



**16 November 2009**

## **Response to Questions on Notice**

**Marriage Equality Amendment Bill 2009  
Senate Legal and Constitutional Affairs Committee  
Public Hearing, 9 November 2009**

### **Question 1**

*Can we provide evidence to assure the Committee that Australia is not only not in breach of its international obligations, but in fact is acting in accordance with them, by continuing to define and recognise marriage as a union of a man and a woman, and declining to recognise same-sex marriages contracted in overseas jurisdictions?*

**Australia is bound to uphold the existing definition of marriage as a union between a man and a woman, as clearly and unambiguously confirmed by international law.**

Several submissions to the subject Inquiry have claimed that marriage, under international human rights law, is a right of any two persons. These submissions have not been able to cite hard law in support of their contentions, for the simple reason that none exists. Article 23 of the *International Covenant on Civil and Political Rights* (ICCPR) clearly affirms that marriage is a union of a man and a woman, with an intrinsic capacity for procreation:

(2) The right of men and women of marriageable age to marry and to found a family shall be recognized.

A General Comment is the most authoritative of all the prescriptions that may be issued by the UN human rights monitoring bodies. The UN Human Rights Committee has stated that the right to marry and found a family in Article 23 “implies, in principle, the

possibility to procreate”.<sup>1</sup> This requirement, “in principle, the possibility to procreate”, rules out definitively any genuine legal right of two persons of the same sex to marry and to found a family. Procreation is a human act between a man and a woman and is fundamentally different in nature to acts which involve the use of biotechnologies to “produce” children.

Additional confirmation of the true nature of Article 23 is found in the communication of *Joslin v New Zealand*. This was a case in which the applicants claimed New Zealand had breached the ICCPR by refusing to provide for marriage between homosexual couples. The UN Human Rights Committee gave the following judgment:

“Given the existence of a specific provision in the Covenant on the right to marriage, any claim that this right has been violated must be considered in the light of this provision. **Article 23, paragraph 2, of the Covenant is the only substantive provision in the Covenant which defines a right by using the term "men and women", rather than "every human being", "everyone" and "all persons". Use of the term "men and women", rather than the general terms used elsewhere in Part III of the Covenant, has been consistently and uniformly understood as indicating that the treaty obligation of States parties stemming from article 23, paragraph 2, of the Covenant is to recognize as marriage only the union between a man and a woman wishing to marry each other.**

“In light of the scope of the right to marry under article 23, paragraph 2, of the Covenant, the Committee cannot find that by mere refusal to provide for marriage between homosexual couples, the State party has violated the rights of the authors under articles 16, 17, 23, paragraphs 1 and 2, or 26 of the Covenant.

“The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol, is of the view that **the facts before it do not disclose a violation of any provision of the International Covenant on Civil and Political Rights.**”<sup>2</sup> [emphasis added]

It is not unjust discrimination against homosexual persons or a violation of Article 2 of *the International Covenant on Civil and Political Rights* (the principle of non-discrimination) to uphold marriage as a union between a man and a woman. Article 23 of the Covenant clearly recognises marriage as a naturally procreative union and Article 2 and Article 23 of the Covenant must be read compatibly. International human rights law requires countries to recognise, in justice, that marriage is unique and essentially different from other kinds of relationships. Article 16 of the *Universal Declaration of Human Rights* states that:

- (1) Men and women of full age, without any limitation due to race, nationality or religion, have the right to marry and to found a family. They are entitled to equal rights as to marriage, during marriage and at its dissolution.
- (2) Marriage shall be entered into only with the free and full consent of the intending spouses.
- (3) The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.

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<sup>1</sup> Human Rights Committee, General Comment 19, Article 23 (Thirty-ninth session, 1990), paragraph 5.

<sup>2</sup> *Joslin et al. v. New Zealand*, Communication No. 902/1999, Views adopted 17 July 2002. Available at <http://www.humanrights.is/the-human-rights-project/humanrightscasesandmaterials/cases/internationalcases/humanrightscommittee/nr/287>.

It is highly significant that Article 16 deliberately omits the term “sex or other status”. The non-discrimination clause extends *only* to “race, nationality or religion” precisely because to extend it further would be to damage the integrity of the very institutions of marriage and family that the article was formulated to protect.

Finally, because same-sex marriages are by their nature invalid under international law (although they may be valid in certain domestic jurisdictions), Australia is under no obligation to recognise those marriages, and in fact, is obliged to withhold such recognition. As a signatory to *The Hague Convention on the Celebration and Recognition of Marriages*, Australia is obliged to recognise valid marriages contracted in other states party to the Convention. But the meaning of “marriage” and “spouses” in the Hague Convention must be read compatibly with their meaning in the *International Covenant on Civil and Political Rights* (ICCPR), which binds Australia and all other states party to the Covenant. The terms “marriage” and “spouses” cannot be reinterpreted and applied by a state in a way contrary to the clear meaning of Article 23 of the ICCPR. Those states which have recognised same-sex unions as marriages have acted in serious breach of Article 23.

## **Question 2**

*Can we provide further support for the proposition that it is in the best interests of the child for the state to continue to recognise that marriage is a union of a man and a woman?*

**Heterosexual Marriage respects and models for children the difference and complementarity of persons. The capacity of same sex relationships to do this is significantly diminished.**

The experience of the natural complementarity of men and women enables an individual to mature in his or her psychosocial understanding of what it is to be a human person. Same sex relationships cannot exemplify the same level of difference and complementarity and openness to new life. Respect for this natural complementarity is described by sociology professor Dr David Popenoe:

“We should disavow the notion that ‘mummies can make good daddies’ just as we should disavow the notion of radical feminists that ‘daddies can make good mummies’... The two sexes are different to the core and each is necessary – culturally and biologically – for the optimal development of a human being”.<sup>3</sup>

**Heterosexual Marriage respects the intrinsic differences of fatherhood and motherhood.**

There are intrinsic differences between what fathers and mothers are able to offer their children. While gratefully respecting the often heroic efforts made by lone parents, most

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<sup>3</sup> David Popenoe, *Life Without Father: Compelling New Evidence That Fatherhood and Marriage are Indispensable for the Good of Children and Society*, (New York: The Free Press 1996), p 197.

people do not usually enter into parenthood intending to be a single parent. Most single mothers and fathers wish that they could enjoy (or still enjoy) the complementary contributions of a spouse to the raising of their children. To suggest that fathers' and mothers' contributions to the raising of children are exactly the same is to 'dumb down' sexual difference and complementarity.

In the case of lesbian parents, children would be without a father in the home. We know that fathers are very important for reducing both antisocial behaviour and delinquency in boys and early sexual activity in girls. Fathers exercise a unique social and biological influence on their children. As the journal *Psychology Today* reports:

"Fatherhood turns out to be a complex and unique phenomenon with huge consequences for the emotional and intellectual growth of children."<sup>4</sup>

A recent study of the effects of father absence on girls found that girls who grew up with an absent biological father were much more likely to experience early puberty and a teen pregnancy than girls who spent their entire childhood in an intact family.<sup>5</sup>

Relationships where homosexual men raise children deny children a mother. And yet we know that mothers are vital for providing children, particularly infants, with emotional security<sup>6</sup> and for giving daughters the trusted counsel they need during puberty and adolescence.<sup>7</sup> Same-sex parental situations which deliberately contrive to deprive children of a mother can never be in the best interests of the child.

### **Lack of Evidence to Support Equivalence of Same Sex Parenting**

Some 'experts' and professional associations have boldly asserted that there are no adverse effects of same-sex couple parenting on children. But it is early days to be making such claims. The studies to date have generally been undertaken by same-sex advocates and they all suffer from serious methodological problems. In a review of 14 studies of homosexual parenting, Belcastro et al reported that:

"All of the studies lacked external validity. The conclusion that there are no significant differences in children raised by lesbian mothers versus heterosexual mothers is not supported by the published research data base".<sup>8</sup>

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<sup>4</sup> "Shuttle Diplomacy", *Psychology Today*, July-August, 1993, p.15.

<sup>5</sup> Ellis, Bruce J., Bates, John E., Dodge, Kenneth A., Fergusson, David M., Horwood, L. John, Pettit, Gregory S., & Woodward, Lianne. "Does Father Absence Place Daughters at Special Risk for Early Sexual Activity and Teenage Pregnancy?" *Child Development*, 74, 801-821 (2003).

<sup>6</sup> M. D. S. Ainsworth et al (1978). *Patterns of attachment: A psychological study of the strange situation*. Hillsdale, NJ, Erlbaum; D. Meadows & G. Elias, "Maternal Sensitivity to Infants' Communicative Acts during the Preverbal Period", in *Reimagining Practice: Researching Change*, 2, 206-220 (Griffith University, 2003).

<sup>7</sup> N. Parera & J. Suris, "Having a good relationship with their mother: a protective factor against sexual risk behavior among adolescent females?", *Journal of Pediatric and Adolescent Gynecology*, 17, 267-271 (2004).

<sup>8</sup> P. Belcastro et al, "A Review of Data Based Studies Addressing the Effects of Homosexual Parenting on Children's sexual and Social Functioning", *Journal of Divorce and Remarriage* 20, 105, 106 (1993).

In a further thorough review of homosexual parenting studies, Lerner and Nagai, who are professionals in the field of quantitative analysis, evaluated 49 empirical studies on same-sex parenting. They found little evidence to support the position that homosexual households are the same as traditional families:

“We conclude that the methods used in these studies are so flawed that these studies prove nothing. Therefore, they should not be used in legal cases to make any argument about ‘homosexual’ vs. ‘heterosexual’ parenting. Their claims have no basis.”<sup>9</sup>

Perhaps the most thorough review was prepared by sociology professor Steven Nock, who was asked to review several hundred such studies as an expert witness for the Attorney General of Canada. Nock concluded:

“Through this analysis I draw my conclusions that 1) all of the articles I reviewed contained at least one fatal flaw of design or execution; and 2) not a single one of those studies was conducted according to general accepted standards of scientific research.”<sup>10</sup>

A research paper from the Australian Institute of Family Studies confirms that the evidence for equivalency in outcomes for children raised in same sex couples is lacking:

“A number of concerns have been raised about the potential negative effects of being raised in a gay or lesbian-headed family. These include the child's confusion in terms of gender identity; problems in personal development and social relationships; harm resulting from family disruption (on the assumption that gay and lesbian relationships are more short lived than heterosexual relationships); and fear of sexual molestation by their gay or lesbian parents (Patterson 1992). The overall mental health of lesbian mothers compared with that of heterosexual mothers has also been raised as an issue (Patterson 2002: 322). Another anxiety is that children might be teased and ostracized by their peers, and consequently show difficulties in social and emotional development...

Studies based on fathers' reports of their own behaviour suggest that gay fathers may be more likely than their heterosexual counterparts to exhibit authoritative patterns of parenting behaviour (Patterson 2002: 324). However, much of the available research has involved small, unrepresentative samples that are predominantly well educated, middle class and American (Patterson 2002). The degree to which results reflect sampling biases of the research, and their applicability in the Australian context, are thus difficult to evaluate.”<sup>11</sup>

The evidence above indicates that it would not be in the best interests of children to expose them to any potential risks from same-sex couple parenting.

### **Evidence in Support of Married Heterosexual Parenting**

In contrast, there is a body of research that supports the position that children from married heterosexual two-parent households do better academically, financially, emotionally and behaviourally than children raised in other forms of relationships. One significant study reported in the journal *Children Australia* compared 174 children living

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<sup>9</sup> Dr R. Lerner and Dr A. Nagai, *No Basis: What the studies Don't Tell us About Same-sex Parenting*, Washington Ethics and Public policy Centre, (2001): 6.

<sup>10</sup> Steven Nock. 2001. *Affidavit to the Ontario Superior Court of Justice regarding Hedy Halpern et al.* University of Virginia Sociology Department.

<sup>11</sup> *Family structure, child outcomes and environmental mediators: An overview of the Development in Diverse Families Study*, Australian Institute of Family Studies, January 2003.

in either heterosexual married, heterosexual cohabiting or homosexual co-habiting homes. The study collected information primarily from teachers and only secondarily from parents and teachers. (As such, it avoided the risk of bias on the part of parents who may have been tempted to show how 'successful' they are.) The study found that the children of married couples did the best in nine out of thirteen measures including language, mathematics, sport, sociability and attitudes to school and to learning. The author concluded:

“Overall, the study has shown that children of married couples are more likely to do well at school, in academic and social terms, than children of co-habiting heterosexual and homosexual couples...In this study, married couples seem to offer the best environment for a child's social and educational development”.<sup>12</sup>

Quite apart from empirical studies, there is also the historical and anthropological datum that every society before our own has privileged heterosexual marriage as the site for the upbringing of children because this has been thought and found to be the best situation for all concerned. Even though, sadly, marriages and families can break down, our collective personal and social experience still attests to the enduring meaning and value of marriage for children. Marriage is the place where a man and a woman commit their lives to each other and open their lives to the gift of children. It is the place where children receive the unique and complementary love of both a father and a mother, who commit to love each other for life. Married parents are able to give children the distinctive and priceless experiences of being mothered and fathered, and to witness to them, on a daily basis, the equal dignity, worth, beauty and value of men and women.



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12 S. Sarantakos, "Children in three contexts: Family, Education and Social Development," *Children Australia*, Vol 21, No 3 (1996), 23. See also the following: Sara McLanahan and Gary Sandfeur, *Growing Up with a Single Parent: What Hurts, What Helps* (Cambridge:Harvard University Press, 1994), p. 45; Pat Fagan, "How Broken Families Rob Children of Their Chances for Prosperity," Heritage Foundation *Backgrounder* No. 1283, June 11, 1999, p. 13; Dawn Upchurch et al., "Gender and Ethnic Differences in the Timing of First Sexual Intercourse," *Family Planning Perspectives* 30 (1998): 121-127; Jeanne M. Hilton and Esther L. Devall, "Comparison of Parenting and Children's Behavior in Single-Mother, Single-Father, and Intact Families," *Journal of Divorce and Remarriage* 29 (1998): 23-54; Jane Mauldon, "The Effect of Marital Disruption on Children's Health," *Demography* 27 (1990): 431-446; Frank Furstenberg, Jr., and Julien Teitler, "Reconsidering the Effects of Marital Disruption: What Happens to Children of Divorce in Early Adulthood?" *Journal of Family Issues* 15 (June 1994); Elizabeth Thomson et al., "Family Structure and Child Well-Being: Economic Resources vs. Parental Behaviors," *Social Forces* 73 (1994): 221-42.