LEGISLATIVE COUNCIL

The Honourable Greg Donnelly MLC

20th April 2012

Committee Secretary
House of Representatives Standing Committee on
Social Policy and Legal Affairs
PO Box 6021
Parliament House
CANBERRA ACT 2600

Dear Committee Secretary,

RE: House of Representatives Inquiry into the Marriage Equality Amendment Bill 2012 and the Marriage Amendment Bill 2012

Thank you for the opportunity to make a contribution to this inquiry. It is my submission that the House of Representatives should reject in the strongest possible terms the proposed amendments to the *Marriage Act 1961* (Cth) to provide for marriage, other than between a man and a woman.

The primary reason for my objection is that I, along with the majority of Australians, believe that marriage in and of itself has a fixed nature i.e. intrinsically the marriage relationship involves a man and a woman. Across cultures, reaching back as far as anyone can trace, this has been the case. Marriage is the social institution that both symbolises and protects the inherently reproductive relationship that exists between a man and a woman, thereby establishing children's human rights regarding their biological origins and the family structure in which they are reared. The House of Representatives should not pass or amend any laws that would undermine this position either directly or indirectly.

For the Committee's information, I attach three articles for its reference. The articles articulate a range of reasons, including the one mentioned above, why the present definition in the *Marriage Act 1961* (Cth) should not be amended. The names of the authors are: Margaret Somerville, Maggie Gallagher and Terri Kelleher.

If there are any matters that you wish to discuss further regarding this submission, can you please call me on (02) 9230 2280.

Yours sincerely,

[redacted]

Greg Donnelly MLC
New South Wales Parliament

NSW Parliament
Macquarie Street
Sydney NSW 2000
Australia

Telephone: [redacted]
Facsimile: [redacted]
Mobile: [redacted]
Email: [redacted]

The Australian

It's all about the children, not selfish adults

- by: Margaret Somerville
- From: The Australian
- July 23, 2011 12:00AM

SAME-SEX marriage creates a clash between upholding the human rights of children with respect to their coming into being and the family structure in which they will be reared, and the claims of homosexual adults who wish to marry a same-sex partner.

It forces us to choose between giving priority to children's rights or to homosexual adults' claims.

Opposite sex marriage does not raise this conflict, because children's rights and adults' claims with respect to marriage are consistent. I oppose discrimination on the basis of sexual orientation and support legalising civil partnerships. But, I also believe that marriage should remain defined as being between a man and a woman.

My reasons go to the nature of marriage as the societal institution that symbolises and protects the inherently reproductive relationship that exists between a man and a woman and, thereby, establishes children's human rights regarding their biological origins and the family structure in which they are reared.

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

Marriage is a compound right in both international and domestic law: it's the right to marry and to found a family. Giving the latter right to same-sex couples necessarily negates the rights of all children with respect to their biological origins and natural families, not just those born into same-sex marriages. The Canadian Civil Marriage Act 2005, which legalised same-sex marriage, demonstrates this in providing that in certain legislation the term "natural parent" is to be replaced by "legal parent". In short, the adoption exception -- that who is a child's parent is established by legal fiat, not biological connection -- becomes the norm for all children.

In the same vein, some Canadian provincial legislation replaces the words "mother" and "father" on a birth certificate with "Parent 1" and "Parent 2". And an Ontario court has ruled that a child can have three legal parents: her biological mother and her lesbian partner, and her gay biological father who donated sperm.

It's true that some opposite-sex marriages do not or cannot result in children. But they do not negate the norms, values and symbolism established by opposite-sex marriage with respect to children's human rights in regard to their natural parents and families, as same-sex marriage necessarily does.

Moreover, the dangers of same-sex marriage to children's human rights are amplified by reprogenetic technoscience. Developments like IVF, cloning and surrogacy pose unprecedented challenges to maintaining respect for the transmission of human life and the resulting children, because they open up unprecedented modes of transmission. When the institution of marriage is limited to opposite-sex couples, it establishes a social-sexual ecology of human reproduction and symbolises respect for the transmission of human life through sexual reproduction, as compared to asexual replication (cloning) or same-sex reproduction (for instance, the future possibility of making a sperm from one woman's stem cell and using it to fertilise another woman's ovum).

Recognising that a fundamental purpose of marriage is to engender respect for the transmission of human life provides a corollary insight: excluding same-sex couples from marriage is not related to those people's homosexual orientation, or to them as individuals, or to the worth of their relationship. Rather, the exclusion of their relationship is related to the fact that it is not inherently procreative. Same-sex marriage is symptomatic of adult-centred reproductive decision making. But this decision-making should be child-centred.

This means we should work from a basic presumption that children have an absolute right to be conceived from natural biological origins, that is, an untampered-with ovum from one, identified, living, adult woman and an untampered-with sperm from one, identified, living, adult man. This, I propose, is the most fundamental human right of all.

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

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

The issue is not, however, whether opposite-sex couples attain the ideals of marriage in relation to fulfilling the needs of their offspring. Nor is the issue whether marriage is a perfect institution: it's not. Rather, the issue is whether children, in general, and society are better off if marriage remains between a man and a woman. I believe they both are.

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

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

In conclusion, legalising same-sex marriage would be a very powerful statement against the horrible wrong of discrimination on the basis of sexual orientation. We clearly need such statements. But, in order to uphold the human rights of children, they should be made in other ways than legalising same-sex marriage.

Australian-Canadian ethicist Margaret Somerville is Samuel Gale professor of law, professor in the faculty of medicine, and founding director of the Centre for Medicine, Ethics and Law at McGill University, Montreal.

TESTIMONY BEFORE THE U.S. SENATE SUBCOMMITTEE ON THE CONSTITUTION, CIVIL RIGHTS, AND PROPERTY RIGHTS HEARING: "WHAT IS NEEDED TO DEFEND THE BIPARTISAN DEFENSE OF MARRIAGE ACT OF 1996?"

September 4, 2003

Why Marriage Matters: The Case for Normal Marriage

By Maggie Gallagher

1. Why Marriage Matters

I am here today as an expert on marriage. I have devoted most of the last fifteen years to research and public education on the marriage issue,[1] particularly the problem of family fragmentation: the growing proportion of our children in fatherless homes, created through divorce or unmarried childbearing.

Marriage is a key social institution, but it is also a fragile institution: with half or more of our children experiencing the suffering, poverty, and deprivation of fatherlessness and fragmented families. This is a crisis that was of course not created by advocates of same-sex marriage. But the marriage crisis *is* intimately involved with how committed we as a society are to two key ideas: that children need mothers and fathers and that marriage is the main way that we create stable, loving mother-father families for children.

After forty years of social experimentation, we now have enormous data on this question. There are not dozens, or hundreds, there are thousands of studies addressing the question of family structure, which control for race, income, family background, and other confounding variables. And the overwhelming consensus of family scholars across ideological and partisan lines is that family structure DOES matter. It is of course not the only variable affecting child well-being. But all things being equal, children do better when their mothers and fathers get and stay married. Both adults and children are better off living in communities where more children are raised by their own two married parents.[2] Both adults and children live longer, have higher rates of physical health and lower rates of mental illness, experience poverty, crime, and domestic abuse less often, and have warmer relationships, on average, when mothers and fathers get and stay married.

In turn, high rates of family fragmentation generate substantial taxpayer costs. According to a report by over one hundred family scholars and civic leaders released in 2000: "Divorce and unwed childbearing create substantial public costs paid by taxpayers. Higher rates of crime, drug abuse, education failure, chronic illness, child abuse, domestic violence, and poverty among both adults and children bring with them higher taxpayer costs in diverse forms: more welfare expenditure; increased remedial and special education expenses; higher day-care subsidies; additional child-support collection costs; a range of increased direct court administration costs incurred in regulating post-divorce or unwed families; higher foster care and child protection serves; increased Medicaid and Medicare costs; increasingly expensive and harsh crime-control measures to compensate for formerly private regulation of adolescent and young-adult behaviors; and many other similar costs. While no study has yet attempted precisely to measure these sweeping and diverse taxpayer costs stemming from the decline of marriage, current research suggests that these costs are likely to be quite extensive."[3]

So we can say with a fair degree of not only common sense but scientific certainty that marriage matters a great deal for children and for society. Marriage is in fact a cross-cultural institution; it is not a mere plaything of passing ideologies but in fact the word for the way that, in virtually every known human culture, society conspires to create ties between mothers, fathers, and the children their sexual unions may produce.[4]

Maggie Gallagher is president of the Institute for Marriage and Public Policy, editor of MarriageDebate.com (a new webzine devoted to same-sex marriage debate), and co-author of The Case for Marriage: Why Married People are Happier, Healthier, and Better Off Financially *(Doubleday, 2000).*

2. How will same-sex marriage affect marriage as a social institution?

Once we acknowledge the gravity of the marriage crisis we now face, and the importance of marriage as a social institution, the single most important question on unisex marriage becomes: will this legal transformation strengthen or weaken marriage as a social institution?

For many Americans this translates into the question: how can Bob and James's marriage possibly affect Rob and Sue's marriage?

There are long, complicated, and erudite answers to this question. Fortunately, there is also a short, simple, and obvious answer. Marriage is not just a legal construct; it is socially and culturally a child-rearing institution, the place where having children and creating families is actually encouraged, rather than merely tolerated. In endorsing same-sex marriage, law and government will thus be making a powerful statement: our government no longer believes children need mothers and fathers. Two fathers or two mothers are not only just as good as a mother and a father, *they are just the same.*

The government promotion of this idea will likely have some effect even on people who are currently married, who have been raised in a particular culture of marriage. But this new idea of marriage, sanctioned by law and government, will certainly have a dramatic effect on the next generation's attitudes toward marriage, childbearing, and the importance of mothers and fathers. If two mothers are just the same as a mother and a father, for example, why can't a single mother and her mother do just as well as a married mom and dad?

The fallacy and temptation is the belief that if we allow unisex couples to marry there will be two kinds of marriage: gay marriage for gays and lesbians, straight marriage for straights. In reality, there will be one institution called marriage, and its meaning will be dramatically different, with deep consequences for children.

Many advocates of gay marriage recognize the importance of this transformation. As one advocate for gay marriage, columnist and radio personality Michelangelo Signorile put it in *Out Magazine* in December of 1994, "[F]ight for same-sex marriage and its benefits and then, once granted, redefine the institution of marriage completely, to demand the right to marry not as a way of adhering to society's moral codes but rather to debunk a myth and radically alter an archaic institution that as it now stands keeps us down."

You may agree or disagree, but let us not fool ourselves that this is a minor amendment to marriage law. Why are courts contemplating a radical shift in our most basic social institution at a time when 25 million children sleep in fatherless homes? Here is the disturbing answer: in order to accommodate or affirm the interests of adults in choosing alternative family forms that they prefer.

Two ideas are in conflict here: one is that children deserve mothers and fathers and that adults have an obligation to at least try to conduct their sexual lives to give children this important protection. That is the marriage idea. The other is that adult interests in sexual liberty are more important than "imposing" or preferring any one family form: all family forms must be treated identically by law if adults are to be free to make intimate choices. This is the core idea behind the drive for same-sex marriage. And it is the core idea that must be rejected if the marriage idea is to be sustained.

ENDNOTES

1. See, for example, Maggie Gallagher, (forthcoming). *Marriage and Public Policy: What Can Government Do? Evidence from the Social Sciences* (Washington, D.C.: National Fatherhood Institute); Maggie Gallagher, 2002. "What is Marriage For? The Public Purposes of Marriage Law," *Louisiana Law Review* 62(3) (Spring); Linda J. Waite and Maggie Gallagher, 2000. *The Case for Marriage: Why Married People Are Happier, Healthier, and Better Off Financially* (New York: Doubleday); *The Marriage Movement: A Statement of Principles*, 2000. (New York: Institute for American Values); Maggie Gallagher, 1999. *The Age of Unwed Mothers: Is Teen Pregnancy the Problem?* (New York: Institute for American Values); Maggie Gallagher, 1996. *The Abolition of Marriage: How We Destroy Lasting Love* (Washington, D.C.: Regnery).

2. See, for example, William J. Doherty, William A. Galston, Norval D. Glenn, John Gottman, Barbara Markey, Howard J. Markman, Steven Nock, David Popenoe, Gloria G. Rodriguez, Isabel V. Sawhill, Scott M. Stanley, Linda J. Waite, and Judith Wallerstein, 2002. *Why Marriage Matters: Twenty-One Conclusions from the Social Sciences* (New York: Institute for American Values). Available at www.americanvalues.org.

3. *The Marriage Movement: A Statement of Principles*, 2000. (New York: Institute for American Values).

4. "Marriage exists in virtually every known human society. . . ..At least since the beginning of recorded history, in all the flourishing varieties of human cultures documented by anthropologists, marriage has been a universal human institution. As a virtually universal human idea, marriage is about the reproduction of children, families, and society. . . . marriage across societies is a publicly acknowledged and supported sexual union which creates kinship obligations and sharing or resources between men, women, and the children that their sexual union may produce." William J. Doherty, William A. Galston, Norval D.Glenn, John Gottman et al., 2002. *Why Marriage Matters: Twenty-One Conclusions from the Social Sciences* (New York: Institute for American Values).

Redefining Marriage: Can we? Should we?

Terri Kelleher, Australian Family Association

Introduction

Western democracies face an unprecedented push to redefine marriage to include same-sex couples. Internationally this push has been successful in a small number of jurisdictions,[1] but has been rejected (usually by popular vote) in many more.[2] In Australia, both major political parties have committed to preserving the legal definition of marriage as "the union of a man and a woman to the exclusion of all others, voluntarily entered into for life".[3]

Proponents of same-sex marriage typically frame the issue as a matter of civil rights, discrimination, and equality before the law. The flagship advocacy group for same-sex marriage is Australian Marriage Equality. Its tagline reads, "Working for equal rights for all Australians." Could anyone reasonably oppose such a self-professedly egalitarian cause?

We say: yes. Defending marriage is both reasonable, and entirely compatible with equality and justice. Unfortunately, however, the debate is often framed as a simplistic division of enlightened progressives versus prejudiced bigots. But name-calling neatly avoids the one essential element of the debate: thoughtful consideration of the institution of marriage itself.

Marriage is more than just a legal definition

Most of those arguing either for or against redefining marriage accept, implicitly or explicitly, that marriage has a nature independent of its legal definition. Any such definition must necessarily restrict the kinds of relationships that will legally constitute marriage, based on certain fundamental criteria. If there were no criteria against which we could determine whether a given relationship can be regarded as "marriage", then it would be impossible to justify a definition of marriage which is exclusive to *any* extent.

Our goal is to examine this thing called "marriage", and to identify its essential properties; to determine what principles underpin its current definition; and ultimately to see whether marriage, of its very nature, precludes same-sex relationships. In doing so, we draw broadly on the work of Girgis, George and Anderson, whose comprehensive article 'What Is Marriage'[4] is compulsory reading for anyone with a serious interest in the present debate.

Part I – Essential elements of marriage

Marriage is broadly understood to be an intimate, personal relationship between two people. But how does marriage differ from other intimate, personal relationships, such as between parents and children, or between friends? The commonly accepted elements of marriage could be summarised as follows: a comprehensive union of the (usually two) spouses; a special link to children; and attributes of permanence and exclusivity.[5] As we shall see, these interdependent elements make good sense in relation to heterosexual marriage. By contrast, they would become entirely arbitrary if marriage were redefined to include same-sex couples.

Marriage is a comprehensive union

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1 As at March 2011, only 10 nations endorse marriage between two persons of the same sex at a federal level: Netherlands, Belgium, Spain, Canada, South Africa, Norway, Sweden, Portugal, Iceland and Argentina; see <http://www.washingtonpost.com/wp-dyn/content/article/2011/03/14/AR2011031402821.html>.

2 In the United States, for example, popular referenda in 31 states have resulted in constitutional amendments defining marriage as between a man and a woman.

3 *Marriage Act 1961* (Cth), s 5.

4 Sherif Girgis, Robert P. George, & Ryan T. Anderson (2010) 'What Is Marriage' *Harvard Journal of Law and Public Policy*, 34 (1) at pages 245-287.

5 Ibid, at page 252.

As a *comprehensive* union,[6] marriage involves the complete sharing of every aspect of the lives of the two persons involved, including bodily union. A union that did not include bodily union would not be comprehensive, as it would exclude an obvious and important part of the identities of the persons involved.[7] But what kind of bodily intimacy warrants our setting apart some relationships as marital, but not others?

It is an undeniable fact of biology that bodily union to the greatest extent possible can only occur between two persons of the opposite sex. Only in heterosexual intercourse can two persons become one flesh. This is not a matter of *feeling* close to each other, or sharing intense pleasure. It is the biological fact of two bodies joined in one common biological purpose, a purpose fulfilled by the joining of male and female sexual organs. The "whole" is the two bodies united, with man and woman each bringing a different but essential element.[8] The utterly unique complementarity of the male and female sex organs results in an equally unique union of two bodies as one, from which union a third person may come into being, whether the spouses desire or intend to conceive or not.

This point is worth emphasising: sex is increasingly viewed as a recreational pastime, and different forms of sexual activity are portrayed as being of equal and indifferent import. But this is simply not the case. Heterosexual intercourse is the only sexual act by which a human person can be brought into existence. It is the profound starting point of a new and unique human life; a moment whose profundity is infinitely compounded for anyone who believes that conception gives rise to a human soul, as well as a body. To state the obvious: heterosexual intercourse is uniquely sacred on account of its life-giving power.

Two persons of the same-sex cannot be sexually united in a biological whole to the same degree as a heterosexual couple, no matter how loving any shared sexual experience might be. Though homosexual activity may signify deep intimacy, it is not the same as the comprehensive union that has come to be known as the "marriage act". Heterosexual intercourse comprises the only biological function that humans cannot complete for themselves: the fulfilment of the reproductive function of their sexual organs.[9] This requires the sexual union of one man and one woman, and it is on this fact that the very existence of the species rests. This is not the case for any other form of sexual activity.

The uniquely comprehensive bodily union of a man and a woman is *the* essential element of marriage, without which none of its other characteristics make sense. Only the unique comprehensiveness of the heterosexual union can explain our species' historically uniform inclination to set heterosexual unions apart as being of special significance. Calling same-sex unions "marriage" would suggest that such unions should also be set apart, falsely implying that they are capable of achieving comprehensive union in the same manner as heterosexual unions. Changing the legal definition of marriage to include same-sex couples would be to legislate a falsehood.

Marriage is oriented to children[10]

As we have said, it is because of its natural orientation to conception that the comprehensive heterosexual union merits special recognition. Conception is the natural result of heterosexual intercourse. Certainly it does not result from every act of intercourse; the woman must be in her fertile period and there must not be any fertility problems in either spouse. But conception can occur only in heterosexual intercourse. Viewed as a social and legal signifier of the heterosexual union's unique, life-generating character, it is unsurprising that marriage should be understood by most people as being uniquely linked to children.

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6 For a detailed analysis of the comprehensive nature of the heterosexual union, see Girgis, George & Anderson, above n 4, at pages 254-5.

7 Girgis, George & Anderson, above n 4, at page 254.

8 Ibid, at pages 253-4.

9 Ibid, at page 254.

10 For a detailed analysis of the special link between marriage and children, see Girgis, George & Anderson, above n 4, at pages 255-9.

A definition of marriage which included same-sex couples would destroy this link. Marital relationships could no longer rightly be considered to be relationships which are inherently oriented towards children. For although some same-sex couples seek to have children using donated gametes and artificial reproductive technologies (ARTs, including surrogacy), such efforts do not negate the inescapable biological distinction between same-sex unions, which are inherently sterile, and heterosexual unions, which are inherently fertile.

Importantly, the association between marriage and children is not diminished by specific instances of infertility in heterosexual couples. These are properly regarded as exceptions to the rule, and do not detract from the inherent life-generating capacity which distinguishes heterosexual unions from all other kinds of sexual union. Infertile heterosexual marriages are real marriages, since the comprehensive sexual union of the spouses is still one in which each spouse's body completes the other and the two bodies become one in unity of purpose.[11]

This is why it is incorrect to suggest that marriage is only about *having* children. Ascertaining which relationships might appropriately be called "marriage" is not a matter of determining whether two particular spouses can or will have children. Rather, as a broad public institution, marriage has regard to the general character of the union in question, and it is only by virtue of its inherently life-giving character that the heterosexual union warrants special signification. Our propensity to link marriage with children can only be explained if marriage is seen as a legal and social signpost by which society draws attention to the unique and incomparably significant life-giving character of the heterosexual union.

Permanence and exclusivity: the child's interest in the heterosexual union

The inherently procreative nature of heterosexual intercourse lends significance also to the *quality* of the relationship within which it occurs, and in this, too, the heterosexual union is entirely unique. In a secular, pluralistic society, non-procreative forms of sexual activity are of interest to no one but the parties involved.[12] But the heterosexual union is different. Any such union is of deep significance not just to the sexual partners, but also to any children conceived. Participation in heterosexual intercourse properly demands a degree of respect for its inherently life-giving nature, and a pre-emptory sense of responsibility for the human life which it may create. No other form of sexual activity is burdened with such responsibilities, because no other form of sexual activity is capable of creating life.

Once new life *has* been formed, the child naturally has a profound, lifelong interest in the quality of the relationship between his or her mum and dad, and in that relationship being characterised by the qualities of lifelong, exclusive fidelity. The harm caused to children by family breakdown and the growing epidemic of fatherlessness are well documented.[13] What's more, research strongly indicates that children reared by their biological parents in intact marriages do better on every measured score – including educational achievement, emotional health, psychological and sexual development, and positive personal and social behaviour.[14]

The research merely confirms the obvious, and it is only in this context that we can see why marriage requires the spouses to make a solemn and binding promise of lifelong, exclusive fidelity. The permanent marital commitment provides the requisite stability and longevity for the rearing of children to maturity. When this permanence is coupled with a commitment of exclusive fidelity, the

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11 For a more detailed treatment of this question see Girgis, George & Anderson, above n 4, at page 265-8. We note here, however, that an intentionally 'contracepted' act of heterosexual intercourse cannot be said to be of a marital nature, since it lacks the comprehensiveness of the free and loving bodily union of spouses, whose openness to conception (and therefore the raising of children) connotes both exclusivity and permanence in the union.

12 With the obvious exception of sexual activity which is unlawfully violent or abusive.

13 For a concise summary of the research, see House of Representatives Legal and Constitutional Affairs Committee (1998) *To have and to hold – Strategies to strengthen marriage and relationships* (Parliament of the Commonwealth of Australia, Canberra), at pages 35-40.

14 See generally, The Witherspoon Institute (2008) "Marriage and the Public Good: Ten Principles", available at <www.winst.org/family_marriage_and_democracy/WI_Marriage.pdf>.

natural result is for the family – mum, dad and their children – to remain a united whole.

Childrearing is not, of itself, justification for a legal institution of marriage

An important distinction must be made here: for although children have an interest in their parents maintaining a permanent relationship, the mere fact of childrearing does not give cause for recognising a relationship as marriage. As has been suggested elsewhere, such a conclusion would require that any two (or more) persons committed to the raising of children be included in any redefined notion of marriage – for example, where two cohabiting brothers are jointly engaged in the rearing of a deceased sibling's orphaned children.[15] Clearly marriage – with its attendant commitment of lifelong, exclusive fidelity – makes no sense in such cases, and therefore cannot be justified by the fact of childrearing alone. It is only in the context of the heterosexual union that the marital virtues of lifelong, exclusive fidelity are able to deliver the ideal result of children being raised in a stable family environment by their own (that is, biological) mother and father.

Although the family takes many forms in contemporary Australian society, it is uncontroversial to insist that the ideal family environment is that in which children are raised by their own mother and father. According to a 2004 study,[16] 73.6% of children under 18 in Australia live with their biological parents in intact families. It is a statistic we expect most Australians would applaud: the more children growing up in such circumstances, the better. The institution of marriage is instrumental in realising this ideal, by binding a man, a woman, and their biological children in a stable family unit.

This ideal may be contrasted with the reality of childrearing within same-sex relationships, where any children are, by necessity, *not* being raised by at least one of their biological parents. The proliferation of ARTs has already gone some way to undermining the importance of a child's connection with his or her biological parents, with often-traumatic repercussions for donor-conceived persons.[17] Redefining marriage to include same-sex couples would accelerate the process, by nullifying the institution's function of preserving the unity of the biological family.

It is important to note that although same-sex parenting deprives children of the right to be raised by their biological parents, this does not mean that women in a lesbian relationship, or men in a homosexual relationship, cannot be good parents. But it is also true that a woman can only be mother, and not a father; and that a man can only be a father, not a mother; and it has been convincingly argued that to voluntarily and unnecessarily deprive a child of either a mother or a father is contrary to the child's fundamental rights[18] and best interests.[19]

The state itself has an interest in fostering permanence and exclusivity

The state too has an interest in fostering the marital qualities of permanence and exclusivity specifically in heterosexual unions. Because of their inherently procreative nature, heterosexual unions are the source of the productive, law abiding (and eventual tax-paying) citizens upon which the state's future livelihood depends. However in the absence of strong, stable marriages, the fractured family unit struggles to provide the optimum environment for children to mature. For example, children raised in single-parent households, children whose parents are divorced, and even those raised in blended families show a greater propensity for substance abuse[20] and

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15 Girgis, George & Anderson, above n 4, at pages 255-6.

16 P. D. Brandon (2004) "Identifying the diversity of children's living arrangements: A research note", *Journal of Sociology* 40 (2) at pages 179-192; cited in David de Vaus (2004) "Diversity and change in Australian families: Statistical Profiles", *Australian Institute of Family Studies*, at page 31.

17 See generally, Elizabeth Marquardt, Norval D. Glenn and Karen Clark (2010) *My Daddy's Name is Donor: A New Study of Young Adults Conceived Through Sperm Donation* (Institute for American Values, New York).

18 See generally, Margaret Somerville (2007) "Children's Human Rights and Unlinking Child-Parent Bonds With Adoption, Same-Sex Marriage, and New Reproductive Technologies", *Journal of Family Studies*, 13 (2).

19 W.B. Wilcox (2007) "The complementarity of motherhood and fatherhood: A tour de force of the relevant social science", in *The family in the new millennium*, A.S. Loveless and T.B. Holman eds (Praeger, Wesport CT).

20 W.B. Wilcox et al. (2005) *Why Marriage Matters, Second Edition: Twenty-Six Conclusions from the Social Sciences* (Institute for American Values, New York) at pages 24-5.

crime,[21] and are at greater risk of suffering abuse.[22] Ultimately the state shoulders the substantial direct and indirect costs[23] of these and other consequences of family breakdown, single parenthood and fatherlessness.

We further suggest that the state bears a positive *obligation* to safeguard the rights of children by encouraging exclusivity and permanence among those relationships which are inherently predisposed to creating new life. It has been suggested that this extends beyond a mere obligation to safeguard the child's developmental wellbeing, but also includes an obligation to protect the child's right not to be separated from his or her biological parents.[24] Marriage is the chief instrument by which the state fulfils this obligation, fostering permanence and exclusivity within the only kind of relationship which is inherently predisposed to creating children: the comprehensive heterosexual union.

But for their life-generating capacity, personal relationships should remain private

It is important to note that marriage comprises an entirely exceptional instance of state intervention in personal relationships. It is not normal for the state to regulate intimate relationships, and given the inherently fraught nature of the marital commitment, one might expect the state to remain impartial. And yet the state *does* become involved, even impressing upon the marrying couple the grave responsibility of honouring their commitment of lifelong, exclusive fidelity. Section 46 of the *Marriage Act* requires a marriage celebrant to warn the marrying couple "...of the solemn and binding nature of the relationship into which you are now about to enter."[25]

For the state to place such expectations on a marrying couple seems wildly out of step with contemporary notions of individual liberty. Such an extraordinary intervention demands justification. However the unique link between the elements of permanence and exclusivity in marriage, and the social stability and economic benefits of children being reared in the optimum environment for healthy development, provides strong grounds for the state becoming involved in the regulation of relationships which are of a life-generating nature. In the absence of this unique interest, any insistence by the state upon permanence and exclusive fidelity in private relationships seems unwarranted.

Part II – Equality, justice and access to services

Having considered how the legal institution of marriage draws its legitimacy from the life-generating nature of the heterosexual union, it is necessary to address the other major consideration in this debate: that of equality, justice and discrimination.

Discrimination is alleged in two ways. Firstly, it is said that the law unfairly discriminates by preventing same-sex couples from marrying on the basis of their sexual orientation. However this assertion blithely assumes that the sex of the spouses is not relevant in determining what does or does not constitute "marriage". That is, the assertion begs the very question in issue.

If the sex of the spouses *is* determinative of whether a relationship can be marital – much as the sex of a man is determinative of whether or not he can be a mother – then allegations that the legal definition of marriage is discriminatory are as nonsensical as alleging that a definition of motherhood which excludes men is discriminatory. If, as we have argued, marriage relates specifically to heterosexual unions, it follows that any relationship which does not meet this criterion simply is not marriage.

Secondly, marriage is said to be discriminatory because couples who cannot marry are precluded

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21 Ibid, at page 29.

22 House of Representatives Legal and Constitutional Affairs Committee, above n 13, at pages 51-2.

23 Ibid.

24 See, for example, Somerville, above n 17; and Elizabeth Marquardt (2006) *The Revolution In Parenthood*, Institute For American Values, New York.

25 *Marriage Act 1961* (Cth), s 46.

from certain marital benefits, relating to such matters as inheritance, taxation, superannuation, medical decision making powers, and being nominated as next of kin. However these benefits are relevant to other types of co-dependent relationships and arrangements (for example, the relationship between a disabled or infirm person and his or her carer), and can be – and for the most part have been – dealt with by specific legislation.[26] Since they do not arise only in relation to couple relationships, they cannot be said to be of the essence of marriage.

Obviously instances of unjust exclusion from certain services or benefits must be remedied. The point here is not to argue whether it is good public policy to extend marital benefits to other forms of co-dependent relationships, but rather to point out that justice in relation to these matters can and should be achieved through means other than radically redefining marriage, which is an important social and legal institution in its own right.

Do supporters of same-sex marriage really want equality for all?

Although present efforts seek only to redefine marriage in respect of same-sex couples, it is not only same-sex couples who are precluded from marrying; marriage between close relatives (incestuous marriage),[27] and marriage to more than one person (polyamorous marriage) are also precluded.[28] If marriage were redefined to include same-sex relationships, should it include incestuous and polyamorous relationships too?

Supporters of same-sex marriage dismiss this question as far-fetched; patently it is not. The right to have polygamous marriages recognised in Canada is currently being argued before the Supreme Court of British Colombia.[29] Meanwhile polyamory was recently touted in Australia as recently as 2010 by an academic at Victoria's La Trobe University.[30] And although voluntary incestuous relationships are an extremely rare phenomenon, widely publicised cases have led to demands that an incestuous couple's right to love whomever they choose should also be respected.[31]

So the question stands: does the claim to equal rights for "equal love"[32] extend to the rights of polyamorous or incestuous lovers to marry?

One of the fundamental reasons for outlawing incestuous marriage is that such unions increase the likelihood of genetic defects in children.[33] But this reasoning holds firm only if we assume that marriage is grounded in the life-generating heterosexual union. And since this is the very assumption which proponents of same-sex marriage reject, we are left to ask what reason might remain for prohibiting incestuous marriage? If marriage is only about love and commitment, who is to say that the consensual love and commitment between two adult siblings is less worthy of recognition than same-sex unions? The prohibition on incestuous marriage points directly to the fact that marriage is fundamentally grounded in the life-giving character of the heterosexual union.

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26 See, for example, the *Same-Sex Relationships (Equal Treatment in Commonwealth Laws – General Law Reform) Act 2008*, which ensures that persons in a same-sex relationship have the same rights as heterosexual couples in relation to a whole range of entitlements, including social security and veterans' entitlements, employment entitlements, workers' compensation, and inheritance rights. In Tasmania, the *Relationships Act 2003* ensures equitable access to certain entitlements for persons in *all* companionate, familial and carer relationships, not just intimate couple relationships.

27 *Marriage Act 1961* (Cth), ss 23(1)(b), 23(2).

28 *Marriage Act 1961* (Cth), s 23(1)(a).

29 Supreme Court of British Colombia, Reference Case No S-097769, Vancouver Registry. For full details see <www.slaw.ca/2010/04/21/polygamous-reference-one-to-watch>. This follows the enshrining of same-sex marriage in Canadian law in 2005.

30 Linda Kirkman, "Poly is the new gay", available at <http://www.latrobe.edu.au/news/articles/2010/opinion/poly-is-the-new-gay>.

31 See, for example, the revelation in 2008 of a consensual incestuous relationship between father and daughter reported on Australian current affairs program *60 Minutes* (and broadly covered by other media outlets) – transcript at <http://sixtyminutes.ninemsn.com.au/stories/peteroverton/441583/forbidden-love>.

32 This assertion is commonly employed by supporters of same-sex marriage, not least by the Australian same-sex marriage advocacy group 'Equal Love' – see <http://www.equallove.info>.

33 For example, *West's Encyclopaedia of American Law* (West Publishing, 1998) states concisely, "The prohibition of intermarriage is also based upon genetic considerations, since when excessive inbreeding takes place, undesirable recessive genes become expressed and genetic defects and disease are more readily perpetuated" (at page 119).

Similarly, it is only in the context of heterosexual unions that restricting marriage to couples makes sense: for the human species, two is the precise number of persons required to consummate the comprehensive, life-giving heterosexual union. By contrast, a redefined notion of marriage would have no principled basis for limiting marriage to couples. But are we to conclude that the current prohibition on polyamorous marriage mean that persons who choose to engage in committed polyamorous relationships are, by virtue of their exclusion from marriage, socially or legally inferior to persons in couple relationships?

Clearly not, and we similarly reject any suggestion that restricting marriage to heterosexual unions diminishes the standing of same-sex-attracted persons before the law. In Australia, marriage law has no bearing upon a person's general standing before the law, since no man or woman is precluded from entering into marriage. It is the nature of the institution itself, centred upon the life-generating heterosexual union, which demands that in any marriage, one party must be male and the other female.

Defending marriage is not just a religious matter

Hopefully it is clear by now that resisting the push for same-sex marriage does not rely on religious grounds, fundamentalism, bigotry or hatred. The argument rests on the proposition that, regardless of what we may wish it to mean, marriage is a reality with certain indispensable elements; that the legal institution of marriage only makes sense in relation to that unique human relationship which is characterised by the comprehensive joining of two bodies as one in a common biological purpose; that this common purpose requires both a male and female element in order to be complete, and therefore must be heterosexual in nature; and that, as distinct from any other kind of interpersonal human relationship, the comprehensive heterosexual union alone is oriented to child bearing and rearing children, and is consequently oriented to permanence and exclusivity.

Redefining marriage would remove it from the only context in which its essential features make sense. However popular such a move might be, this would be contrary to the common good, and the antithesis of good public policy. For although public policy should not disregard the desires or needs of individuals, it must primarily serve the common good. Marriage law currently does so by fortifying that unique relationship which is naturally oriented towards bringing forth children.

Redefining marriage would undermine the very significance of the indelible biological bond between man, woman and child. At a time when family dislocation weighs with increasing severity on families, we need public policy which reinforces, rather than undermines, the importance of mums and dads sticking together in a spirit of service to one another, to their children, and to the communities in which they live.

Marriage, as it stands, makes a lot of sense. Let's keep it that way.