery slope makes sense. The monogamous aspirations of the same-sex marriage campaigners fit well with the nation’s deep cultural commitment to the fantasy of monogamy and its equally trenchant resistance to recognizing monogamy’s frequent failure. The prevalence of the fantasy and the reality of nonmonogamy suggests, however, that the rhetorical slippery slope masks the real proximity of nonmonogamy to mainstream reality. And for polyamory’s practitioners, this paradox of prevalence stands in the way of mainstream social or political support.*¹⁵⁷

These comments are not the musings of sensationalist, anti-same-sex marriage scaremongers, but the professional opinions of legal experts writing in America’s highest institutions.

In Australia, La Trobe University academic Linda Kirman has said,

*I look forward to a society where any loving family, irrespective of how many people it includes or what sex they are, feels safe to be open about who they are.*¹⁵⁸

Consequences of same-sex marriage for marriage itself – deconstruction of marriage

Opinions such as those of Emens discussed above are cause enough for concern about what effects same-sex marriage might have on the institution of marriage itself. However, exploring the opinions of same-sex marriage advocates more deeply reveals that it is not merely the “expansion” of marriage to include same-sex couples, or polygamous and polyamorous relationships, that is sought. Rather, same-sex marriage is seen as a step to “weakening” marriage, so that it holds a devalued place in society and ultimately resulting in its total deconstruction.

The American group Beyond Marriage argues that marriage “is not the only worthy form of family or relationship, and it should not be legally and economically privileged above all others”.¹⁵⁹ They claim that:

*Recognizing the diverse households that already are the norm in this country is **simply a matter of expanding upon the various forms of legal recognition that already are available.***¹⁶⁰

¹⁵⁵ Charles Krauthammer (July 22, 1996), ‘When John and Jim Say, I Do’, *Time Magazine*, <http://www.time.com/time/magazine/article/0,9171,984875,00.html>.

¹⁵⁶ Joy Singer (pseudonym) (1996), *For Better or for Worse: How the Law and Politics of Gay Marriage Affects Polys*, Loving More, at 4, 5. Cited in Emens (2004), *Monogamy’s Law*, University of Chicago, p 375.

¹⁵⁷ Emens (2004), *Monogamy’s Law*, University of Chicago, p 378.

¹⁵⁸ Linda Kirman (no date), ‘Poly is the new gay’, La Trobe University, <http://www.latrobe.edu.au/news/articles/2010/opinion/poly-is-the-new-gay>.

¹⁵⁹ BeyondMarriage.org (July 26, 2006), *Beyond Same-Sex Marriage: A New Strategic Vision for All Our Families & Relationships*, http://beyondmarriage.org/full_statement.html. Emphasis added.

¹⁶⁰ BeyondMarriage.org (July 26, 2006), *Beyond Same-Sex Marriage*.

Their statement is signed by hundreds of scholars and other community advocates of the expansion of legal relationship recognition.

New York University professor Judith Stacey hopes that revising marriage would “promote a democratic, pluralist expansion of the meaning, practice, and politics of family life”.¹⁶¹ This would “supplant the destructive sanctity of *The Family*” and replace it with “*families*”, helping “family” to assume “varied, creative and adaptive contours”. Stacey imagines that friends might marry “without basing their bond on erotic or romantic attachment”, and that others would:

*question the dyadic limitations of Western marriage and seek some of the benefits of extended family life through small group marriages.*¹⁶²

Author and same-sex marriage advocate Victoria Brownworth shares this goal, admitting that traditional marriage supporters are correct to fear a weakening of marriage:

*[people are] correct... when [they state] that **allowing same-sex couples to marry will weaken the institution of marriage... it most certainly will do so, and that will make marriage a far better concept than it previously has been.***¹⁶³

Journalist and political essayist Ellen Willis similarly acknowledged that:

*conferring the legitimacy of marriage on homosexual relations will introduce **an implicit revolt against the institution into its very heart...** For starters, if homosexual marriage is OK, why not group marriage.*¹⁶⁴

Elizabeth Brake, philosopher at the University of Calgary, argues for legal recognition of relationships of “any size, gender, composition, and allocation of responsibilities”.¹⁶⁵ Brake believes the law should be used to “denormalize... heterosexual monogamy as a way of life”.¹⁶⁶

Ridding marriage of the requirement of exclusivity is not a position coming only from the left side of politics. Andrew Sullivan, a prominent American political commentator who describes himself as a politically conservative Roman Catholic, argues that:

*among gay male relationships, the [sexual] openness of the contract makes it more likely to survive than many heterosexual bonds... [T]here is more likely to be greater understanding of the need for extramarital outlets between two men than between a man and a woman.*¹⁶⁷

It is not surprising, then, that McWhirter and Mattison, themselves a same-sex couple, were able to comment after an extensive study:

¹⁶¹ Judith Stacey, *Gay and Lesbian Families: Queer Like Us*, in *All Our Families: New Policies for a New Century*, p 117, 128-29 (Mary Ann Mason, Arlene Skolnick & Stephen D Sugarman eds, Oxford U Press 1998), cited in Maggie Gallagher (2004), *(How) Will Gay Marriage Weaken Marriage as a Social Institution: A Reply to Andrew Koppelman*, *University of St. Thomas Law Journal*, Fall 2004, Volume 2, Number 1, p 62.

http://www.marriagedebate.com/pdf/UST_fall2004.pdf.

¹⁶² Stacey (1998), *Gay and Lesbian Families*, cited in Gallagher (2004), *(How) Will Gay Marriage Weaken Marriage*, p 62.

¹⁶³ Victoria A Brownworth (2004), *Something Borrowed, Something Blue: Is Marriage Right for Queers?*, in I DO/I DON'T: QUEERS ON MARRIAGE, pp 53, 58-59 (Greg Wharton & Ian Philips eds, 2004). Cited in Girgis, George, and Anderson (2010), *What is Marriage?*, p 277. Emphasis added.

¹⁶⁴ Ellen Willis (July 5, 2004), ‘Can Marriage Be Saved? A Forum’, *The Nation*, <http://blog.lib.umn.edu/puot0002/glb1001/can%20marriage%20be%20saved.pdf>, p 16.

¹⁶⁵ Girgis, George, and Anderson (2010), *What is Marriage?*, p 261.

¹⁶⁶ Elizabeth Brake (2010), *Minimal Marriage: What Political Liberalism Implies for Marriage Law*, 120 *Ethics* 302, 332. Cited in Girgis, George, and Anderson (2010), *What is Marriage?*, p 276-277.

¹⁶⁷ Andrew Sullivan (1996), *Virtually Normal*, Vintage Books, Division of Random House. Cited in Girgis, George, and Anderson (2010), *What is Marriage?*, p 277.

sexual monogamy is a passing stage of homophobia and... many homosexuals separate emotional fidelity and sexual exclusivity. What matters for male couples is emotional not physical faithfulness.

Nevertheless, exclusivity is an essential characteristic of marriage. It encourages strong and intact families and safeguards the best interests of children. It should not be altered, allowing further redefinition at a later date.

Same-sex marriage as a means to an end

Before concluding, it is worth noting that marriage is not the end goal of many same-sex activists. The end goal is that of social acceptance of homosexual people, and marriage is a means to this end. While social acceptance is a worthy goal, it is unacceptable that the definition of marriage be discarded in its pursuit.

Stanley Kurtz, citing Norwegian sociologist Rune Halvorsen, suggests that the low take-up of same-sex marriage or civil unions can be understood as a “collective protest against the expectations (presumably, monogamy), embodied in marriage”.¹⁶⁸ Halvorsen also argued that many of Norway’s homosexuals “imposed self-censorship during the debate, so as to hide their opposition to marriage itself”.¹⁶⁹

Halvorsen and Danish social theorist Henning Bech argue that the “conservative case” for redefining marriage has been rejected by many homosexuals. Bech, whom Kurtz describes as “perhaps Scandinavia’s most prominent gay thinker”, says the claim that same-sex marriage promotes monogamy is “implausible” and admits that the “conservative case” was a tactical argument.¹⁷⁰ There is little doubt that the self-censorship identified in Scandinavia is also at play in the Australian debate.

It seems that for many, the redefinition of marriage in the *Marriage Act* would eventually go beyond replacing “one man and one woman” with “two persons” in the phrase “*marriage means the union of a man and a woman to the exclusion of all others, voluntarily entered into for life*”, but would read something much closer to “*marriage is the union of people, voluntarily entered into*”.

Consequences for marriage – conclusion

At this point it has to be acknowledged that most advocates of same-sex marriage engaged in the current debate are not agitating for the removal of the numeracy requirement, nor are they recommending the removal of the exclusive, lifelong ideal from the law. Most advocates of same-sex marriage, nearly all of those publicly involved presently, do not wish to see marriage extended to groups.

But their case for removing one of the central pillars of marriage as it is currently defined rests entirely on notions of equality and non-discrimination.

Issues of polygamy, polyamory, and so on, have not been raised by homosexuals advocating for same-sex marriage. To exclude discussion of these issues from the debate on the basis that same-sex marriage advocates do not agree with them is akin to excluding same-sex marriage advocates from a debate on marriage because traditional marriage supporters do not agree with them. Advocates for

¹⁶⁸ Stanley Kurtz (February 2, 2004), ‘The End of Marriage in Scandinavia: The “conservative case” for same-sex marriage collapses’, *The Weekly Standard*, <http://www.weeklystandard.com/Content/Public/Articles/000/000/003/660zypwj.asp?>

¹⁶⁹ Kurtz (February 2, 2004), ‘The End of Marriage’, *The Weekly Standard*.

¹⁷⁰ Kurtz (February 2, 2004), ‘The End of Marriage’, *The Weekly Standard*.

these issues do exist and are agitating for consequential change to include them. They are backed by academics at prominent universities.

Based solely on the arguments made by same-sex marriage advocates, there is no logical reason to exclude polygamists, polyamorists, and others. Their insistence that marriage is the union of *two* people is as discriminatory as the insistence that marriage is the union only of a man and a woman, as it excludes those who do not fall within that particular, and necessarily narrow, definition.

Addressing common arguments in favour of same-sex marriage

Human Rights

The argument for same-sex marriage is commonly couched in terms of human rights.

The right to marry is found in Article 23 of the International Covenant on Civil and Political Rights (ICCPR). Section 1 states:

*The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.*¹⁷¹

This reference to the “natural” and “fundamental” group only makes sense in the context of heterosexual marriage, as nature requires an opposite-sex union for procreation to occur. The same language is used in the International Covenant on Economic, Social and Cultural Rights, which goes further to explicitly acknowledge the importance of marriage to the raising of children:

*The widest possible protection and assistance should be accorded to the family, which is the natural and fundamental group unit of society, particularly for its establishment and while it is responsible for the care and education of dependent children.*¹⁷²

That this “fundamental group unit” refers implicitly to a heterosexual union is made clear in section 2 of Article 23 of the ICCPR:

*The right of **men and women** of marriageable age to marry and to found a family shall be recognized.*¹⁷³

It is significant to note that the Covenant only refers to men and women separately in this article and one other.¹⁷⁴ Elsewhere, the Covenant refers to “persons” *without* making the distinction between male and female. This indicates the importance of gender in marriage. At the very least, it indicates that same-sex marriage is not a fundamental human right recognised in international law.

Indeed, same-sex marriage has been held *not* to be a fundamental right by both the United Nations Human Rights Committee (HRC) and the European Court of Human Rights (ECHR). In *Joslin v New Zealand*, the HRC said that “mere refusal to provide for marriage between homosexual couples” was not a violation of the rights of the couple in that case.¹⁷⁵

More recently, the ECHR has also ruled that same-sex marriage is not a human right.¹⁷⁶ In doing so, it upheld the decisions of France’s highest court, the Constitutional Court, which decided in previous cases that there is no right to same-sex marriage in French law.

This decision reiterated a 2010 judgement declaring that Austria was not violating the human rights of a same-sex couple by not allowing them to marry. In that case the ECHR also found no discrimination against the same-sex couple.¹⁷⁷

¹⁷¹ Article 23(1), *International Covenant on Civil and Political Rights*.

¹⁷² Article 10(1), *International Covenant on Economic, Social and Cultural Rights*. Emphasis added.

¹⁷³ Article 23(2), *International Covenant on Civil and Political Rights*.

¹⁷⁴ Article 3 refers to men and women separately. It establishes sex equality for men and women under the Covenant.

¹⁷⁵ *Joslin v New Zealand* (2002), Communication No 902/1999, UN Doc A/57/40 at 214.

¹⁷⁶ Donna Bowater (21 March, 2012), ‘Gay marriage is not a human right, according to European ruling’, *The Telegraph*, <http://www.telegraph.co.uk/news/religion/9157029/Gay-marriage-is-not-a-human-right-according-to-European-ruling.html>.

¹⁷⁷ *Case of Schalk and Kopf v Austria* (2004), European Court of Human Rights, Application no 30141.

Discrimination

Same-sex couples currently face no legal detriments. They have all the same legal rights and responsibilities as heterosexual couples, including married couples. The Labor government removed legal discrimination in 85 pieces of legislation in 2008,¹⁷⁸ a move which ACL supported.

Homosexuals do not suffer significant cultural discrimination either. Many prominent Australians in politics, law, the media, and sport are openly homosexual and suffer no detriment.

ACL has no sympathy for people who bully homosexuals, or for those who perpetuate discrimination based on sexuality, or indeed based on any irrelevant characteristic. As discussed above, however, ACL does not believe redefining marriage will redress any substantive discrimination against same-sex attracted people. Certainly, redefining marriage can offer no legal rights to same-sex couples that they do not already possess.

Given the clear attempt by activists to imply that they are discriminated against in a way that only same-sex marriage can address, ACL calls on the Inquiry to make a statement that either confirms the substantial legal discrimination claimed or rebuts it.

The people want same-sex marriage

It is often claimed that most people support redefining marriage. The carefully crafted image of discrimination is evident in the phrase “marriage equality” used by advocates of same-sex marriage, but deeper analysis shows there is a lack of almost any concern for the issue in the general public and little priority for it even within “socially progressive” advocacy groups.

Recent polling by the Ambrose Centre for Religious Liberty¹⁷⁹ shows that people hold favourable views of marriage as a heterosexual institution and recognise the value of marriage to children.

After the initial question about same-sex couples having the right to marry, with which 58 per cent of respondents agreed,¹⁸⁰ more probing questions were asked of participants. These show that while there may be support in principle for same-sex marriage, there is significantly less support for change at the expense of marriage as they understand it. A minority of people – 49 per cent – support changing the *Marriage Act*.¹⁸¹

Many of those who do support redefinition do not feel strongly about the issue. Only 14 per cent “strongly support” redefinition while 18 per cent “strongly oppose” it.¹⁸² This reflects the deeply held convictions of a significant proportion of Australians.

When the survey asked questions about the impacts of redefining marriage and the value of the institution as it is currently defined, the results were telling.

Forty-eight per cent of people believe that same-sex marriage is a divisive issue.¹⁸³ Only 35 per cent of people believe the *Marriage Act* should be changed if doing so is divisive.¹⁸⁴

Furthermore, people are generally in agreement that heterosexual marriage is an important social institution that should be upheld. Sixty-nine per cent agree that:

¹⁷⁸ Attorney-General’s Department, *Same-Sex Reforms*,

<http://www.ag.gov.au/Humanrightsandantidiscrimination/Pages/SameSexReforms.aspx>.

¹⁷⁹ Ambrose Centre for Religious Liberty (November 22, 2011), *Public attitudes towards same sex marriage in Australia*, <http://www.ambrosecentre.org.au/images/survey%20final%20report%20for%20web.pdf>.

¹⁸⁰ Ambrose (2011), *Public attitudes towards same sex marriage*, p 12.

¹⁸¹ Ambrose (2011), *Public attitudes towards same sex marriage*, p 13.

¹⁸² Ambrose (2011), *Public attitudes towards same sex marriage*, p 26.

¹⁸³ Ambrose (2011), *Public attitudes towards same sex marriage*, p 15.

¹⁸⁴ Ambrose (2011), *Public attitudes towards same sex marriage*, p 16.

*Marriage between a man and a woman and them having children together is an important social institution and we should uphold marriage and its traditional meaning.*¹⁸⁵

Seventy-three per cent agree that:

*Where possible, as a society we should try to ensure that children are raised by their natural mother and father, **and promote this.***¹⁸⁶

Fifty-nine per cent agree that marriage is about more than just “love and commitment between two adults” – it is also about ensuring children have a mother and father – and redefining marriage would be a “significant change to Australian society” which should not be rushed into.¹⁸⁷

The survey also shows that a majority of people, both those who support and oppose redefining marriage, believe that the issue is a “distraction and a waste of resources” and that:

*politicians need to re-focus on the more important issues that really matter to mainstream Australians.*¹⁸⁸

Indeed, among supporters of left-leaning lobby group GetUp, same-sex marriage was ranked last out of 12 issues by its supporters in a survey published in its 2008-2009 Annual Report.¹⁸⁹ In 2012, the same supporters voted on the issues that they wished GetUp to campaign on for the year. Same-sex marriage did not rate in the top ten.¹⁹⁰

If even GetUp’s supporter base does not rate same-sex marriage as an important issue, it is difficult to take seriously the assertion that there is general support for same-sex marriage in the community.

Perhaps the greatest evidence of this came on August 24, 2011, when parliamentarians reported back on consultations with their constituencies on the issue. Only seven MPs could report having an electorate supportive of same-sex marriage, with 20 reporting that voters in their electorate rejected the notion.¹⁹¹ The electorates supporting same-sex marriage did so by small margins, while those rejecting it were mostly by very large margins.¹⁹²

Same-sex couples want same-sex marriage

As discussed, many homosexuals desire marriage less than societal acceptance, and in many cases do not value marriage as an institution. Some proponents of same-sex marriage seem to regard it as a step towards the deconstruction or devaluing of marriage in society.

It is thus unsurprising to find that, where marriage has been redefined, very few same-sex couples actually get married.

The limited evidence we have from overseas jurisdictions shows marriage is not a pressing issue for most homosexuals.

¹⁸⁵ Ambrose (2011), *Public attitudes towards same sex marriage*, p 17.

¹⁸⁶ Ambrose (2011), *Public attitudes towards same sex marriage*, p 17. Emphasis added.

¹⁸⁷ Ambrose (2011), *Public attitudes towards same sex marriage*, p 17.

¹⁸⁸ Ambrose (2011), *Public attitudes towards same sex marriage*, p 17.

¹⁸⁹ GetUp! (2009), *2008-09 Annual Report*, <http://getup-production.s3.amazonaws.com/143-finalannualreport200809.pdf>, slide 14.

¹⁹⁰ GetUp! (2012), *Campaigning Top Ten*, <http://www.getup.org.au/campaigns/generous/vision-2012/vision-2012/>.

¹⁹¹ Paul Kelly (August 27, 2011), ‘MPs won’t jump on same-sex bandwagon’, *The Australian*, <http://www.theaustralian.com.au/national-affairs/opinion/mps-wont-jump-on-same-sex-bandwagon/story-e6frgd0x-1226123175832>.

¹⁹² House of Representatives Hansard (24 August, 2011).

In the United States about 27 per cent of same-sex couples report being in a husband/wife-type relationship. This compares with about 91 per cent of opposite-sex couples.¹⁹³

While it could be argued that this is because most of the country defines marriage as a male-female union, it must be noted that this rate is *higher* than in Canada, where marriage has been redefined federally to include same-sex couples. In the 2006 Canadian census, there were 7,465 same-sex couples in marriages out of a total of more than 6 million couples. This accounts for a mere 16.5 per cent of the 45,345 same-sex couples counted in Canada.¹⁹⁴

In European countries which have redefined marriage, take-up has been even lower. In Spain, only a handful of same-sex weddings took place in the year after marriage was redefined. Slightly over a thousand marriages, or 0.6 per cent of the total number of marriages that year, were between couples of the same sex.¹⁹⁵ Only 6.3 per cent of homosexuals in The Netherlands were married in the four years following redefinition of marriage there.¹⁹⁶ An even smaller number of same-sex couples married in Belgium – only about 4.7 per cent.¹⁹⁷

In Sweden and Norway, after seven and eight years respectively of legally recognised same-sex unions, which are substantially the same as marriage, only 1,300 and 1,500 couples took advantage of this recognition compared to 200,000 and 280,000 heterosexual marriages respectively.¹⁹⁸ William Eskridge of Yale Law School also acknowledges the “exceedingly small” take-up rates of marriage among Scandinavian same-sex couples.¹⁹⁹

In Australia, in states which offer civil unions or other types of relationship registries, very few same-sex couples take advantage of them. By March 2011, only 210 relationships were registered in Tasmania since 2004, only 133 of which were same-sex couples.²⁰⁰ In contrast, there are more than 2,500 marriages in Tasmania each year.²⁰¹ In New South Wales, less than a quarter of roughly 2,500 relationships registered since July 2010 were same-sex relationships, while more than 40,000 marriages were registered in each of the last four years to 2011.²⁰² Similar numbers are found in the ACT and Victoria.

It is notable that marriage rates for same-sex couples start highly as couples rush to take advantage of the new legal definition, but significantly drop off over time.

The numbers, then, betray the limited interest in marriage that most same-sex couples actually have.

In this context it is important to consider the arguments made above about marriage as a means to the end of social approval of homosexuality and consider the effect it will have on those who value the institution and on the institution itself, and judge whether it is fair or justified to redefine it for

¹⁹³ <http://www.cbsnews.com/stories/2009/09/22/national/main5328794.shtml>.

¹⁹⁴ Statistics Canada (September 12, 2007), *Families and households*, Release no 3, <http://www12.statcan.ca/census-recensement/2006/rt-td/fam-eng.cfm>.

¹⁹⁵ Zenit Daily Dispatch (June 24, 2006), ‘Same-Sex Marriage Flounders: Few Homosexuals Interested in Tying the Knot’, <http://www.ewtn.com/library/ISSUES/zsasxmar.HTM>.

¹⁹⁶ Zenit (2006), ‘Same-Sex Marriage Flounders’.

¹⁹⁷ Zenit (2006), ‘Same-Sex Marriage Flounders’.

¹⁹⁸ Zenit (2006), ‘Same-Sex Marriage Flounders’.

¹⁹⁹ Stanley Kurtz (February 2, 2004), ‘The End of Marriage in Scandinavia: The “conservative case” for same-sex marriage collapses’, *The Weekly Standard*, <http://www.weeklystandard.com/Content/Public/Articles/000/000/003/660zypwj.asp?>

²⁰⁰ Rosemary Bolger (March 3, 2011), ‘Civil union publicity on the cards’, *The Examiner*.

²⁰¹ Australian Bureau of Statistics, *3310.0 – Marriages and Divorces, Australia, 2010 – State and Territory Data*, <http://www.abs.gov.au/ausstats/abs@.nsf/Products/5927B03DEA0F2ABBCA2579A3001C3E0F?opendocument>.

²⁰² ABS, *Marriages and Divorces*.

that reason. Without repeating the discussion here, it is worth noting the thoughts of Bech and Halvorsen in the Scandinavian context:

*The goal of the gay marriage movements in both Norway and Denmark, say Halvorsen and Bech, was not marriage but social approval for homosexuality.*²⁰³

Australia is “out of step” with the rest of the world

It is commonly argued that by defining marriage as a male-female union, Australia is behind other “enlightened” democratic countries. However, only ten countries, seven US jurisdictions, and Mexico City have redefined marriage. Everywhere else, marriage is defined as a male-female union.

In the United States, 29 states define marriage in their constitutions as being between a man and a woman, and 12 forbid recognition of same-sex marriage in legislation.²⁰⁴ The total population of all jurisdictions around the world which have redefined marriage is comparable to that in those American states alone.

It is worth noting that in socially liberal Europe, only seven countries have legally redefined the definition of marriage. France, popularly regarded as a sexually permissive, *laissez-faire* society, has rejected same-sex marriage on more than one occasion. Its highest court, the Constitutional Court, has ruled that the right “to lead a normal family life does not imply the right to marry for couples of the same sex”, so the provisions upholding man-woman marriage “do not infringe the right to lead a normal family life”.²⁰⁵ The Court deferred the right to redefine marriage to the French legislature, which declined to do so in June 2011.²⁰⁶

As discussed above, France’s position has been upheld in the European Court of Human Rights, which confirmed that same-sex marriage is not a human right.

To argue that Australia is out of step, behind the times, or backwards in comparison to the rest of the world is misleading and only serves to distract from the debate.

²⁰³ Kurtz (February 2, 2004), ‘The End of Marriage’, *The Weekly Standard*.

²⁰⁴ John Schwartz (June 27, 2011), ‘After New York, New Look at Defense of Marriage Act’, *The New York Times*, http://www.nytimes.com/2011/06/28/us/politics/28doma.html?_r=1.

²⁰⁵ *Mrs Corinne C et al [Prohibition of marriage between persons of the same sex]*, Decision no 2010-92 of 28 January 2011, http://www.conseil-constitutionnel.fr/conseil-constitutionnel/root/bank_mm/anglais/en201092qpc.pdf.

²⁰⁶ AP (15 June, 2011), ‘French parliament rejects same-sex marriage bill’, <http://www.france24.com/en/20110614-french-parliament-rejects-gay-marriage-bill-homosexuality>.

Conclusion

In preparing this submission ACL has considered the profound importance marriage has in society. It is the bedrock of family, which itself is the core social unit around which communities are built. The importance of marriage to the raising of children goes beyond merely providing a loving family in which children can grow; it ensures that, whenever possible, a child is raised by both his or her biological parents, the mother and the father, each of which bring unique and essential attributes to her or his child.

Marriage also holds profound cultural significance to the majority of Australians. Redefining marriage goes beyond tweaking the definition to allow an excluded group of citizens; it redefines the very institution itself, replacing it altogether with something else. As Monte Stewart argued:

*Society cannot simultaneously have as shared, core, constitutive meanings of the marriage institution both “the union of a man and a woman” and “the union of any two persons”; one meaning necessarily displaces the other. Thus, every society must choose either to retain man-woman marriage or, by force of law, replace it with a radically different... marriage regime.*²⁰⁷

The modern state recognises and regulates marriage because of its importance to the good of society, but it does not give marriage its meaning. Marriage is an institution which pre-dates both state and church regulation, stretching back to time immemorial, with deep historical, cultural, and theological roots.

As Margaret Somerville has said:

*Institutions have both inherent and collateral features. Inherent features define the institution and cannot be changed without destroying the institution. Collateral features can be changed without such impact. We rightly recognized that women must be treated as equal partners with men within marriage. While that changed the power of husbands over their wives, it simply changed a collateral feature of marriage. Recognizing same-sex marriage would change its inherent nature.*²⁰⁸

ACL urges the Legal and Constitutional Affairs Legislation Committee to reject Senator Hanson-Young's bill.

²⁰⁷ Stewart (2008), *Marriage Facts*, 31 Harvard Journal of Law & Public Policy, p 327.

²⁰⁸ Margaret Somerville (July 9, 2003), 'Note to Svend Robinson', as published in the *Globe and Mail*.

APPENDIX 1

Around the world, Christians who adhere to traditional Christian teaching on sexuality are facing threat to their religious freedom to act and speak in accordance with those beliefs.

Australia

- Tennis great Margaret Court came under attack when she expressed opposition to same-sex marriage early in 2012. Court was accused of spreading “hateful comments” and “inciting the bigots out there” by same-sex marriage activist Kerryn Phelps.²⁰⁹ Court said she felt stunned, victimised, and the target of a “relentless hate campaign” for stating her views.²¹⁰
- Former Victorian Premier was subjected to similarly vicious attacks after writing that man-woman marriage was the best environment in which to raise children.²¹¹ Kennett spoke from his experience as leader of Beyond Blue, having observed a rise in anxiety among very young children that is often “a direct result” of their family situations. Following outrage from homosexual activists, Kennett backtracked on his statements “in an apparent bid to mollify the gay and lesbian community”.²¹²
- Toowoomba GP David van Gend was forced to attend mediation before the Anti-Discrimination Commission Queensland after expressing similar views which “offended” a homosexual man.²¹³

United Kingdom

- In 2011, Adrian Smith made a private comment in his own time opposing same-sex weddings in churches and was later demoted for “gross misconduct”, suffering a 40 per cent pay cut.²¹⁴
- Peter and Hazelmary Bull were fined 3,600 pounds for not allowing a same-sex couple to stay at their bed and breakfast, despite their policy requiring guests to be married applying to heterosexual couples also.²¹⁵ The Bulls lost their appeal.²¹⁶

Canada

²⁰⁹ Tanya Nolan (January 13, 2012), ‘Tennis great accused of inciting gay hatred’, *ABC News*, <http://www.abc.net.au/news/2012-01-13/tennis-great-accused-of-inciting-gay-hatred/3771854>.

²¹⁰ Aaron Langmaid (January 24, 2012), ‘Hatred stuns tennis great Margaret Court’, *Herald Sun*, <http://www.heraldsun.com.au/news/more-news/hatred-stuns-tennis-great-court/story-fn7x8me2-1226251748152>.

²¹¹ Jeff Kennett (September 9, 2011), ‘Children need mum and dad for best mental health’, *Herald Sun*, <http://www.heraldsun.com.au/opinion/children-need-mum-and-dad-for-best-mental-health/story-e6frfhqf-1226132579875>.

²¹² Melissa Fyfe (October 6, 2011), ‘Kennett reversal on gay parenting’, *The Age*, <http://www.theage.com.au/national/kennett-reversal-on-gay-parenting-20111005-119pu.html>.

²¹³ Angela Shanahan (October 15, 2011), ‘Discrimination police indulging in gay abandon’, *The Australian*, <http://www.theaustralian.com.au/news/opinion/discrimination-police-indulging-in-gay-abandon/story-e6frg6zo-1226167016741>.

²¹⁴ Louise Gray (24 October, 2011), ‘Christian demoted for views on gay weddings’, *The Telegraph*, <http://www.telegraph.co.uk/earth/earthnews/8844445/Christian-demoted-for-views-on-gay-weddings.html>.

²¹⁵ The Telegraph (January 18, 2011), ‘Gay couple awarded damages after Christian hotel owners refused to let them share double room’, *The Telegraph*, <http://www.telegraph.co.uk/news/uknews/law-and-order/8266097/Gay-couple-awarded-damages-after-Christian-hotel-owners-refused-to-let-them-share-double-room.html>.

²¹⁶ Neil Millard (February 10, 2012), ‘Hoteliers’ gay couple ban appeal fails’, *The Sun*, <http://www.thesun.co.uk/sol/homepage/news/4121685/Hoteliers-Peter-and-Hazelmary-Bull-lose-appeal.html>.

- In 2008, an Alberta pastor, Stephen Boissoin, wrote a letter to a local newspaper which was disapproving of homosexual behaviour. Boissoin was fined \$7,000 and ordered not to express his views on homosexuality in public.²¹⁷ He was also ordered to publicly apologise to a homosexual activist who took offence at the letter.
- Also in 2011, a respected Canadian sports anchor was fired after expressing support for the traditional definition of marriage. Damian Goddard used Twitter to express his opinion on marriage, a decision which led to his dismissal from the television station, Sportsnet.²¹⁸

These examples are inevitable consequences of the Canadian government redefining marriage. Because the revision is done in the name of equality, disagreeing with the state's new definition is seen as perpetuating inequality for a minority group. The many examples of this type of incident, including in Australia, would suggest it is as much about drowning out alternate views. Due to the normalising effect that redefining marriage would have, the expression of alternate views would be even more difficult.

USA

- In 2011, Peter Vidmar was chosen to be *chef de mission* for the United States at the 2012 London Olympics. Dual gold-medallist Vidmar had been involved with the Olympic movement in the USA for more than 20 years but was pressured to resign because he had supported Proposition 8, the measure which defined marriage as between a man and a woman.²¹⁹
- In 2009, the runner-up in the Miss USA competition, Carrie Prejean, was asked her views on marriage, to which she replied that "marriage should be between a man and a woman". One of the judges, Perez Hilton, stated that she "lost it because of that question. She was definitely the front-runner before that". Prejean was also condemned by organisers of the competition for her views.²²⁰
- In Wisconsin, which does not recognise same-sex marriages, 15-year-old school boy Brandon Wegner was censored and "threatened with suspension and called ignorant by the superintendent of the Shawano School District"²²¹ after writing an opinion piece in the school newsletter which opposed the adoption of children by same-sex couples.
- In 2011, Starbucks founder and CEO Howard Schultz cancelled an appearance at the Global Leadership Summit after a petition denounced the host church Willow Creek as "anti-gay". The Summit reaches a global audience of about 165,000 at 450 locations around the world.²²² By comparison, under 800 people signed the petition.²²³

²¹⁷ Tim Waggoner (June 9, 2008), 'Alberta Pastor Fined \$7000 and Ordered to Publicly Apologize and Remain Silent on Homosexuality', *LifeSiteNews.com*, <http://www.lifesitenews.com/news/archive/ldn/2008/jun/08060902>.

²¹⁸ Cathal Kelly (May 12, 2011), 'Fired Sportsnet host Damian Goddard 'stands by' tweets', *The Toronto Star*, <http://www.thestar.com/sports/article/989686--fired-sportsnet-host-damian-goddard-stands-by-tweets>.

²¹⁹ Juliet Macur (May 11, 2011), 'For Some Sports Figures, Opinions Have a Price', *The New York Times*, http://www.nytimes.com/2011/05/12/sports/olympics/gay-marriage-stance-costs-vidmar-olympic-role.html?_r=2.

²²⁰ BBC (April 20, 2009), 'Gay marriage row at Miss USA show', *BBC*, <http://news.bbc.co.uk/2/hi/americas/8009359.stm>.

²²¹ Fox News (January 24, 2012), 'Atty Says School Threatened, Punished Boy Who Opposed Gay Adoption', *Fox*, <http://radio.foxnews.com/toddstarnes/top-stories/atty-says-school-threatened-punished-boy-who-opposed-gay-adoption.html>.

²²² Ted Olsen (August 10, 2011), 'Starbucks CEO Withdraws from Willow Creek Leadership Summit', *Christianity Today*, http://blog.christianitytoday.com/ctliveblog/archives/2011/08/starbucks_ceo_w.html.

- In separate incidents, two counselling students were dismissed from their universities for expressing a preference to refer homosexual clients to other counsellors. Julia Ward was dismissed by Eastern Michigan University²²⁴ while Jennifer Keeton was suspended when she refused to undergo “diversity sensitivity training” at August State University in Georgia.²²⁵
- In Ohio in 2008, Crystal Dixon, the associate vice president of Human Resources at the University of Toledo, was fired for writing a letter to a local newspaper challenging the notion that “those choosing the homosexual lifestyle are ‘civil rights victims’”. She wrote as a private citizen, without identifying herself with the University. Dixon, a black woman, was objecting to comparisons between the gay rights movement and the black civil rights movement. For this, she was fired.²²⁶
- In 2010, a professor who taught courses on Catholicism at the University of Illinois was fired after teaching that the Catholic Church believes homosexual acts are morally wrong. A student complained that some of Professor Kenneth Howell’s remarks were “offensive”, and Howell was subsequently dismissed, despite the fact that he was teaching the position of the Catholic Church accurately.²²⁷
- Apple came under pressure in 2011 when it approved an iPhone application by Exodus International, a group which helps people who struggle with unwanted homosexual desire.²²⁸ The previous year saw Apple remove the Manhattan Declaration iPhone application, which advocated religious liberty and the “dignity of marriage as the union of one man and one woman”.²²⁹
- In 2010, the University of California’s Hastings College of Law refused to recognise a Christian group because the group regarded homosexuality as immoral. The case went to the US Supreme Court, and Hastings won in a 5-4 decision.

²²³ As of March 27, 2012. This is well short of the target of 1,000 signatures. Change.org, ‘Starbucks: Denounce the Anti-Gay Views of Willow Creek Community Church’, <http://www.change.org/petitions/starbucks-press-denounce-the-anti-gay-views-of-willow-creek-community-church>.

²²⁴ LifeSiteNews (July 28, 2010), ‘Another Counseling Student Harrassed for Christian Beliefs Appeals Court Ruling’, *LifeSiteNews.com*, <http://www.lifesitenews.com/news/archive/ldn/2010/jul/10072803>

²²⁵ Ben Johnson (December 2, 2011), ‘Case of counseling student forced to undergo pro-homosexual ‘sensitivity training’ goes to court’, *LifeSiteNews.com*, <http://www.lifesitenews.com/news/case-of-counselling-student-forced-to-undergo-pro-homosexual-sensitivity-tr>

²²⁶ Gail Burkhardt (December 5, 2008), ‘Crystal Dixon sues UT for rights violation’, *Toledo Free Press*, <http://www.toledofreepress.com/2008/12/05/crystal-dixon-sues-ut-for-rights-violations/>

²²⁷ Jodi Heckel (July 9, 2010), ‘Instructor of Catholicism at UI claims loss of job violates academic freedom’, *The News-Gazette* (East Central Illinois), <http://www.news-gazette.com/news/university-illinois/2010-07-09/instructor-catholicism-ui-claims-loss-job-violates-academic-free>.

²²⁸ Bianca Bosker (March 19, 2011), ‘Apple Under Fire For Approving ‘Gay Cure’ iPhone App From Exodus International’, *The Huffington Post*, http://www.huffingtonpost.com/2011/03/18/apple-exodus-international-app_n_837698.html.

²²⁹ Ki Mae Heussner (November 30, 2010), ‘“Anti-Gay” iPhone App Pulled From Apple Store’, *ABC News*, <http://abcnews.go.com/Technology/anti-gay-iphone-app-pulled-apple-store/story?id=12274937#.T3EIUcVQhIH>.