Marriage Submission

Standing Committee on Justice

On Marriage and the Legal Recognition of Same-Sex Unions

February, 13, 2003
**Introduction**

Marriage has been given special status in law by governments because of its unique role in providing for a committed relationship between women and men and a stable setting for the raising and nurturing of children. The Department of Justice asks whether marriage has a continuing role to play in Canadian society. Our reply is an overwhelming yes.

At its core, this debate is about preserving the social, cultural, religious and legal means of facilitating the long term exclusive sexual bonding of male and female. It is also about society’s commitment to offer children the practical ideal of a stable and committed context within which they can intimately know and experience their biological and social heritage. Marriage is the preferred means of heterosexual bonding and the preferred context for the procreation and raising of children.

The focus of our presentation will be on the structure of marriage and its benefits, and the harm that will flow from a restructuring of marriage or the elimination of marriage from law and public policy.

**A Christian Understanding of Marriage**

As Christians, our understanding of the structure and nature of marriage is founded on the biblical account of the creation of man and woman. Genesis 1 and 2 state that God created man and woman to fulfill their need of intimate partnership and to carry out the mandate given by God in Gen. 1:28; “Be fruitful and increase in number; fill the earth and subdue it”. Jesus reiterated this understanding when he said,

> Have you not read that the one who made them at the beginning ‘made them male and female,’ and said, “For this reason a man shall leave his father and mother and be joined to his wife, and the two shall become one flesh”? So they are no longer two but one. Therefore what God has joined together, let no one separate.” (Math. 19:4-5, NRSV).

As Christians, we believe marriage is rooted in the way we are made. Marriage is founded upon the biological reality that we humans exist in two sexes. It expresses the complimentarity of the sexes, and therefore requires both sexes. Marriage was established for the purposes of companionship and sexual fidelity between husband and wife. Marriage is the social, cultural and religious context for the *conjugal* relationship, which is exclusive to male and female.

Properly understood, marriage is covenantal, not merely contractual. Marriage has the unique power to promote the exclusive and permanent sexual, psychological and emotional bonding of a man and a woman. That is why marriage is called a covenant, not merely a contract that can be formed and broken with the casualness of a business transaction.
The structure and nature of marriage provides a stable and caring environment for the expression of the physical and psychological bond between male and female, and the raising of children by a parent of each sex. The uniting of man and woman is distinguished from other types of social interaction and is described in scripture as becoming “one flesh.”

The Universality of Marriage

All the world’s major religions, and all cultures and societies have from time immemorial recognized marriage as the union of male and female, grounded in our dimorphic nature. According to Rabbi David Novak,

"Jewish tradition teaches that marriage is a natural institution that religious traditions have elevated to the level of the sacramental without, however, changing its earlier pre-religious character. … Judaism, Christianity, Islam and others, have preserved and protected a pre-existing institution that they did not invent. Each religious tradition believes that they have the right to insist that the state not radically redefine an institution that the state did not invent. Although Jewish tradition does not accept, and most Jews cannot accept, gay and lesbian marriage, this should not be construed as a rejection of homosexuals as people. Judaism recognizes the dignity of all persons who are made in the image of God. …Although a small number of reformed Rabbis in Canada have a different understanding of the Jewish faith and Jewish tradition, their views are dissentient and held by a very small number (36) of Rabbis in Canada. The vast majority of Rabbis and rabbinic teaching reject the possibility of same-sex marriage."

Islam also understands marriage to be fundamentally an opposite-sex union. Abdalla Idris Ali, director of the Center of Islamic Education in North America, makes the following statement about the significance of marriage in Islam:

We believe that a husband and wife are two pieces of the same whole and will not be spiritually fulfilled until they have united in pieces of the same whole and will not be spiritually fulfilled until they have united in marriage. Islam teaches us that a marital unit made up of a man and a woman is the best environment in which to raise children. We believe in the complimentarity of parenting between the sexes.

World religions, each from their respective theologies and traditions, understand marriage to be in its essence the union of male and female. Each religion has, in its distinctive way, understood marriage to have religious significance. Yet the unitive understanding of the structure of marriage is not exclusively religious. It is shared by societies and cultures throughout the world and throughout time.

Dr. Katherine Young, professor of religion at McGill University, has done an extensive survey of small-scale world cultures and religions (representative of large-scale cultures). Prof. Young and her research team found that the requirement that marriage partners be of the opposite sex is one of the core universal features of marriage across cultures and religions.

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1 ’Conjugal’ refers specifically to the sexual relationship between a man and a woman in marriage. See The Consice Oxford Dictionary, 7th Ed.


From my study of world religions (such as Judaism, Confucianism, Hinduism, Islam, and Christianity) and the worldviews of small-scale societies, I conclude that this institution [marriage] is a culturally approved opposite-sex relationship intended to encourage the birth (and rearing) of children, at least to the extent necessary for the preservation and well-being of society. As such, marriage is a universal norm.

From my comparative study of the world religions and the worldviews of small-scale societies I have also concluded that the following features of marriage are universal. Marriage is supported by authority and incentives; it recognizes the interdependence of maleness and femaleness; it has a public dimension; it defines eligible partners; it encourages procreation under specific conditions; and it provides mutual support not only between men and women but also between men and women and their children (the sharing of resources, apart from anything else, or transmission of property)…

Same-sex relationships are indeed worthy of respect. But “same-sex marriage” is an oxymoron, because it lacks the universal, or defining, feature of marriage according to religious, historical, and anthropological evidence. Apart from anything else, marriage expresses one fundamental and universal human need: a setting for reproduction that recognizes the reciprocity between nature (sexual dimorphism) and culture (gender complementarity).

Marriage is not merely a religious institution. The uniqueness and importance of marriage has been recognized by all societies. There is no known society which has consistently endorsed marriage between persons of the same sex as a norm.

**The Structure of Marriage**

Marriage unites male and female, and this conjugal union is the only physical relationship which can beget children. It is in the best interests of a child to intimately know and experience the two individuals that created her/him; this relationship is important to the development of the child's own identity. Marriage is the practical ideal within society that recognizes this reality. Marriage does not intentionally forfeit the child's right to grow up being nurtured by both parents. The underlying reality remains: same-sex partners cannot both be the biological parents of a child (regardless of their social role in the child's life).

While not all married couples have children, all children are born of the union of male and female, including the very few that require technological mediation. In 1994-95, the majority of Canadian children (71%) were born to married parents, with 20% born to parents in a common-law union and 9% born to parents who did not live together. Every child has a mother and a father, and marriage provides the most stable environment for the nurturing of a child by her/his biological parents.

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4 This term is often used in connection with the difference in size of male and female bodies; the difference is very significant in some species but not in others. I use it here in connection only with the simple fact of sexual reproduction.
5 Affidavit of Katherine Young, Submitted by the Attorney General of Canada In Halpern v. Ontario.
7 While common-law relationships are capable of procreation, they tend to be far less stable than marriage, which is less ideal for nurturing children. In addition, common law status is imposed on a couple regardless of their intentions concerning the longevity of their relationship.
Marriage is more than sexual and more than just "mating" - it is unitive and procreative. Marriage creates a stable relationship and recognizes the unique procreative capacity of a heterosexual union to create children. Reproductive technologies do not undermine the uniqueness of marriage as a heterosexual institution. Single persons and other domestic relationships, whether sexually intimate or not, may have children from previous relationships, through adoption, or through the use of reproductive technologies. These relationships are not, in and of themselves, procreative.

Marriage includes procreative powers and companionship but cannot be reduced to either. While marriage is possible and legal between a man and a woman who cannot procreate (e.g., due to infertility or old age) or who choose not to have their own children, this does not alter the distinctiveness of marriage as the preferred form of heterosexual bonding. These exceptions do not alter the reality that marriages usually produce children and that procreation necessarily requires the union of male and female. Marriage is the relationship upon which human society is founded.

The Legal Recognition of Marriage

In addition to being a social, cultural and religious institution, marriage has been recognized in law and public policy as the union of one male and one female. However, marriage predates both the state of Canada and the English common law upon which most of our legal system is based. Governments and courts are not the authors of marriage. And until the lower court decisions in Ontario and Quebec last year, no court in the world had found that the definition of marriage as being between one man and one woman was discriminatory.

Marriage in Canadian Courts Before 2002
The legal definition of marriage comes from the common law, which defines marriage as the voluntary union for life of one man and one woman, to the exclusion of all others. This definition has been affirmed by Canadian courts in many decisions.

*Hyde v. Hyde and Woodmansee (1866)*
This case before the Matrimonial Court of England is the basis for the current definition of marriage in Canadian law. A British judge was asked to decide whether a marriage contracted in a country that recognized polygamy by a couple whose faith allowed polygamy constituted a valid marriage under the laws of England. The judge defined marriage as "the voluntary union for life of one man and one woman, to the exclusion of all others."

*North v. Matheson (1974)*
Two Manitoba men attempted to get married by reading the banns of marriage. The Registrar refused to register their marriage, and the County Court of Winnipeg upheld the registrar's right to refuse the couple, citing the definition of marriage in *Hyde v. Hyde.*

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8 See *Hyde v. Hyde and Woodmansee* (1866) L.R. 1P.&D. 130.
9 *Hyde v. Hyde* (1866), L.R. 1 P & D. 130 at p. 133.
Layland v. Ontario (1993)
A city clerk refused to issue a marriage license to two homosexual men on the grounds that marriage between a same-sex couple was illegal. The two men applied for a judicial review under the Marriage Act. In 1993, the Ontario Divisional Court ruled 2:1 that the common law prohibits same-sex "marriage" and that this prohibition does not constitute discrimination under section 15 of the Charter.

EGALE v. British Columbia (2001)
A coalition of gay and lesbian couples brought a suit against the province of BC to obtain marriage licenses. Justice Pitfield affirmed that marriage is by its very nature a monogamous union between a man and a woman. He also held that because the nature of marriage is heterosexual, excluding two partners of the same sex was not unconstitutional under the Charter.

Until last year no Canadian court, before or after the Charter, had ever ruled that the definition of marriage infringed on the equality rights of gay and lesbian people.

Law and the Definition of Marriage
As stated in the factum of the Interfaith Coalition for Marriage and the Family in the B.C. Court of Appeal,

"Marriage" is not a legal construct. It is an institution that was not created by law.
It is, rather, a pre-existing societal and primarily religious institution which has existed for millennia. It has only been recognized recently by legislation. Unlike the legislative concept of "spouse," the institution of marriage was neither created by nor defined by legislation. It alone conferred the status of "husband and wife", and has been recognized by all major religious faiths and societal groups as existing uniquely between a man and a woman."

The heterosexual nature of marriage was affirmed by La Forest J. in Egan v. Canada who wrote:

Marriage has from time immemorial been firmly grounded in our legal tradition, one that is itself a reflection of long-standing philosophical and religious traditions. But its ultimate raison d'être transcends all of these and is firmly anchored in the biological and social realities that heterosexual couples have the unique ability to procreate, that most children are the product of these relationships, and that they are generally cared for and nurtured by those who live in that relationship. In this sense, marriage is by nature heterosexual.10

The B.C. Supreme Court affirmed that the opposite-sex structure of marriage is recognized in Canada’s constitution. Canada’s constitution did not create marriage. It recognized that which other governments have understood in legally recognizing marriage.

Due to the nature and contribution of marriage to society, governments are justified in affording marriage a differential status. The Hon. Mr. Justice Pitfield of the B.C. Supreme Court wrote:

“The state has a demonstrably genuine justification in affording recognition, preference, and precedence to the nature and character of the core social and legal arrangements by which society endures… The legitimacy of the state’s interest in marriage is beyond question. There is no need for scientific evidence. The importance of the essential character of marriage to Canadian society is a matter of common sense understanding and observation. Other than the desire for public recognition and acceptance of gay and lesbian relationships, there is nothing that should compel the equation of a same-sex relationship to an opposite-sex relationship when the biological reality is that the two relationships can never be the same. That essential distinction will remain no matter how close the similarities are by virtue of social acceptance and legislative action. I concur with the submission of the Attorney General of Canada that the core distinction between same-sex and opposite-sex relations is so material in the Canadian context that no means exist by which to equate same-sex relationships to marriage while at the same time preserving the fundamental importance of marriage to the community… In my opinion, the issue before the court has nothing to do with the worth of any individual whether his preference is for a same-sex or opposite-sex relationship. The only issue is whether marriage must be made something it is not in order to embrace other relationships.” (p.83-84)

International Cases: Same-Sex "Marriage" is not a Human Right

The international jurisprudence overwhelmingly supports the findings of Justice Pitfield and others. It is only very recently in Canada that the contention that marriage between persons of the same sex is a matter of basic human rights has been accepted at all. Outside of Canada, no court in the world has found that it was a violation of fundamental human rights to maintain marriage as a heterosexual union. Below are a few of the key cases:

- In 1998, the European Court of Justice ruled that refusal to recognize same-sex partners as the same as opposite-sex common law partners did not violate the European Community Treaty (Grant v. South-West Trains Ltd., C-249). This issue has not come before the European Court of Human Rights, however, the European Court of Justice noted that the European Commission for Human Rights does not consider different treatment of same-sex couples a violation of the European Convention on Human Rights.
- In 1996, the New Zealand Court of Appeal dismissed an application by a lesbian couple to have their “marriage” recognized (Quilter v. AG, [1996] NZFLR 481).
- In 1992 the Supreme Court of the Netherlands ruled that Dutch law did not require or allow for same-sex marriage and that the European Convention on Human Rights did not require the

In Belgium and the Netherlands, same-sex marriage was a political decision, not a rights-based one. Even in the Netherlands, the Supreme Court found that same-sex couples could not claim a fundamental right to marry under the European Convention on Human Rights.

Some inappropriately compare the refusal to restructure marriage with miscegenation laws at one time applied in the United States. The structure and purpose of marriage is the union of a man and a woman. Miscegenation laws thwarted the purpose of marriage by prohibiting such unions for reasons that lacked moral and historical validity. They were properly struck down by courts which recognized the core universal features of marriage throughout time and understood the importance of marriage to society.

**Religious Freedom Concerns**

We are deeply concerned about the implications of a redefinition of marriage for religious freedom. Under the current system, clergy who perform marriages do so as agents of provincial governments. Some clergy, as a matter of conscience, would refuse to perform marriages under a system that recognizes marriages as anything other than an exclusive union of one man and one woman. Most others are concerned that as agents of the provincial government, their ability, as a matter of conscience and religious freedom, to refuse to marry same-sex couples would be challenged under human rights codes and the *Charter*. Some 94% of marriages in Ontario, and 76% nationally, are performed by clergy.\(^1\)

As has been acknowledged in previous testimony, the push for the redefinition of marriage comes from pursuit of social recognition by gays and lesbians.\(^2\) We can thus anticipate legal challenges to the refusal of clergy to marry persons of the same sex, as this refusal would thwart the recognition objective of some gays and lesbians. EGALE and several other gay and lesbian lobby groups have testified before the Justice Committee that they would not challenge the right of clergy to refuse to perform marriages against their beliefs. However, given the recent history of religious people and institutions being challenged in courts and before human rights tribunals for their stance on homosexuality, it is unlikely that churches, clergy and religious institutions that do not recognize same-sex marriage will escape legal action.

**Trinity Western University**

Trinity Western, an accredited university in British Columbia, was refused approval for its teacher education program because of the community standards policy it asked students and faculty to sign. The community standards asked students to refrain from a variety of otherwise legal behaviours, such as drinking, swearing, viewing pornography, gossiping, adultery and homosexual behaviour. The BC College of Teachers acted against the advice of its own subcommittee to deny Trinity Western's teacher training program accreditation, and Trinity Western took them to court. In 2001, the

\(^1\) "Religious marriages remain popular," *Canadian Social Trends*, Spring 2000, p. 36.

\(^2\) See for example the oral testimony of Lesbian Mothers of Quebec and Mr. Hendricks and Mr. Leboeuf before the Justice Committee, February 2003.
Supreme Court ruled 8 to 1 in favour of Trinity Western.\footnote{Trinity Western v. The BC College of Teachers (2001).} Nevertheless, it is important to note that Trinity Western's fitness to prepare public school teachers was not challenged by free speech advocates upset with the policy's stance on pornography, swearing and gossiping. Trinity Western was singled out because of its beliefs about homosexual behaviour and unfounded assumptions about the future behaviour of its graduates in the classroom. EGALE was an intervenor in the case against Trinity Western from the BC Supreme Court and Court of Appeal level all the way to the Supreme Court of Canada.

**Brillinger v. Brockie** In this case Scott Brockie, a Toronto printer, was approached by the president of a gay advocacy group, The Canadian Lesbian and Gay Archives. Brockie, who had numerous gay clients, declined the job because he did not want to support an advocacy group with which he disagreed. During the course of the original human rights hearings, the Human Rights Commission called in a witness to testify that some Christians do not have any moral or theological problems with homosexual behaviour. On the basis of this and other evidence, the Board of Inquiry found that Brockie discriminated against Ray Brillinger (president of the Lesbian and Gay Archives) on the basis of his sexual orientation, and fined him. Mr. Brockie appealed to the Ontario Divisional Court on the basis that the decision infringed his freedom of religion and conscience because The Archives promoted a cause (the celebration of homosexual history) which offended Mr. Brockie’s conscience. The Divisional Court found that Brockie did not have the right to refuse work from an organization with which he disagreed, but did have the right to refuse to print materials which would offend his conscience. In this situation, the court took it upon itself to determine what kinds of materials would offend the conscience of a religious believer.

**PEI bed and breakfast** A PEI couple who ran a bed and breakfast in their home refused to rent a room with a double bed in it to a gay couple. Despite the fact that the deeply religious couple also refused to rent the room to unmarried heterosexuals, the PEI human rights commission found them guilty of discrimination on the basis of sexual orientation, fined them and caused them to close down their home business.\footnote{See PEI Human Rights Commission website: \url{http://www.gov.pe.ca/humanrights/releases/may22-01.php3}. For more information on this case, contact EFC directly.}

Concerns about the impact of the recognition of same-sex marriage are not limited to potential legal action against religious individuals and institutions. Because it is difficult to draw a line between civil and religious marriage, a fundamental redefinition of marriage would impact the whole range of social and governmental institutions. Among other things, a redefinition of marriage would create religious freedom concerns for some parents of children in the public school system. As stated in the factum of the Interfaith Coalition for Marriage and the Family in the BC marriage case:

\begin{quote}
The Interfaith Coalition for Marriage believes that the inclusion of same-sex relationship recognition into the institution of marriage would fundamentally change the existing institution, not
\end{quote}
just add to it. There is no “bright line” that can be drawn between civil marriage and marriage before religious clergy. This is so because of the nature of the intermeshing that exists between civil and religious authorities and because all citizens live in civil society and share its institutions and legal recognitions. This inter-connection is particularly the case with such public institutions as public education. What is deemed to be required in “the Supreme Law of Canada” will become, in the nature of things, part of the expected curriculum of public education. The concept of a “bright line” or “water-tight compartment” between civil and religious institutions breaks down when one considers the reality of contemporary legal challenges and the wide-spread nature of the claim for recognition made by [same-sex marriage advocates] in these proceedings. Those parents with a belief (religioulsly motivated or not) that same-sex conduct is wrong ought not to be put in the position of having this view forced upon their children by way of constitutional determinations on another issue such as “marriage”. It would be naïve to assume that this case will not produce just such a result when the flurry of recent Court cases in [B.C.] and elsewhere have been in just this direction. Public order is one aspect of the rule of law about which the court should be concerned.

Many Canadians have come forward to express religious freedom concerns surrounding same-sex marriage. It is important to take the time to understand where these concerns come from and why they are so compelling to so many.

**Marriage and Public Policy**

In public policy, governments around the world have recognized the important role and unique needs of marriage, and have maintained a distinction and afforded differential treatment to marriage, as compared to other forms of cohabitation. Those relatively few countries that have established domestic partnership regimes treat marriage distinctively, affording to marriage a unique range of benefits and obligations. Even in the two countries which have chosen to recognize the marriage of persons of the same sex, limitations have been placed on these relationships that do not apply to heterosexual marriage.

Benefits and obligations were originally attached to marriage to remedy injustice resulting from the breakdown of the family. Historically women and children were economically dependent on the husband/father. For these two reasons-- the economic inequality between men and women, and the vulnerability of dependent children-- some of the obligations and benefits were extended to heterosexual common law relationships of some duration. Yet it is marriage that provides a more stable and enduring relationship between a man and a woman.
Numerically, marriage is the most popular family form. The majority of families (70%) are married-couple families. The majority of children under 14 years old (68%) live with married parents. Of the 8.4 million families in Canada, 5.9 million are married couples, 1.3 million (16%) are lone-parent, and 1.2 million (14%) are opposite-sex common-law partners. The census found that same-sex common-law partners comprise 0.5% of the total number of families. The census counted 503,100 stepfamilies, with approximately half of the parents married and half living common-law.

The marital commitment between a man and a woman promotes social stability and a depth of relationship which cohabitation outside of marriage cannot provide. Marriages generally last twice as long as common-law relationships. According to the 2001 General Social Survey, the probability of women separating who first live common-law is double that of women who marry without living common-law. When a common-law relationship ends, women are far more likely to enter into another common-law relationship rather than a marriage.

Marriage is a safer place for women and children. There is less risk of spousal violence among couples that are married than among separated or common-law partners. Between 1991-2000, the intimate partner homicide rate was 4.4 per million couples for married women, 29.5 for women living common-law. Children living with their two married biological parents are much less likely to experience neglect or abuse, and half as likely to witness violence in the home as children living with one parent. Higher percentages of children witnessed physical fights if they were living in blended/step parent (14.7%) or single parent (10.3%) homes as compared to biological or adoptive two-parent families (7.4%). Children were also more likely to witness physical fights in the home if their family structure had undergone change over the previous period, either from two parents to one (13.6%), or from one parent to two (14.4%).

Intact marriages are the most stable family form for children. The majority of children (68%) live with married parents. Married parent families tend to be far more stable than common-law unions, or even families where parents marry after living common-law. Children born to parents who married without living common-law beforehand are approximately three times less likely to experience family breakdown than children whose parents were living common-law when they were born and did not subsequently marry. By the age of 10, 14% of children whose parents married without living common-law had experienced family breakdown, compared with 25% whose parents married after living common-law, and 63% whose parents lived common-law and never married.

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15 Profile of Canadian families and households: Diversification continues, 2001 Census Analysis Series Statistics Canada.
Approximately 60% of common-law relationships are expected to end in separation, compared with approximately 30% of married relationships.\textsuperscript{21}

Children living with their two married biological parents are much less likely to experience neglect or abuse. Almost one-half of child maltreatment cases (44%) involved children living in lone-parent families although lone-parent families made up less than one-fifth of families. Almost one-fifth (19%) of child maltreatment cases involved children living in a parent blended family where one parent was a step-parent or common-law partner but not the biological parent of at least one of the children in the family, although these make up approximately 6% or less of families. Among the remaining child maltreatment cases, only 28% involved children living with their two biological parents.\textsuperscript{22}

Marriage has proven to be the most stable form of relationship between men and women and the best context for the procreation and nurturing of children. In this manner, marriage (real or symbolic) is society's commitment to and affirmation of the child's right to know and experience his or her biological and social heritage.

It is in the interest of society and of government to recognize and promote marriage and its distinctive nature and role in society. Though there may be other forms of relationships, such as friendships and domestic partnerships, which fulfill some of the same functions as marriage, the distinctiveness of marriage must be retained so that government may effectively address its specific needs. Government policy should protect and promote, not undermine, marriage.

Canada began to undergo massive social changes during the 1970s. Also during this time, governments in Canada began recognizing in law and policy other forms of relationships, notably opposite-sex common law partnerships. Beginning in 1971, the rate of marriages in Canada has been in steady decline (see chart below).

Law reinforces and is reinforced by social practices. As a societal institution, the difference and uniqueness of marriage must be maintained in law and policy or we fear the decline in marriages will continue, with all the attendant social consequences.

Attempts to restructure marriage

Various groups are seeking to expand the definition of marriage for the purpose of obtaining benefits and/or to achieve social legitimacy and acceptance. Some provincial and federal human rights boards have found current marital and family status provisions to be discriminatory toward homosexual couples and the courts are being asked to redefine marriage to include these and other groups. In this movement towards redefinition, the prevailing approach is to define marriage in terms of function and then to consider as marriage any form of relationship which shares some or all of those functions.

There are two issues: 1) the legal recognition of other domestic relationships and 2) whether marriage should be restructured to afford recognition to a specific group.

Extending protection through the legal recognition of other groups does not require redefinition. As indicated above, marriage was recognized by governments to protect the vulnerable within the marital relationship. Marriage was first recognized by governments in order to address the needs of women and children when marriages broke down, not as an expression of societal affirmation. For these same two reasons (the social and economic inequality of women and the vulnerability of children as compared to men), some of the obligations and benefits extended to marriages were extended to opposite-sex common law couples because they were relationships between women and men and because of their reproductive capacity. Marriage was not redefined in the process. If there are other domestic relationships in society in which there are vulnerable parties that need protection, then these relationships could be identified and dealt with separately. Both Nova Scotia and Quebec have instituted civil partnership regimes to allow gays and lesbians and others to opt into a partnership. Marriage need not be redefined in order to accomplish this goal.

If the government is treating similarly situated groups unfairly, the solution is to address the inequality rather than to try to eliminate the difference between the groups. Good public policy needs to be able to make distinctions. Inequality on the basis of sex or race is not addressed by redefining sex or race to eliminate difference, but by treating different sexes and different races equally. The solution to inequality is to address the unequal treatment. In the process, marriage does not need to be redefined.

Using the language of diversity, retaining marriage as an opposite-sex institution affirms diversity and acknowledges difference. Many heterosexuals want to be free to preserve and articulate their own unique historical identity. Advocates of marriage are now being portrayed by many as intolerant, anti-progressive and pejoratively religious, as if the deeply held beliefs of men and women in this country are somehow less worthy of consideration and as if marriage has no unique role and history within society.

23 It is interesting to note that even pro-gay law professor Michel Morin told the committee in his oral testimony (February 4, 2003) that in his opinion as a legal scholar redefining marriage was not the only possible and constitutionally valid way to respond to the inequality concerns of gays and lesbians.
Marriage is one among many forms of relationships within a pluralistic society. The definition of marriage distinguishes it from other forms of relationships. Definitions make distinctions - this is what definitions do. Pluralism is premised on the ability to acknowledge differences between things and relationships. A definition makes a distinction in order to preserve a thing’s essence. Without a language to describe these differences, we will advance the erosion of tolerance and pluralism. There are a variety of other domestic relationships characterized by emotional and economic dependency, and yet we do not argue that it is somehow a violation of rights that they do not get to be called "marriage." The very definition of marriage distinguishes it from all other relationships.

The Consequences of Restructuring Marriage

If marriage is restructured following a functional approach, how broad will marriage become? If the legal purpose of marriage is reduced to an affirmation and public support of committed relationships, then marriage will have to be restructured to include more than sexually intimate relationships.

In 2001, the Law Commission of Canada issued a report called Beyond Conjugality. In this report, the Law Commission examined the regulation of close personal relationships in Canada. Currently, the federal government regulates marriage and common law relationships, but very few other personal relationships between adults. The Law Commission recommended a dramatic increase in the number and forms of adult relationships recognized by the state. They said:

The focus in this Report is on interdependent relationships that are distinguished by mutual care and concern, the expectation of some form of an enduring bond, sometimes a deep commitment, and a range of interdependencies-- emotional and economic-- that arise from these features.2

On what rational policy basis would gay and lesbian relationships be included in marriage and other domestic relationships be excluded? If the capacity to procreate is no longer a distinctive feature of marriage, then sexual intimacy should also be eliminated as a criteria for marriage, as such intimacy between same-sex couples is not procreative.

If one purpose of redefining marriage is to extend societal affirmation to other types of relationships, as the Law Commission of Canada has suggested, why limit this to gay and lesbian relationships?

Further, with such a broad definition of close personal relationship, it is hard to see how governments could justify limiting any related institution to two people. In fact Nathalie Des Rosiers, president of the Law Commission, said as much in her testimony before the Justice Committee. In response to a question as to whether there was any rational reason for excluding more than two people from entering into marriage together, she said: "[t]here is no reason that polygamy should be excluded [from marriage in

Canada].” And while some negative aspects of the "lived experience" of polygamy gave her pause, Ms. Des Rosiers said that considering whether polygamy should be allowed in Canada was part of an "important process of ongoing reflection" on Canadian marriage laws.

Already in Canada, provincial officials refuse to prosecute open polygamists out of fear that courts will strike down existing laws against polygamy. The broadening of marriage to include gay and lesbian couples fundamentally alters the structure of marriage and opens the door to other, different relationship types – bisexual relationships for example.

Some gay and lesbian theorists have also recognized impact on marriage that a redefinition will entail. Lesbian theorist Ladelle McWhorter states that if gay people are "allowed to participate as gay people in the communities and institutions they [heterosexuals] claim as theirs, our presence will change those institutions and practices enough to undermine their preferred version of heterosexuality and, in turn, they themselves will not be the same. They [heterosexuals] are right, for example, that if same-sex couples get legally married, the institution of marriage will change, and since marriage is one of the institutions that supports heterosexuality and heterosexual identities, heterosexuality and heterosexuals will change as well.

Rather than reinventing marriage, governments should affirm marriage and provide marriage with the legal and economic support it needs. Marriage as the union of one woman and one man must remain a distinctive institution socially, culturally and legally, because it is the most reliable, stable and preferred basis for heterosexual bonding and the procreation and nurturing of children. Restructuring marriage by reducing it to an expression of commitment among adults will not strengthen marriage as we know it. When in law and public policy, the distinctiveness of marriage has been eroded, the rate of marriages in Canada has steadily declined. Redefining marriage solely in terms of a commitment between two persons will further erode the distinctiveness of marriage in law and society. This will result in a further decline of marriage. The onus should be on those seeking to reinvent marriage to show the positive social consequences of redefining marriage.

Examining the Options

In November 2002 the Department of Justice released a discussion paper on marriage in preparation for the Justice Committee hearings. The discussion paper, "Marriage and the Legal Recognition of Same Sex Unions," makes the mistake of framing the debate surrounding marriage in very narrow terms:

- Instead of considering on what basis the government should register non-marital relationships, the Justice paper focuses on same- and opposite-sex “conjugal” relationships. Other kinds of currently

25 The polygamous commune in Bountiful, B.C. is a well-known example. See Stewart Bell, “'Word is out' Canada is a safe haven,” *National Post*, July 12, 2002.
unrecognized relationships, such as non-sexually intimate friendships, are ignored and excluded from the discussion paper.

- Gay and lesbian relationships actually share significant similarities with other committed domestic relationships such as non-sexually intimate friendships or relationships between adult relatives. These similarities are not discussed in the Justice paper.

There are four options:

1) Marriage could be defined in law as the union of one man and one woman
2) In addition to an explicit definition of marriage, this option could also include the establishment of a civil registry or domestic partnership regime (hereafter referred to as a civil partnership)
3) Marriage could be defined in statute as the union of two persons
4) Marriage could be replaced in law and policy by a civil registry for domestic relationships

Each of these options requires Parliament to define the types of relationships they will and will not recognize. The Law Commission of Canada’s report *Beyond Conjugality* goes so far as to suggest that anything short of the legal recognition of domestic relationships of multiple adults will promote inequality. Hence, making distinctions in any of the three options may be challenged under the *Charter*.

**Option 1.** This option would include an explicit definition of marriage in federal law, enabling governments in Canada to continue to recognize marriage in law and public policy as the legal union of one man and one woman. It would facilitate a legal recognition of the social, cultural and religious institution. It would enable governments to address the needs of marriage in public policy. We endorse this option.

**Option 2.** In addition to marriage, a civil partnership regime could be established. It would be different than common-law relationships as the partners would register their partnerships and the benefits and obligations would apply from the date of registry.

As an association, we have neither promoted nor opposed the establishment of domestic partnerships. Our recommendation is that if they are established to recognize emotionally and economically dependent relationships, sexual intimacy should not be a condition for registering the partnership. We see no reason why non-sexually intimate domestic relationships should be excluded.

Our concern is that if the partnerships are treated equally to marriage, then marriage in law and public policy will lose its distinctiveness, most probably resulting in a further decline in the number of marriages.

**Option 3.** The redefinition of marriage entails a fundamental reconstruction of marriage. As stated previously, marriage is an expression of the complimentarity of the sexes. It is the social, cultural and religious means of facilitating the long-term and exclusive sexual bonding of one male and one female. It recognizes the unique procreative capacity of a heterosexual union and recognizes the best interest of the child to know and experience his or her biological and social heritage.
A redefinition of marriage reduces marriage to companionship between two people. As the Law Commission of Canada has suggested, if companionship is the sole purpose of marriage, then why not call all close personal relationships marriage? And, if procreation is not a core expectation of marriage, then why retain co-sanguinity restrictions?

**Option 4.** Under this option, a civil registry for domestic relationships would replace the institution of marriage. This option, often referred to as "getting out of the marriage business," would be technically and politically complicated. All provinces would have to agree to this route, since they still have the constitutional authority to solemnize marriage. This option may also create complications for couples who move to other countries where civil registries are not recognized.

As governments would not recognize marriages, marriage could not be promoted or protected in law and public policy. Legal recognition of this social/cultural/religious institution would be lost and we are concerned that fewer marriages would take place.

Effective public policy requires legislators to make distinctions. Legislators would need to consider the implications of a policy framework that only recognizes the civil union of multiple adults.

**Conclusion**

Marriage is, in its structure and nature, a union between one man and one woman. This has been recognized repeatedly by courts around the world and by societies and cultures throughout time. In no other jurisdiction in the world have the definition, nature and structure of marriage been found to violate the human rights of gay and lesbian people. We recommend that marriage continue to be defined in law as the union of one man and one woman, to the exclusion of all others.