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The Committee Secretary
Senate Legal & Constitutional Affairs Committee
Parliament House
CANBERRA ACT 2600

Email: legcon.sen@aph.gov.au

Dear Committee Secretary

SUBMISSION ON THE MARRIAGE EQUALITY AMENDMENT BILL 2010

I write in favour of the Bill.

Australians breathe every day the air of freedom. This is accorded to us because of our fundamental beliefs in democracy, freedom, equality under the law and having a fair go. Over time we as Australians have removed discrimination that we once considered was right and proper and lawful. That discrimination included that against women the foundation of one of the pillars of Australian society, the White Australia Policy.

We in modern Australia recognise that that discrimination was wrong because it fundamentally offends our sense of equality and decency.

The Bill before the Senate is not a radical reform as suggested by some, but is merely a reversal of the law prior to the amendments of the Howard Government. Before those amendments there was nothing as a matter of law that would prevent same sex marriage. The fact that it did not occur was because there was a belief, mistaken in my view, that same sex marriage was not recognised by law.

I do not consider that the issue of same sex marriage is a party political issue. I know many people who voted for the recent LNP Government in Queensland, for example, who also are of the view that there ought to be same sex marriage.

Many years ago I was of the view that marriage was only between a man and a woman to the exclusion of all others for life. Some years ago I came to the conclusion that that view was a mistake. I came to this conclusion in part through my job.

For the last 27 years I have acted in family law (25 as a solicitor). I made the decision to specialise in family law 24 years ago. In the last 27 years I have acted in thousands of cases where couples have split up, their marriages or de facto relationships ended and they were arguing about money or children. Many of the cases have involved domestic violence.

For the last 20 years I have acted for gay, lesbian, bisexual and transgender clients. For the last 5 years approximately I have authored the Australian Gay & Lesbian Law Blog:

http://lgbtlawblog.blogspot.com.au.

What I see about same sex marriage is that it is a fundamental human right of any adult to be able to be married to the partner of their choice. We all view the right to marry as a fundamental right, just as we consider that marriage and families form the fundamental binding blocks of society. As the law now stands, gay and lesbian citizens are denied this right, because the law states that their spouse to be is someone they can never marry, someone of the opposite sex.

There is nothing that describes the pain of a gay friend who has told me that when he went to his sister's wedding that he felt entirely excluded from the joy of the wedding. He felt joy for his sister, as one would expect, but at the same time he felt extreme pain because he realised that he would never have his relationship recognised in the same way and he would never have the choice as the rest of us have the choice as to whether or not to marry or live in a de facto relationship or be single.

Australia has had a proud record in the removal of discrimination including leading the world with the rights of women being able to vote, for example. Australia now lags the world on this issue when we see developing countries such as Mexico and South Africa allowing same sex marriage, but Australia still does not.

There are misconceptions about the implications of same sex marriage and there is a mistaken view that civil unions are just as good.

There have been heavily publicised cases in the United States where considerable intellectual rigor was applied to legal arguments to validate civil unions as opposed to same sex marriage or to say why same sex marriage was fundamentally wrong and was supremely challenging to the concept of marriage.

On this point I should add that I fundamentally believe in the sanctity of marriage. Although I am a family lawyer, I have married, been divorced and married a second time. I did not question my ability to marry and to divorce. The option to do so was always open to me. The option to do so has not been and is not available to gay and lesbian citizens.

The case for same sex marriage

It is really very simple. To quote Jefferson:

> *"All men are created equal."*

This fundamental notion of equality before the law is one of our society's most basic constructs. If we cannot have equality before the law, then law falls into disrepute, the rule of law is not followed, and most significantly, discrimination occurs.

It has been put to me that gay and lesbian people do not need marriage, that somehow they are not ready for marriage, but if they are going to be granted the right to have their relationship recognised, then why not give them civil unions.

This argument misses the point. Many gay and lesbian people want to get married, at least to have the choice of marriage. The power of being able to choose one's destiny – isn't that a

fundamental concept of our society? How can that truly be given to people when they are not able to choose to marry?

The argument against civil unions

The argument was best put by the Connecticut Supreme Court. Connecticut was one of the first US States to legislate for civil unions. Gay and lesbians who wanted to marry challenged the law, saying that they wanted to marry, and that civil unions denied them this fundamental right. The Supreme Court agreed with them. This is what it had to say:

> *"The defendants' motion for summary judgment, they asserted that the plaintiffs had failed to demonstrate that they have suffered any harm as a result of the statutory bar against same sex marriage because, under the civil union law, gay persons are entitled to all of the rights that married couples enjoy.*
>
> *The defendants also maintained that this state's ban on same sex marriage does not deprive the plaintiffs of a fundamental right because, since ancient times, marriage has been understood to be the union of a man and a woman, and only such rights that are "deeply rooted in this [n]ation's history and tradition . . . and implicit in the concept of ordered liberty" are deemed to be fundamental. .... The defendants contended that, in light of the universally understood definition of marriage as the union of a man and a woman, the right that the plaintiffs were asserting, namely, the right to marry "any person of one's choosing," is not a fundamental right.*
>
> *The defendants also asserted that our statutory scheme does not discriminate on the basis of sex because, inter alia, it does not single out men or women as a class for disparate treatment, the touchstone of any sex discrimination claim. Those laws also do not discriminate on the basis of sexual orientation, the defendants maintained, because gay persons are not prohibited from marrying. According to the defendants, our laws are facially neutral because they treat homosexual and heterosexual persons alike by providing that anyone who wishes to marry may do so with a person of the opposite sex....*
>
> *The plaintiffs challenge the trial court's conclusion that the distinction between marriage and civil unions is merely one of nomenclature. They contend that marriage is not simply a term denominating a bundle of legal rights. Rather, they contend that it is an institution of unique and enduring importance in our society, one that carries with it a special status. The plaintiffs therefore contend that their claim of unequal treatment cannot be dismissed solely because same sex couples who enter into a civil union enjoy the same rights under state law as married couples. The plaintiffs also claim that we must consider the legislature's decision to create civil unions for same sex couples in the context of the historical condemnation and discrimination that gay persons have suffered.... We agree with the plaintiffs that, despite the legislature's recent establishment of civil unions, the restriction of marriage to opposite sex couples implicates the constitutional rights of gay persons who wish to marry a person of the same sex....*
>
> *A cognizable constitutional claim arises whenever the government singles out a group for differential treatment. The legislature has subjected gay persons to precisely that kind of differential treatment by creating a separate legal classification for same sex couples who, like opposite sex couples, wish to have their relationship recognized under the law. Put differently, the civil union law entitles same sex couples to all of the same rights as married couples except one, that is, the freedom to marry, a right that "has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men [and women]" and "fundamental to our very existence and survival."...*

Indeed, marriage has been characterized as ''intimate to the degree of being sacred''; ... (''many religions recognize marriage as having spiritual significance''); and ''an institution more basic in our civilization than any other.'' ... Marriage, therefore, is not merely shorthand for a discrete set of legal rights and responsibilities but is ''one of the most fundamental of human relationships . . . .'' ... ''Marriage . . . bestows enormous private and social advantages on those who choose to marry. Civil marriage is at once a deeply personal commitment to another human being and a highly public celebration of the ideals of mutuality, companionship, intimacy, fidelity, and family. . . . Because it fulfills yearnings for security, safe haven, and connection that express our common humanity, civil marriage is an esteemed institution . . . .'' ...

Especially in light of the long and undisputed history of invidious discrimination that gay persons have suffered; ...we cannot discount the plaintiffs' assertion that the legislature, in establishing a statutory scheme consigning same sex couples to civil unions, has relegated them to an inferior status, in essence, declaring them to be unworthy of the institution of marriage. In other words, ''[b]y excluding samesex couples from civil marriage, the [s]tate declares that it is legitimate to differentiate between their commitments and the commitments of heterosexual couples.

Ultimately, the message is that what same-sex couples have is not as important or as significant as 'real' marriage, that such lesser relationships cannot have the name of marriage.''... (''[t]he current statutes—by drawing a distinction between the name assigned to the family relationship available to opposite-sex couples and the name assigned to the family relationship available to samesex couples, and by reserving the historic and highly respected designation of marriage exclusively to opposite- sex couples while offering same-sex couples only the new and unfamiliar designation of domestic partnership— pose a serious risk of denying the official family relationship of same-sex couples the equal dignity and respect that is a core element of the constitutional right to marry''); ... (''[t]he dissimilitude between the terms 'civil marriage' and 'civil union' is not innocuous; it is a considered choice of language that reflects a demonstrable assigning of same-sex, largely homosexual, couples to second-class status''). Although the legislature has determined that same sex couples are entitled to ''all the same benefits, protections and responsibilities . . . [that] are granted to spouses in a marriage''; ... the legislature nonetheless created an entirely separate and distinct legal entity for same sex couples even though it readily could have made those same rights available to same sex couples by permitting them to marry. In view of the exalted status of marriage in our society, it is hardly surprising that civil unions are perceived to be inferior to marriage. We therefore agree with the plaintiffs that ''[m]aintaining a second-class citizen status for same-sex couples by excluding them from the institution of civil marriage is the constitutional infirmity at issue.''...

Although marriage and civil unions do embody the same legal rights under our law, they are by no means ''equal.'' As we have explained, the former is an institution of transcendent historical, cultural and social significance, whereas the latter most surely is not. Even though the classifications created under our statutory scheme result in a type of differential treatment that generally may be characterized as symbolic or intangible, this court correctly has stated that such treatment nevertheless ''is every bit as restrictive as naked exclusions''; ... because it is no less real than more tangible forms of discrimination, at least when, as in the present case, the statute singles out a group that historically has been the object of scorn, intolerance, ridicule or worse.

We do not doubt that the civil union law was designed to benefit same sex couples by providing them with legal rights that they previously did not have. If, however, the

intended effect of a law is to treat politically unpopular or historically disfavored minorities differently from persons in the majority or favored class, that law cannot evade constitutional review under the separate but equal doctrine. ...In such circumstances, the very existence of the classification gives credence to the perception that separate treatment is warranted for the same illegitimate reasons that gave rise to the past discrimination in the first place. Despite the truly laudable effort of the legislature in equalizing the legal rights afforded same sex and opposite sex couples, there is no doubt that civil unions enjoy a lesser status in our society than marriage."

All the other dodgy reasons why marriage is said to exclude same sex people

All the other arguments were debunked by the Iowa Supreme Court. In Iowa several gay and lesbian couples successfully challenged the law that prevented them from getting married. This is what the Iowa Supreme Court had to say:

"*Unlike opposite-sex couples in Iowa, same-sex couples are not permitted to marry in Iowa. The Iowa legislature amended the marriage statute in 1998 to define marriage as a union between only a man and a woman.2 Despite this law, the six same-sex couples in this litigation asked the Polk County recorder to issue marriage licenses to them. The recorder, following the law, refused to issue the licenses, and the six couples have been unable to be married in this state. Except for the statutory restriction that defines marriage as a union between a man and a woman, the twelve plaintiffs met the legal requirements to marry in Iowa....*

The County offered five primary interests of society in support of the legislature's exclusive definition of marriage. The first three interests are broadly related to the advancement of child rearing. Specifically, the objectives centered on promoting procreation, promoting child rearing by a mother and a father within a marriage, and promoting stability in an opposite-sex relationship to raise and nurture children. The fourth interest raised by the County addressed the conservation of state resources, while the final reason concerned the governmental interest in promoting the concept and integrity of the traditional notion of marriage.

Much of the testimony presented by the County was in the form of opinions by various individuals that same-sex marriage would harm the institution of marriage and also harm children raised in same-sex marriages. Two college professors testified that a heterosexual marriage is, overall, the optimal forum in which to raise children. A retired pediatrician challenged the accuracy of some of the medical research that concludes there is no significant difference between children raised by same-sex couples and opposite-sex couples. A clinical psychologist testified sexual orientation is not as defined and stable as race and gender and can change over time. He acknowledged, however, it is difficult to change a person's sexual orientation, and efforts to do so can be harmful to the person.

The plaintiffs produced evidence to demonstrate sexual orientation and gender have no effect on children raised by same-sex couples, and same-sex couples can raise children as well as opposite-sex couples. They also submitted evidence to show that most scientific research has repudiated the commonly assumed notion that children need opposite-sex parents or biological parents to grow into well-adjusted adults. Many leading organizations, including the American Academy of Pediatrics, the American Psychiatric Association, the American Psychological Association, the National Association of Social Workers, and the Child Welfare League of America, weighed the available research and

supported the conclusion that gay and lesbian parents are as effective as heterosexual parents in raising children.

For example, the official policy of the American Psychological Association declares, "There is no scientific evidence that parenting effectiveness is related to parental sexual orientation: Lesbian and gay parents are as likely as heterosexual parents to provide supportive and healthy environments for children." Almost every professional group that has studied the issue indicates children are not harmed when raised by same-sex couples, but to the contrary, benefit from them. In Iowa, agencies that license foster parents have found same-sex couples to be good and acceptable parents. It is estimated that more than 5800 same-sex couples live throughout Iowa, and over one-third of these couples are raising children....

It is true the marriage statute does not expressly prohibit gay and lesbian persons from marrying; it does, however, require that if they marry, it must be to someone of the opposite sex. Viewed in the complete context of marriage, including intimacy, civil marriage with a person of the opposite sex is as unappealing to a gay or lesbian person as civil marriage with a person of the same sex is to a heterosexual. Thus, the right of a gay or lesbian person under the marriage statute to enter into a civil marriage only with a person of the opposite sex is no right at all. Under such a law, gay or lesbian individuals cannot simultaneously fulfil their deeply felt need for a committed personal relationship, as influenced by their sexual orientation, and gain the civil status and attendant benefits granted by the statute. Instead, a gay or lesbian person can only gain the same rights under the statute as a heterosexual person by negating the very trait that defines gay and lesbian people as a class—their sexual orientation. .... The benefit denied by the marriage statute—the status of civil marriage for same-sex couples—is so "closely correlated with being homosexual" as to make it apparent the law is targeted at gay and lesbian people as a class....

The County does not, and could not in good faith, dispute the historical reality that gay and lesbian people as a group have long been the victim of purposeful and invidious discrimination because of their sexual orientation. The long and painful history of discrimination against gay and lesbian persons is epitomized by the criminalization of homosexual conduct in many parts of this country until very recently. ...

Additionally, only a few years ago persons identified as homosexual were dismissed from military service regardless of past dedication and demonstrated valor. Public employees identified as gay or lesbian have been thought to pose security risks due to a perceived risk of extortion resulting from a threat of public exposure. School-yard bullies have psychologically ground children with apparently gay or lesbian sexual orientation in the cruel mortar and pestle of school-yard prejudice. At the same time, lesbian and gay people continue to be frequent victims of hate crimes. See Criminal Justice Information Servs. Div., FBI, Hate Crime Statistics 2007, http://www.fbi.gov/ucr/hc2007/victims.htm (according to FBI-collected data, the only hate crimes occurring more frequently than sexual-orientation-motivated hate crimes are crimes based on race or religious bias)....

Rather, we merely highlight the reality that chapter 216 and numerous other statutes and regulations demonstrate sexual orientation is broadly recognized in Iowa to be irrelevant to a person's ability to contribute to society... Those statutes and regulations reflect at least some measure of legislative and executive awareness that discrimination based on sexual orientation is often predicated on prejudice and stereotype and further express a desire to remove sexual orientation as an obstacle to the ability of gay and lesbian people to achieve their full potential. Therefore, we must scrutinize more closely those

classifications that suggest a law may be based on prejudice and stereotype because laws of that nature are "incompatible with the constitutional understanding that each person is to be judged individually and is entitled to equal justice under the law."...

It is also important to observe that the political power of gays and lesbians, while responsible for greater acceptance and decreased discrimination, has done little to remove barriers to civil marriage. Although a small number of state legislatures have approved civil unions for gay and lesbian people without judicial intervention, no legislature has secured the right to civil marriage for gay and lesbian people without court order.22 The myriad statutes and regulatory protections against discrimination based on sexual orientation in such areas as employment, housing, public accommodations, and education have not only been absent in the area of marriage, but legislative bodies have taken affirmative steps to shore up the concept of traditional marriage by specifically excluding gays and lesbians. Like Iowa, over forty other states have passed statutes or constitutional amendments to ban same-sex marriages....

[The County's arguments against same sex marriage debunked]:

***a. Maintaining traditional marriage**. First, the County argues the same-sex marriage ban promotes the "integrity of traditional marriage" by "maintaining the historical and traditional marriage norm ([as] one between a man and a woman)." This argument is straightforward and has superficial appeal. A specific tradition sought to be maintained cannot be an important governmental objective for equal protection purposes, however, when the tradition is nothing more than the historical classification currently expressed in the statute being challenged. When a certain tradition is used as both the governmental objective and the classification to further that objective, the equal protection analysis is transformed into the circular question of whether the classification accomplishes the governmental objective, which objective is to maintain the classification. In other words, the equal protection clause is converted into a " 'barren form of words' " when " 'discrimination . . . is made an end in itself.' " Tussman & tenBroek, 37 Cal. L. Rev. at 357 (quoting Truax v. Raich, 239 U.S. 33, 41, 36 S. Ct. 7, 10, 60 L. Ed. 131, 135 (1915)).*

This precise situation is presented by the County's claim that the statute in this case exists to preserve the traditional understanding of marriage. The governmental objective identified by the County—to maintain the traditional understanding of marriage—is simply another way of saying the governmental objective is to limit civil marriage to opposite-sex couples. Opposite-sex marriage, however, is the classification made under the statute, and this classification must comply with our principles of equal protection. Thus, the use of traditional marriage as both the governmental objective and the classification of the statute transforms the equal protection analysis into the question of whether restricting marriage to opposite-sex couples accomplishes the governmental objective of maintaining opposite-sex marriage.

This approach is, of course, an empty analysis. It permits a classification to be maintained " 'for its own sake.' " Kerrigan, 957 A.2d at 478 (quoting Romer, 517 U.S. at 635, 116 S. Ct. at 1629, 134 L. Ed. 2d at 868). Moreover, it can allow discrimination to become acceptable as tradition and helps to explain how discrimination can exist for such a long time. If a simple showing that discrimination is traditional satisfies equal protection, previous successful equal protection challenges of invidious racial and gender classifications would have failed. Consequently, equal protection demands that " 'the classification ([that is], the exclusion of gay [persons] from civil marriage) must advance a state interest that is separate from the classification itself.' " Id. (quoting Hernandez v. Robles, 855 N.E.2d 1, 33 (N.Y. 2006) (Kaye, C.J., dissenting)); see also Romer, 517 U.S.

at 635, 116 S. Ct. at 1629, 134 L. Ed. 2d at 868 (rejecting "classification of persons undertaken for its own sake").

"[W]hen tradition is offered to justify preserving a statutory scheme that has been challenged on equal protection grounds, we must determine whether the reasons underlying that tradition are sufficient to satisfy constitutional requirements." Kerrigan, 957 A.2d at 478–79 (emphasis added). Thus, we must analyze the legislature's objective in maintaining the traditional classification being challenged.

The reasons underlying traditional marriage may include the other objectives asserted by the County, objectives we will separately address in this decision. However, some underlying reason other than the preservation of tradition must be identified. Because the County offers no particular governmental reason underlying the tradition of limiting civil marriage to heterosexual couples, we press forward to consider other plausible reasons for the legislative classification.

b. Promotion of optimal environment to raise children. *Another governmental objective proffered by the County is the promotion of "child rearing by a father and a mother in a marital relationship which social scientists say with confidence is the optimal milieu for child rearing." This objective implicates the broader governmental interest to promote the best interests of children. The "best interests of children" is, undeniably, an important governmental objective. Yet, we first examine the underlying premise proffered by the County that the optimal environment for children is to be raised within a marriage of both a mother and a father.*

Plaintiffs presented an abundance of evidence and research, confirmed by our independent research, supporting the proposition that the interests of children are served equally by same-sex parents and opposite-sex parents. On the other hand, we acknowledge the existence of reasoned opinions that dual-gender parenting is the optimal environment for children. These opinions, while thoughtful and sincere, were largely unsupported by reliable scientific studies.

Even assuming there may be a rational basis at this time to believe the legislative classification advances a legitimate government interest, this assumed fact would not be sufficient to survive the equal protection analysis applicable in this case. In order to ensure this classification based on sexual orientation is not borne of prejudice and stereotype, intermediate scrutiny demands a closer relationship between the legislative classification and the purpose of the classification than mere rationality. Under intermediate scrutiny, the relationship between the government's goal and the classification employed to further that goal must be "substantial." Clark, 486 U.S. at 461, 108 S. Ct. at 1914, 100 L. Ed. 2d at 472. In order to evaluate that relationship, it is helpful to consider whether the legislation is over-inclusive or under-inclusive. See RACI II, 675 N.W.2d at 10 (considering under-inclusion and over-inclusion even in the rational basis context)....

We begin with the County's argument that the goal of the same-sex marriage ban is to ensure children will be raised only in the optimal milieu. In pursuit of this objective, the statutory exclusion of gay and lesbian people is both under-inclusive and over-inclusive. The civil marriage statute is under-inclusive because it does not exclude from marriage other groups of parents—such as child abusers, sexual predators, parents neglecting to provide child support, and violent felons—that are undeniably less than optimal parents. Such under-inclusion tends to demonstrate that the sexual-orientation-based classification is grounded in prejudice or "overbroad generalizations about the different

talents, capacities, or preferences" of gay and lesbian people, rather than having a substantial relationship to some important objective. See Virginia, 518 U.S. at 533, 116 S. Ct. at 2275, 135 L. Ed. 2d at 751 (rejecting use of overbroad generalizations to classify). If the marriage statute was truly focused on optimal parenting, many classifications of people would be excluded, not merely gay and lesbian people.

Of course, "[r]eform may take one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind." Knepper v. Monticello State Bank, 450 N.W.2d 833, 837 (Iowa 1990) (citing Williamson v. Lee Optical of Okla., 348 U.S. 483, 489, 75 S. Ct. 461, 465, 99 L. Ed. 563, 573 (1955)). Thus, "[t]he legislature may select one phase of one field and apply a remedy there, neglecting the others." Williamson, 348 U.S. at 489, 75 S. Ct. at 465, 99 L. Ed. at 573. While a statute does not automatically violate equal protection merely by being under-inclusive, the degree of under-inclusion nonetheless indicates the substantiality of the relationship between the legislative means and end.

As applied to this case, it could be argued the same-sex marriage ban is just one legislative step toward ensuring the optimal environment for raising children. Under this argument, the governmental objective is slightly more modest. It seeks to reduce the number of same-sex parent households, nudging our state a step closer to providing the asserted optimal milieu for children. Even evaluated in light of this narrower objective, however, the ban on same-sex marriage is flawed.

The ban on same-sex marriage is substantially over-inclusive because not all same-sex couples choose to raise children. Yet, the marriage statute denies civil marriage to all gay and lesbian people in order to discourage the limited number of same-sex couples who desire to raise children. In doing so, the legislature includes a consequential number of "individuals within the statute's purview who are not afflicted with the evil the statute seeks to remedy." Conaway, 932 A.2d at 649 (Raker, J., concurring in part and dissenting).

At the same time, the exclusion of gay and merely precluding gay and lesbian people from civil marriage. If the statute was truly about the best interest of children, some benefit to children derived from the ban on same-sex civil marriages would be observable. Yet, the germane analysis does not show how the best interests of children of gay and lesbian parents, who are denied an environment supported by the benefits of marriage under the statute, are served by the ban. Likewise, the exclusion of gays and lesbians from marriage does not benefit the interests of those children of heterosexual parents, who are able to enjoy the environment supported by marriage with or without the inclusion of same-sex couples.

The ban on same-sex civil marriage can only logically be justified as a means to ensure the asserted optimal environment for raising children if fewer children will be raised within same-sex relationships or more children will be raised in dual-gender marriages. Yet, the same-sex-marriage ban will accomplish these outcomes only when people in same-sex relationships choose not to raise children without the benefit of marriage or when children are adopted by dual-gender couples who would have been adopted by same-sex couples but for the same-sex civil marriage ban. We discern no substantial support for this proposition. These outcomes, at best, are minimally advanced by the classification. Consequently, a classification that limits civil marriage to opposite-sex couples is simply not substantially related to the objective of promoting the optimal environment to raise children. This conclusion suggests stereotype and prejudice, or some other unarticulated reason, could be present to explain the real objectives of the statute.

c. Promotion of procreation. *The County also proposes that government endorsement of traditional civil marriage will result in more procreation. It points out that procreation is important to the continuation of the human race, and opposite-sex couples accomplish this objective because procreation occurs naturally within this group. In contrast, the County points out, same-sex couples can procreate only through assisted reproductive techniques, and some same-sex couples may choose not to procreate. While heterosexual marriage does lead to procreation, the argument by the County fails to address the real issue in our required analysis of the objective: whether exclusion of gay and lesbian individuals from the institution of civil marriage will result in more procreation? If procreation is the true objective, then the proffered classification must work to achieve that objective.*

Conceptually, the promotion of procreation as an objective of marriage is compatible with the inclusion of gays and lesbians within the definition of marriage. Gay and lesbian persons are capable of procreation. Thus, the sole conceivable avenue by which exclusion of gay and lesbian people from civil marriage could promote more procreation is if the unavailability of civil marriage for same-sex partners caused homosexual individuals to "become" heterosexual in order to procreate within the present traditional institution of civil marriage. The briefs, the record, our research, and common sense do not suggest such an outcome. Even if possibly true, the link between exclusion of gay and lesbian people from marriage and increased procreation is far too tenuous to withstand heightened scrutiny. Specifically, the statute is significantly under-inclusive with respect to the objective of increasing procreation because it does not include a variety of groups that do not procreate for reasons such as age, physical disability, or choice. In other words, the classification is not substantially related to the asserted legislative purpose.

d. Promoting stability in opposite-sex relationships. *A fourth suggested rationale supporting the marriage statute is "promoting stability in opposite sex relationships." While the institution of civil marriage likely encourages stability in opposite-sex relationships, we must evaluate whether excluding gay and lesbian people from civil marriage encourages stability in opposite sex relationships. The County offers no reasons that it does, and we can find none. The stability of opposite-sex relationships is an important governmental interest, but the exclusion of same-sex couples from marriage is not substantially related to that objective.*

e. Conservation of resources. *The conservation of state resources is another objective arguably furthered by excluding gay and lesbian persons from civil marriage. The argument is based on a simple premise: couples who are married enjoy numerous governmental benefits, so the state's fiscal burden associated with civil marriage is reduced if less people are allowed to marry. In the common sense of the word, then, it is "rational" for the legislature to seek to conserve state resources by limiting the number of couples allowed to form civil marriages. By way of example, the County hypothesizes that, due to our laws granting tax benefits to married couples, the State of Iowa would reap less tax revenue if individual taxpaying gay and lesbian people were allowed to obtain a civil marriage. Certainly, Iowa's marriage statute causes numerous government benefits, including tax benefits, to be withheld from plaintiffs.28 Thus, the ban on same-sex marriages may conserve some state resources. Excluding any group from civil marriage—African-Americans, illegitimates, aliens, even red-haired individuals—would conserve state resources in an equally "rational" way.*

Yet, such classifications so obviously offend our society's collective sense of equality that courts have not hesitated to provide added protections against such

inequalities.... Exclusion of all same-sex couples is an extremely blunt instrument for conserving state resources through limiting access to civil marriage. In other words, the exclusion of same-sex couples is overinclusive because many same-sex couples, if allowed to marry, would not use more state resources than they currently consume as unmarried couples. To reference the County's example, while many heterosexual couples who have obtained a civil marriage do not file joint tax returns—or experience any other tax benefit from marital status—many same-sex couples may not file a joint tax return either. The two classes created by the statute—opposite-sex couples and same-sex couples—may use the same amount of state resources. Thus, the two classes are similarly situated for the purpose of conserving state resources, yet the classes are treated differently by the law. In this way, sexual orientation is a flawed indicator of resource usage.

Just as exclusion of same-sex couples from marriage is a blunt instrument, however, it is also significantly undersized if the true goal is to conserve state resources. That is to say, the classification is underinclusive. The goal of conservation of state resources would be equally served by excluding any similar-sized group from civil marriage. Indeed, under the County's logic, more state resources would be conserved by excluding groups more numerous than Iowa's estimated 5800 same-sex couples (for example, persons marrying for a second or subsequent time). Importantly, there is also no suggestion same-sex couples would use more state resources if allowed to obtain a civil marriage than heterosexual couples who obtain a civil marriage.

Such over-inclusion and under-inclusion demonstrates the trait of sexual orientation is a poor proxy for regulating aspiring spouses' usage of state resources. This tenuous relationship between the classification and its purpose demonstrates many people who are similarly situated with respect to the purpose of the law are treated differently. As a result, the sexual orientation- based classification does not substantially further the suggested governmental interest, as required by intermediate scrutiny.

***4. Conclusion**. Having examined each proffered governmental objective through the appropriate lens of intermediate scrutiny, we conclude the sexual-orientation-based classification under the marriage statute does not substantially further any of the objectives. While the objectives asserted may be important (and many undoubtedly are important), none are furthered in a substantial way by the exclusion of same-sex couples from civil marriage. Our equal protection clause requires more than has been offered to justify the continued existence of the same-sex marriage ban under the statute.*

***I. Religious Opposition to Same-Sex Marriage**. Now that we have addressed and rejected each specific interest advanced by the County to justify the classification drawn under the statute, we consider the reason for the exclusion of gay and lesbian couples from civil marriage left unspoken by the County: religious opposition to same-sex marriage. The County's silence reflects, we believe, its understanding this reason cannot, under our Iowa Constitution, be used to justify a ban on same-sex marriage.*

While unexpressed, religious sentiment most likely motivates many, if not most, opponents of same-sex civil marriage and perhaps even shapes the views of those people who may accept gay and lesbian unions but find the notion of same-sex marriage unsettling. Consequently, we address the religious undercurrent propelling the same-sex marriage debate as a means to fully explain our rationale for rejecting the dual-gender requirement of the marriage statute.

It is quite understandable that religiously motivated opposition to same-sex civil marriage shapes the basis for legal opposition to same-sex marriage, even if only indirectly.

Religious objections to same-sex marriage are supported by thousands of years of tradition and biblical interpretation. The belief that the "sanctity of marriage" would be undermined by the inclusion of gay and lesbian couples bears a striking conceptual resemblance to the expressed secular rationale for maintaining the tradition of marriage as a union between dual-gender couples, but better identifies the source of the opposition. Whether expressly or impliedly, much of society rejects same-sex marriage due to sincere, deeply ingrained— even fundamental—religious belief.

Yet, such views are not the only religious views of marriage. As demonstrated by amicus groups, other equally sincere groups and people in Iowa and around the nation have strong religious views that yield the opposite conclusion.

This contrast of opinions in our society largely explains the absence of any religion-based rationale to test the constitutionality of Iowa's same-sex marriage ban. ...

The statute at issue in this case does not prescribe a definition of marriage for religious institutions. Instead, the statute declares, "Marriage is a civil contract" and then regulates that civil contract. Iowa Code § 595A.1. Thus, in pursuing our task in this case, we proceed as civil judges, far removed from the theological debate of religious clerics, and focus only on the concept of civil marriage and the state licensing system that identifies a limited class of persons entitled to secular rights and benefits associated with civil marriage."

Yours faithfully

Stephen Page
Family Law Accredited Specialist
