

INQUIRY INTO SAME SEX MARRIAGE LAW IN NSW

Organisation: Australian Christian Lobby

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Australian Christian Lobby

Submission to the NSW Legislative Council Standing Committee on Social Issues

Inquiry into same-sex marriage laws



Marriage provides a **natural, timeless and sustainable** foundation for our society.

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Executive Summary

The Australian Christian Lobby (ACL) welcomes the opportunity to make a submission to the Standing Committee on Social Issues' Inquiry Into Same Sex Marriage Law in NSW.

Marriage is the union of one man and one woman voluntarily entered into for life. It provides a natural, timeless and sustainable foundation for our society.

Redefining marriage is unnecessary, would be detrimental to society and is beyond the power of the New South Wales Parliament.

Same-sex couples enjoy exactly the same rights as any other citizen under Australian and New South Wales law. In NSW, same-sex couples can enter into a civil union through the NSW Relationships Register. There is no need for NSW to redefine marriage.

In Australia, states are unable to legislate to redefine marriage. The power to create laws concerning marriage resides with the Federal Parliament. This was the position of

both the Labor Party and Liberal/National Coalition going into the 2011 state election.

Redefining marriage would have a detrimental effect on our society. It would sever the connection between marriage and children. It would change society. Experience overseas has demonstrated how redefining marriage has been used to curtail important human rights. Freedom of speech and freedom of religion have both come under attack in countries that have redefined marriage.

We can't afford to redefine marriage.

David Hutt
NSW Director
Australian Christian Lobby

Marriage provides a
natural, timeless and
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Introduction

ACL represents a significant section of the Australian community. Our supporters are mainly Christians, coming from a diverse range of denominations. Catholic, Orthodox, evangelical, and Pentecostal denominations.

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Marriage is a timeless institution. It is older than government and predates organised religion.

Yet throughout history, it has become necessary to describe it and clothe it in a legal definition.

The Commonwealth *Marriage Act* 1961 defines marriage as:

the union of a man and a woman to the exclusion of all

*others, voluntarily entered into for life.*¹

While this definition was only added to the *Marriage Act* in 2004, ‘marriage’ has always been understood as an institution involving opposite sexes.

It was first described as such in common law in 1866 in the case of *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 was not a new definition. Rather, it affirmed the historic understanding of marriage. This is how Christians have understood marriage for over a millennium.

It is also worth noting that marriage was first defined in common law in response to a case of bigamy.

However people don’t have to be Christian or religious to share this view.

Marriage has held its meaning as the union of a man and a woman throughout history. This definition transcends 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.

Redefining marriage is unnecessary, would be detrimental to society and is beyond the power of the New South Wales Parliament.

Nowhere is the universality of this definition more obvious than the current Australian political context.

While Prime Minister Gillard and Opposition Leader Abbott share different religious views, both maintain that marriage is a man-woman union. Even as an atheist, the Prime Minister maintains this view and recognises the value in upholding natural marriage.

Same-sex marriage is a completely new idea.

The first time same-sex marriage was legislated anywhere in the world was just 12 years ago, in 2001 in the Netherlands. It is a new experiment. Its advocates cannot say with any certainty how the experiment will end. They cannot prove that its long term consequences will have a positive effect on society.

What is marriage?

Marriage is the union of one man and one woman, voluntarily entered into for life.

Marriage was not created by the *Marriage Act*. It is a natural institution that is recognised by the law.

Marriage symbolises fertility. It is the first step to building a family.

Only by bringing together two who are different can new human life be created.

The law recognises, promotes, and protects marriage. While not every married couple will be able to have children, the legal recognition of marriage is predicated largely on this biological function.

Marriage exists to provide protection for children, for their biological parents, and for the families they form.

An individual human is by nature complete for biological functions such as circulation and digestion. However,

*Individual adults are naturally incomplete with respect to one biological function: sexual reproduction.*³

The state should recognise and regulate marriage because of its “link to the welfare of children”.⁴

Families are an economically efficient vehicle for sharing wealth and resources.

ACL submits that a significant number of Australians, and most of faith, adhere to the timeless view of marriage.

On this view, opposing same-sex marriage is not merely a judgement that homosexual couples *may not* marry. This could rightly seem an unjust position. Rather, given the nature of marriage – what marriage *is* – same-sex couples *cannot* marry. This is because marriage is, inherently and by its nature, the union of *opposite sexes*.⁵

The NSW Parliament does not have the power to redefine marriage.

Marriage was not
created by the
Marriage Act. It is a
natural institution that
is recognised by the
law.

Parliaments can change a law, but they cannot change an idea.

If marriage *is* something, parliament can't change what that something is, only how it is described.

Many advocates of redefining marriage have a very small vision of what marriage is.

Some will claim that marriage is simply about love.

Love is important to marriage. No one wants to find him or herself in a loveless marriage. But marriage is much more than love.

Indeed, no one should feel the need for a parliament to recognise his or her love. As a society, our friendships, emotions and passion ought to be well beyond the reach of legislative fiat.

Marriage is good for society

Marriage is an institution older than either church or government regulation. 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 usually does not regulate personal relationships among its citizens. Marriage is one of the few exceptions. The state's interest in regulating marriage is due to the importance of marriage as a foundational unit in society. The state has an interest in upholding marriage as an ideal. It has an interest in encouraging and regulating relationships inherently predisposed towards procreation. It also has an interest in encouraging permanency and exclusivity in such relationships.

Writing in the *Harvard Journal of Law & Public Policy*, Monte Stewart identifies six valuable social goods of traditionally, male-female marriage. Marriage 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**... (this

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.⁷

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

Marriage's importance to children in particular is thoroughly supported by social science.

Children do best with married, biological parents

Marriage is about family formation. Any discussion about redefining marriage in law must therefore consider potential consequences for children.

Married, biological parents provide the best environment in which to nurture and raise children. This environment should be encouraged by government.

Sociologist David Popenoe states:

The two sexes are different to the core, and each is necessary – culturally and biologically – for the optimal development of a human being.⁸

This view is confirmed by social science.

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”.⁹

Professor Patrick Parkinson of the University of Sydney conducted research into the wellbeing of children and released his report, *For Kids' Sake*, in September 2011. Professor Parkinson concluded that:

*The **overwhelming evidence** from research is that children do best in two-parent married families.¹⁰*

Parkinson's report examined a range of research from social scientists. For example, 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.¹¹

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

Prof Patrick Parkinson
University of Sydney

These benefits “not only are evident in the short-term but also endure through adulthood.”¹² That is, a child’s environment impacts his or her wellbeing for the rest of life.

A thorough study by sociologist Mark Regnerus of the University of Texas supports this conclusion. Mark Regnerus concludes that:

*children appear most apt to succeed well as adults – on multiple counts and across a variety of domains – when they spend their entire childhood with their married mother and father”.*¹³

The study involved a large representative probability sample. It avoided some of the flaws of many similar studies, such as self-selection and small sample sizes. The study was criticised by some and one activist even called for an investigation by the University.¹⁴ The University absolved Regnerus and declared that no formal investigation was warranted.¹⁵

Professor Paul Amato argues that these benefits are not only merely correlated

to family structure. They are, he says, 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 differences, studies that have used a variety of sophisticated statistical methods, including controls for genetic factors, suggest that this is the case.*¹⁶

Another study conducted for the American research centre Child Trends, agrees that

*research findings linking family structure and parents’ marital status with children’s well-being are very consistent.*¹⁷

Children in families both with single parents and stepparents have lower levels of wellbeing than those with both biological parents. Thus, it concludes:

*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.*¹⁸

One reason two biological parents is so important is the different effects mothers and fathers have on their children. One study concludes that “both parents shape their children’s psychological security but each in his or her unique way”.¹⁹ The authors 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”.*²⁰

Kyle Pruett, a renowned paediatrician, agrees. The gender of the father and mother each play distinct roles in the child’s development through early childhood and adolescence. Both the father’s “masculine gender” and the “mother’s femininity” carry great

importance for their relationship with their child.

This modelling of male and female roles in a child's life is essential. It is protected in marriage, as is a child's biological identity. These factors, combined with the stability of marriage, are worth protecting. They are explicit factors of marriage, as currently defined, and are a powerful reason for defending natural marriage.

The importance of fathers

The importance that fathers have is supported emphatically by social science. A father's positive effects on his children is tragically demonstrated by the reverse – father absence. Since father absence has become a widespread social problem, studies are showing the negative outcomes this has for children. One study states:

*father love is the sole significant predictor of specific outcomes after controlling for the influence of mother love.*²¹

A study in the leading journal *Pediatrics* states:

*Father involvement is of a different nature than mother involvement.*²²

Fathers spend more time engaged in play, tactile and stimulating activities, and recreational activities such as walks and outings.²³ Fathers are important role models for both girls and boys, and have a strong influence on his child's gender role development.²⁴ Fathers act as "teachers, disciplinarians, and role models" and impart important knowledge for "life-survival skills and for school learning".²⁵

Another study, in the *Review of General Psychology*, supports these claims. Fathers' love has a "powerful influence... on children's and young adults' social, emotional, and cognitive development and functioning".²⁶ Father love is as important as mother love in the psychological health of children.²⁷

Children who spend time with their fathers also have "improved academic performance".²⁸ According to the *Pediatrics* study, children with encouraging and involved fathers have:

*higher college entrance examination scores, reach higher economic and educational attainment, show less delinquent behavior, and possess greater psychologic well-being.*²⁹

They also have a "stronger sense of social competence" and "fewer depressive symptoms".³⁰

The importance of fathers for girls

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

"Father love is the sole significant predictor of specific outcomes after controlling for the influence of mother love"

in different ways.

Father absence is associated with some alarming outcomes for girls. For example, father absence is associated with “early sexual activity, teenage pregnancy, behavioural difficulties and life adversity”.³¹ Other negative outcomes include poor academic performance and lower self-esteem.³² One Australian study also found that participants had difficulties in relating to men, including distrust and fear of abandonment. They also reported “a sense of ‘craving’ male attention and male affection”. These problems were associated with father absence and lack of father affection.³³

Flaws in some studies of same-sex parenting

The weight of social science reveals the importance of both mothers and fathers. Despite this, advocates of same-sex marriage claim that there is no difference between same-sex and opposite-sex parenting. Various studies are cited, but these studies have been shown to have serious methodological flaws.

Same-sex parenting is relatively new in society. Public debate around same-

sex parenting is even newer. There have been relatively few children raised in same-sex households. Because of this, there has been little time to see the full extent of the effects of same-sex parenting.

As a result, many of the studies that have been done have not been comprehensive.

In 2005 the American Psychological Association (APA) claimed that no study has found any disadvantage for children of same-sex parents. They cited 59 studies to support this claim. In 2012, Loren Marks of Louisiana State University analysed the 59 studies. He found that:

*not one of the 59 studies referenced in the 2005 APA Brief...compares a large, random, representative sample of lesbian or gay parents and their children with a large, random, representative sample of married parents and their children...*³⁴

The data used were “insufficient to support a strong generalizable claim either way”.³⁵ Loren Marks concluded about the APA’s claim that it was “not

empirically warranted” and “not...grounded in science”.³⁶

Marks’ study confirms what quantitative analysis experts Robert Lerner and Althea Nagai found in 2001. They studied 49 same-sex parenting studies and found them to be “gravely deficient”.³⁷ Problems ranged from unclear hypotheses to inadequate comparison groups, unreliable measurements, and non-random samples. They concluded that every one of the studies was “so flawed” that it failed to prove anything.³⁸

This quote from Tom Frame is a good summary of the situation:

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 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.³⁹

Marriage is good for society: Conclusion

Marriage goes far beyond meeting the relational needs of adults. Marriage is good for individual adults, but it is far more than that. It also promotes the optimal environment for the raising of children. Social science demonstrates the benefits for children of having both a mother and father.

It is for this reason that government has an interest in promoting and protecting marriage, as it is currently defined. Redefining marriage would sever its biological link to children. The adverse effects of placing adult rights ahead of the best interests of children is already being seen.

ACL acknowledges the reality that there are many children not being raised by married, biological parents. This is usually the result of death or desertion of one or both parents. There are many single parents and parents in same-sex relationships who raise their children well. ACL's support for natural marriage does not deny that other families exist. It is not a judgement on the love, or the competence, of parents in these other families.

However, families headed by married, biological parents are the ideal

environment. Government should promote and encourage this ideal. It should encourage the environment that is *best* for children, which nature dictates is best for children.

Maintaining natural marriage in the law and upholding it as a social ideal is in the best interests of children. It is in the best interests of society as a whole.

What are the legal issues involved in redefining marriage?

Can Australian states go-it-alone on marriage?

The NSW Parliament does not have the legal authority to redefine marriage. Only the Australian parliament has power to make marriage laws.

This was the position of both the Liberal / National Coalition parties and the Labor Party at the 2011 NSW election. Each party was asked in an election questionnaire whether they would support state-based same-sex marriage. Both parties responded by saying marriage was a federal issue and that states were powerless to legislate in this area.

A number of prominent supporters of same-sex marriage have conceded it is an issue for the federal parliament and not the states.

NSW Opposition Leader John Robertson⁴⁰, Member for Sydney Alex Greenwich⁴¹ and WA Opposition Leader Mark McGowan⁴² have all said marriage is a federal issue.

Section 51(xxi) of the Constitution gives the power to make laws with respect to marriage to the Commonwealth. The Commonwealth did just that in 2004 when it amended the *Marriage Act* to define marriage:

*“marriage” means the union of a man and a woman to the exclusion of all others, voluntarily entered into for life.*⁴³

This not only serves as a definition of natural marriage. It makes quite clear the intention of the Commonwealth with respect to same-sex marriage.

Section 88EA of the *Marriage Act* states explicitly that unions between two men or two women entered into overseas are not to be recognised as marriage in Australia. The choice of the words “in Australia” is significant. The Commonwealth Parliament could have used “under Commonwealth law”. Saying “in Australia” demonstrates that the Commonwealth intended its legislation to cover marriage throughout Australia, including at state level.⁴⁴ There is no doubt about the

“The NSW Liberals & Nationals have no plans to legislate regarding any changes to the current definition of marriage. Marriage is a Commonwealth matter under the *Marriage Act 1961*.”

*NSW Liberal / National Coalition
Election questionnaire response 2011
www.nswvotes.org.au*

“Under section 50 (xxi) of the Australian Constitution, marriage is a matter reserved for the legislative powers of the Commonwealth Government, which has exercised those powers by enacting legislation to define marriage as a relationship between a man and a woman.

State governments are not able to meaningfully legislate with regard to marriage in these circumstances”

*NSW Labor Party
Election questionnaire response 2011
www.nswvotes.org.au*

intention of the Commonwealth in regard to recognising marriage in Australia.

Tasmania recently voted to preserve the natural and timeless definition of marriage.⁴⁵ Several legal scholars commented on this issue of constitutionality. Among them was former Governor and Chief Justice of Tasmania William Cox. According to Cox:

*It is clear that the Commonwealth has primacy in respect of laws in relation to marriage. (Any) State law inconsistent with legislation enacted by the Commonwealth will be struck down by the High Court.*⁴⁶

Some people, like Professor George Williams argue that because the *Marriage Act* deals with different-sex marriage, states can deal with same-sex marriage as it is a separate field. However this view is disputed by South Australian barrister Neville Rochow and solicitor Chris Brohier. According to Rochow and Brohier, the *Marriage Act* does not deal with “different-sex marriage” as opposed to “same-sex

**“Look it’s a federal issue.
And I have a son who is openly gay.
Obviously I think he is a wonderful
person.**

**But it’s a matter for the
Commonwealth.”**

John Robertson MP, NSW Opposition Leader
Insiders ABC 3 April 2011

marriage” but with *marriage*. Therefore same-sex marriage was expressly excluded from the institution of marriage by the 2004 amendments.⁴⁷

Eminent constitutional lawyer Augusto Zimmermann also provided legal advice regarding attempts to redefine marriage in Tasmania. Dr Zimmermann’s advice presented to the Tasmanian Government agrees with that of Cox, Rochow, and Brohier. He argues that the *Marriage Act* is clearly intended to “cover the field” of marriage throughout the country. This is clear, he argues, because of sections 109 and 88EA of the Constitution.

Section 109 says that any conflict between federal and state laws is to be resolved in favour of the state laws. Section 88EA, as discussed, precludes any same-sex union entered into overseas being recognised as marriage “in Australia”. Again, **the use of “in Australia” is significant as it shows the intention that the whole country comes under the federal marriage law.**

William Cox, Neville Rochow and Chris Brohier, and Augusto Zimmermann all argue that any state marriage law would be invalid under the Constitution.

In addition, Michael Stokes of the University of Tasmania Law School and Professor Greg Craven, Arch-Chancellor of the Australian Catholic University, gave similar advice.

It may take a High Court challenge to determine otherwise. However, it is not true that the experts agree that it is a grey area. William Cox said that he sees “nothing grey about it at all”.⁴⁸

It is likely that state-based same-sex marriage would result in a High Court case. This would be costly and time consuming.

In the likely event that any such law would be overturned, it could also result in great confusion regarding any “marriages” formed while the law was active.

It seems imprudent to go forward with legislation that is likely to be overturned. This is especially the case given that the federal parliament so overwhelmingly rejected same-sex marriage in 2012.

**“Although
it’s a federal issue
it still impacts how
people vote. That will either
mean a conscience vote or
bringing forward the national
conference.”**

Alex Greenwich, former convener
Australian Marriage Equality

Sydney Star Observer “Marriage equality
‘inevitable’” 10 November 2010

Many eminent legal experts agree – the NSW Parliament does not have the power to redefine marriage.

NSW does not have the power to redefine marriage. Section 51 xxi of the Australian constitution places this issue squarely in the jurisdiction of the Australian Parliament.

“When the *Marriage Act* was amended to define “marriage”, the Commonwealth extended the legislative field of that Act to provide an exhaustive definition of “*marriage*”. That institution cannot be validly re-defined by State law.”

- Neville Rochow and Chris Brohier⁴⁹

“As long as the Commonwealth defines marriage as the union between one man and one woman, any State law providing to the contrary will automatically fall outside the scope of the State power.”

- Dr Augusto Zimmermann, Murdoch University⁵⁰

“The Marriage Act exhaustively delineates the notion of marriage, both positively by defining it as union between people of different genders, and by necessary implication, by negatively excluding marriage between persons of the same sex.”

- Greg Craven, Arch-Chancellor of Australian Catholic University⁵¹

“The intention was to cover the field by restricting marriage in Australia to a man and a woman, leaving no room for State laws establishing same sex marriages. This interpretation is supported by the addition of section 88EA to the *Marriage Act* at the same time.”

- Michael Stokes – law school, University of Tasmania⁵²

“It is most unlikely that they would be regarded as legally ‘married’ for the purposes of Commonwealth law or under the law of any other State and would therefore not attract any legal benefits or status accorded to a married couple.”⁵³

- Prof Anne Twomey, University of Sydney

“There is absolutely nothing in the ‘Marriage Act Case’ to suggest that state laws concerning solemnisation of marriages could survive the enactment of this uniform national law, or that the states retained any residual legislative capacity in relation to the solemnisation of marriage.”

- Prof Patrick Parkinson, University of Sydney⁵⁴

“Its essence is that it is (1) a voluntary union, (2) for life, (3) of one man and one woman, (4) to the exclusion of all others.”

- John Quick and Robert Garran⁵⁵

Marriage is good for society

If parliaments were to try and redefine marriage, it would have a detrimental effect on our society.

Redefining marriage would not expand this good to a broader group. It would remove the good of marriage. It would have a range of serious, negative consequences.

Redefining marriage would sever the connection between marriage and children.

It would also have far-reaching consequences in other areas of life. In particular, it would have profound consequences for religious freedom, as well as education and marriage itself.

Redefining marriage would redefine family

As discussed, marriage is the best environment for children. Redefining marriage would remove the ideal of a mother and a father. It would not only remove this ideal from the law. It would send a message that, as a society, we

do not value the distinctiveness of motherhood and fatherhood.

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.⁵⁶

NSW will be in breach of International Law

The best interests of children should be paramount in public policy discussion of any family issue. This principle, the “best interests of the child”, is fundamental in family law.

Children’s’ rights are enshrined in international law under the *Convention on the Rights of the Child*. Article 3 of the convention states:

The child shall be registered immediately after birth and shall have the right from birth to a name, the right to acquire a nationality and. as far as possible, the right to know and be cared for by his or her parents.

Article 7, UN Convention on the Rights of the Child

*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.*⁵⁷

The Australian Family Law Act 1975 also emphasises this principle.⁵⁸

In situations involving children, the best interests of the child is considered to be “**the paramount consideration**”.⁵⁹ 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.*⁶⁰

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”.⁶¹

Advocates of redefining marriage argue from the angle of legal equality

for same-sex and opposite-sex couples. This has already been legally achieved in Australia. But redefining marriage would result in an assumed equality between same-sex and opposite-sex parenting, in terms of benefit to children.

It is a biological reality that the creation of life requires a complementary union of male and female. For a same-sex couple to have a child, that child must be separated from one or both biological parents.

For a same-sex couple to have a child, that child must be separated from one or both biological parents.

This practice is no less than a commodification of children to meet the desires of adults. It ignores the interests of children.

A state which allows it is ignoring its explicit responsibility to protect the best interests of children.

Last year’s inquiry by the Australian Senate into donor conception practices in Australia was instigated by people conceived using artificial reproductive technology (ART). Most of these people did grow up in a family with a mother and a father. However, 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.⁶²

A 2012 Victorian Parliamentary inquiry recommended that donor conceived adults be given the right to track their donor father.⁶³

These recommendations are an attempt to remedy situations in which children were severed from their biological origins. The state should not permit children to be created in an arrangement which would deliberately

deny them an upbringing with their biological parents.

As 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.*⁶⁴

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. It is not legitimately within the prerogative of government.

In NSW same-sex couples already have access to surrogacy and reproductive technologies. 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.*⁶⁵

Children need a mum and a dad

Same-sex parenting necessarily severs a child from at least one of their biological parents. Some Australian cases highlight the tragedy that can result in these circumstances.

“Same-sex couples cannot provide for a child's need to experience both male and female parental love.”

Prof Tom Frame

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.

In 2010, Queensland decriminalised surrogacy. At the same time the state made it possible for same-sex couples to acquire a child through surrogacy. **One year after the birth of the first child under this regime, the mother expressed profound regret about her arrangement.** She said:

*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.*⁶⁶

The two men in this case refuse to allow the woman to have involvement with the child. They said they "went into this just wanting to be parents and not having a third parent".⁶⁷

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.⁶⁸ This incident prompted an inquiry into whether sperm donor's details should be included on birth certificates.

Famously, Sir Elton John and his partner have obtained two babies through surrogacy. After their first, they admitted **he will never know his biological mother as the egg was from an anonymous donor.**⁶⁹ Homosexual journalist Andrew Pierce, who is also adopted, decried the selfishness of John and his partner. Pierce stated 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".⁷⁰

These cases are examples of adults selfishly placing their own desires ahead of the interests of children. This selfishness is aided by the failure of government to act in children's best interests.

Demolishing the natural understanding of parenting by redefining marriage can only multiply these situations.

The government has a responsibility to protect the best interests of children.

This includes protecting a child's biological identity. Marriage is fundamental to both. There would need to be an overwhelming case for redefining marriage to ignore these serious issues. Such a case has not been made.

Religious freedoms will come under attack

Unlike same-sex marriage, freedom of religion is a human right.

Freedom of religion is protected by the United Nations International Covenant on Civil and Political Rights ⁷¹ . Redefining marriage would threaten this important human right.

Around the world, defenders of natural marriage have been subjected to ridicule, abuse, and even legal persecution.

In March 2012, the European Court of Human Rights (ECHR) declared that same-sex marriage is not a human right. ⁷² Commenting on the ruling, discrimination law expert Neil Addison commented that in countries that had redefined marriage:

"It's going to be heartbreaking for him to grow up and realise he hasn't got a mummy."

Sir Elton John
The Daily Mail 15 July 2012

*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.*⁷³

In other words, although not a human right, countries which redefine marriage will need to ensure that all couples are treated the same. Churches will be forced “to fall into line and perform the wedding ceremonies” of same-sex couples.⁷⁴

Redefining marriage would decree that same-sex and opposite-sex unions are equivalent. The state would be compelled to restrict the circumstances in which a person could hold an opposing view. Over time such circumstances would be defined more and more narrowly.

Supporters of marriage would thus be on perilous legal ground. Culturally they would also be subject to increasing marginalisation. Opposing the legally mandated norm of same-sex marriage,

even for reasons of faith, would be tolerated less and less.

We have seen such growing intolerance of this natural view of marriage in countries which have redefined marriage. This is occurring even in countries which still define marriage as between a man and a woman.

Redefining marriage threatens human rights

The European Court of Human Rights has ruled that same-sex marriage is not a human right.

However in countries where marriage has been redefined in law, important human rights like freedom of speech and freedom of religion have come under threat.

THE NETHERLANDS

2001 – marriage redefined

Civil servant fired by the City of The Hague simply for stating his desire not to perform same-sex marriages, “because he expressed his views on same-sex marriages.”

MASSACHUSETTS

2004 – marriage redefined

Catholic Charities were forced to shut down in 2009. The law would have forced them to provide adoption services to same-sex couples.

CANADA

2005 – redefined marriage

Marriage commissioner Orville Nichols refused to perform a wedding for two men. Taken to court. Ordered to pay \$2,500.

IOWA

2009 – marriage redefined

A baker threatened with legal action after declining to make a wedding cake for two women.

VERMONT

2009 – marriage redefined

Catholic innkeepers sued after declining to host a wedding reception for two lesbians.

NEW MEXICO

Photographer found guilty of unlawful discrimination by Human Rights Commission for declining to photograph a lesbian ‘commitment ceremony’.

Ordered to pay \$6,000

ILLINOIS

Bed and breakfast owners facing lawsuit for refusing to host a civil union ceremony.

Redefining marriage will marginalise people of faith

Redefining marriage will not grant additional rights to people in same-sex relationships. As outlined above, they enjoy the same rights as any other citizen.

Same-sex attracted people are now widely accepted in society, and animosity directed towards homosexuals is decreasing.

In contrast, Christian and other religious groups are facing an increasingly hostile environment.⁷⁵ 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 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 right to be free from discrimination and the right to freedom of religion, religious groups said, with faith losing.⁷⁶

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

“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.”

David Menzies, *The Huffington Post*

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.*⁷⁷

He added that “the whole gay issue seems to be less about equal rights and more about special rights these days.”⁷⁸

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.*⁷⁹

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.⁸⁰

Polygamy and polyamory

Around the world and in Australia, polygamists and polyamorists are seeking the same 'marriage equality' as same-sex activists.

This is not a 'slippery slope' argument. This is fact.

If marriage were to be defined on the basis of love alone, there would be no basis on which to refuse it to any type of relationship, regardless of number, or the mixture of people.

If NSW were to attempt to redefine marriage it would have negative and unintended consequences for all marriages.

"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."

- Ean Higgins, *The Australian*

"Surely it makes more sense (than just legislating 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."

- Katrina Fox *The Drum* ABC

"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."

- Linda Kirman, La Trobe University

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

- Prof Elizabeth Emens, Columbia University

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.⁸¹

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.⁸² 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.⁸³

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.⁸⁴ 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.⁸⁵

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

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

Lawyers representing Canadian polyamorists who sued the state to gain legal recognition of their relationship.

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 Smith⁸⁶ and Tilda Swinton.⁸⁷ Prominent sex columnist Dan Savage⁸⁸ advocates “non-monogamy” in marriages.⁸⁹ 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,⁹⁰ 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 organisers refused to allow the polyamorous float to participate.⁹¹

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.*⁹²

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.*⁹³

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”.⁹⁴

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”.⁹⁵

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”,⁹⁶ penned an article for the

mainstream opinion website *The Drum* entitled “Marriage needs redefining”.⁹⁷ 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.*⁹⁸

The Netherlands

There is precedent for formal recognition of polyamorous groupings. In The Netherlands – the first country to redefine marriage – legal recognition of a threesome was given to Victor de Bruijn and his two “brides”. Not technically a marriage, the relationship is a *samenlevingscontract* or “cohabitation contract”,⁹⁹ 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.***¹⁰⁰

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.*¹⁰¹

Columbia University law professor Elizabeth Emens questions why people are willing to concede the sex

**FACT: The Netherlands
Redefined marriage in 2001**

**Civil unions called
samenlevingscontract are
now available to
polyamorous relationships.**

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).¹⁰²

Emens ponders how the “law might be used to encourage people to consider non-normative alternatives”,¹⁰³ 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.***¹⁰⁴

Emens expands on Charles Krauthammer’s question:

if marriage is redefined to include two men in love, on what possible principled grounds can

it be denied to three men in love?¹⁰⁵

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.¹⁰⁶

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.

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”.¹⁰⁷ They claim that:

Recognizing the diverse households that already are the norm in this country is simply a

“If marriage is redefined to include two men in love, on what possible principled grounds can it be denied to three men in love?”

Prof Elizabeth Emens, Columbia University

matter of expanding upon the various forms of legal recognition that already are available.¹⁰⁸

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”.¹⁰⁹ 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”.

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.*¹¹⁰

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.*¹¹¹

Elizabeth Brake, philosopher at the University of Calgary, argues for legal recognition of relationships of “any size, gender, composition, and allocation of responsibilities”.¹¹² Brake believes the law should be used to “denormalize... heterosexual monogamy as a way of life”.¹¹³

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.*¹¹⁴

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

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.

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.

Why most of the world supports man-woman marriage.

In 2012 the Tasmanian Parliament re-affirmed the natural and timeless definition of marriage. Many MPs were worried about the constitutional consequences of redefining marriage. However, widespread community concern about the consequences of redefining marriage also played a role. Opposition to same-sex marriage is based on far more than the validity of state-based marriage laws.

At the Commonwealth level, two bills were comprehensively defeated in September last year. The Senate voted 41-26 against the *Marriage Amendment Bill (No 2) 2012*.¹¹⁵ The day before this, the House of Representatives voted even more overwhelmingly, 98-42, against the *Marriage Amendment Bill 2012*.¹¹⁶ In these votes the Commonwealth Government strongly voted to defend its 2004 amendments. This sends a strong message that the intent of that amendment remains the opinion of the Parliament.

Prior to the parliamentary votes there was a wide consultation with the Australian community. In response to Adam Bandt's demands, Members of the House of Representatives consulted with their electorates. The Australian people spoke overwhelmingly to their representatives. On August 24, 2011, 30 MPs reported on their consultations with their electorates. Of those 30 electorates, 18 were strongly in favour of protecting the current definition of marriage, while only six were calling for change.¹¹⁷

Around the world, it remains the case that only a small minority of jurisdictions have redefined marriage. Only 11 countries, 10 US States, and a small group of states in other countries like Brazil and Mexico have done so. 30 US States constitutionally define marriage as between a man and a woman, and a further nine do so by statute.

Currently, France and Great Britain are considering redefining marriage despite enormous public opposition. In France, a march in Paris on November 17, 2012 saw an estimated 70,000 march to oppose same-sex marriage.¹¹⁸ In January, hundreds of thousands marched again.¹¹⁹ A pro-same-sex marriage rally two weeks later was much smaller in comparison.¹²⁰

Politically, although the proposal has the backing of cabinet, the bill is deeply divisive. Over 1,000 French mayors opposes the plan, as does the Catholic Church.¹²¹

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 a handful of jurisdictions have redefined marriage. Everywhere else, marriage is defined as a male-female union.

In the United States, 30 states define marriage in their constitutions as being between a man and a woman, and 12 forbid recognition of same-sex marriage in legislation.¹²² 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 eight 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”.¹²³ The Court deferred the right to redefine marriage to the French legislature, which declined to do so in June 2011.¹²⁴

98
150

Members of the Australian House of Representatives voted to preserve the definition of marriage in 2012.

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.

41
76

Australian Senators voted to preserve the definition of marriage in 2012.

Why same-sex marriage is unnecessary

Advocates often argue that same-sex marriage is necessary to create equality and to remove discrimination. This is simply not the case.

Same-sex couples currently face no legal detriments. They have all the same legal rights and responsibilities as heterosexual couples, including married couples.

NSW also allows same-sex couples to adopt children. Legislation was passed in 2010 allowing same-sex couples to adopt. At the time, same-sex activists acknowledged there was no longer any discrimination in law. The NSW Gay & Lesbian Rights Lobby published a press release with the title "Adoption reform removes final piece of discrimination". The group said:

*this historic reform removes the last piece of direct legislative discrimination against same-sex couples in NSW.*¹²⁵

Federally, the Labor government removed legal discrimination in 85 pieces of legislation in 2008.¹²⁶ This move was supported by ACL. The move reformed the law in the areas of tax, superannuation, aged care, Medicare, immigration, and others.

In NSW, as in several of the other states and territories, there is legal recognition of same-sex relationships. Same-sex couples can register their relationships with the Registry of Births, Deaths & Marriages.

Out of 1,946 relationships registered in 2011, only 420 (21.6%) were same-sex. In 2010, out of 538 only 177 (32.9%) were same-sex.

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.

Fact:

NSW laws do not discriminate against same-sex couples.

Source: NSW Gay and Lesbian Rights Lobby media release *Adoption reform removes final piece of discrimination* 9 September 2010

www.girl.org.au

ACL does not believe redefining marriage will redress any substantive discrimination. Certainly, redefining marriage can offer no legal rights to same-sex couples that they do not already possess. Same-sex marriage is therefore unnecessary for reasons of discrimination or legal recognition.

Addressing common arguments given for redefining 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.*¹²⁷

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**.*¹²⁸

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.*¹²⁹

It is significant to note that the Covenant only refers to men and women separately in this article and

one other.¹³⁰ 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.¹³¹

More recently, the ECHR has also ruled that same-sex marriage is not a human right.¹³² 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.¹³³

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.

Polling commissioned by the Ambrose Centre for Religious Liberty¹³⁴ shows that people hold favourable views of marriage as a heterosexual institution



the number of times same-sex
marriage has ranked in the top
ten issues GetUp! supporters
want action on

Source: GetUp!'s annual survey of supporters
www.getup.org.au

45%

Australians believe same-sex marriage
Is a divisive issue*

14%

Australians “strongly” support
redefining marriage*

* Source: Ambrose Centre for Religious Liberty

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,¹³⁵ 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*.¹³⁶

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.¹³⁷ 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.¹³⁸ Only 35 per cent of people believe the *Marriage Act* should be changed if doing so is divisive.¹³⁹

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

*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.*¹⁴⁰

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.***¹⁴¹

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

69%

Australians believe we should uphold marriage and its traditional meaning.*

* Source: Ambrose Centre for Religious Liberty

mother and father – and redefining marriage would be a “significant change to Australian society” which should not be rushed into.¹⁴²

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.*¹⁴³

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.¹⁴⁴ 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.¹⁴⁵

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.¹⁴⁶ The electorates supporting same-sex marriage did so by small margins, while those rejecting it were mostly by very large margins.¹⁴⁷

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.

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.¹⁴⁸

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.¹⁴⁹

In European countries that 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.¹⁵⁰ Only 6.3 per cent of homosexuals in The Netherlands were married in the four years following redefinition of marriage there.¹⁵¹ An even smaller number of same-sex couples married in Belgium – only about 4.7 per cent.¹⁵²

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.¹⁵³ William Eskridge of Yale Law School also acknowledges the “exceedingly small” take-up rates of marriage among Scandinavian same-sex couples.¹⁵⁴

In Australia, in states that 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.¹⁵⁵ In contrast, there are more than 2,500 marriages in Tasmania each year.¹⁵⁶ 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 2011.¹⁵⁷ 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 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.

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Conclusion

Marriage is the union of one man and one woman voluntarily entered into for life. It provides a natural, timeless and sustainable foundation for our society.

Redefining marriage is unnecessary, would have detrimental effects on our society and is beyond the powers of the NSW Parliament.

As the NSW Gay and Lesbian Rights Lobby have publicly stated in 2010, same-sex couples are not discriminated against under NSW law. There is no need for change.

Many Australians see this as a divisive issue.

There is no logical reason why the Parliament should rush into implementing a reform that is unneeded, will divide the community and that is beyond the power of the NSW Parliament to deliver.

Redefining marriage would redefine family. It would profoundly change our society.

Same-sex marriage is not a human right. Yet, experience from overseas jurisdictions where marriage has been redefined clearly show how some activists have sought to diminish peoples' rights to free speech, conscience and religious practice.

ACL appreciates the opportunity to make this submission to the Standing Committee on Social Issues.

We humbly submit that the committee should recommend against redefining marriage.

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.¹⁵⁹ Court said she felt stunned, victimised, and the target of a “relentless hate campaign” for stating her views.¹⁶⁰
- Former Victorian Premier was subjected to similarly vicious attacks after writing that man-woman marriage was the best environment in which to raise children.¹⁶¹ 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”.¹⁶²
- 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.¹⁶³

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.¹⁶⁴
- 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.¹⁶⁵ The Bulls lost their appeal.¹⁶⁶

Canada

- In 2008, an Alberta pastor, Stephen Boissain, wrote a letter to a local newspaper which was disapproving of homosexual behaviour. Boissain was fined \$7,000 and ordered not to express his views on homosexuality in public.¹⁶⁷ 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.¹⁶⁸

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.¹⁶⁹
- 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.¹⁷⁰
- 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”¹⁷¹ 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.¹⁷² By comparison, under 800 people signed the petition.¹⁷³
- 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 University¹⁷⁴ while Jennifer Keeton was suspended when she refused to undergo “diversity sensitivity training” at August State University in Georgia.¹⁷⁵
- 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.¹⁷⁶
- 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.¹⁷⁷
- 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.¹⁷⁸ 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”.¹⁷⁹

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.

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