



Submission

Senate Legal and Constitutional Affairs Committee's Inquiry into the *Marriage Equality Amendment Bill 2010*

30 March 2012

Introduction

Catholics hold strong beliefs about the dignity of the human person and the goodness and beauty of marriage as a natural institution between a man and a woman. In response to the subject inquiry, I make the following submissions regarding the nature of marriage and why the laws of the Commonwealth of Australia must continue to recognise and support marriage as meaning the exclusive and permanent union of one man and one woman.

What is marriage?

Marriage is a natural institution whereby a man and a woman give themselves to each other for life in an exclusive sexual relationship that is open to procreation. It is a union that is publicly recognised, honoured and supported because of its unique capacity to generate children and to meet children's deepest needs for the love and attachment of both their father and their mother. In the words of Professor Robert George of Princeton University:

"Marriage is the community formed by a man and a woman who publicly consent to share their whole lives, in a type of relationship oriented toward the begetting, nurturing and educating of children together. This openness to procreation, as the community's natural fulfilment, distinguishes this community from other types."¹

By contrast, although the community formed by a homosexual couple may involve genuine caring, affection and commitment to one another, it is not an inherently procreative community, because their sexual relationship is not designed to generate children. Marriage is not simply a loving, committed relationship between two people, but a unique kind of physical and emotional union which is open to the possibility of new life.

The definition of marriage as an inherently procreative community does not exclude heterosexual married couples who cannot have children for reasons of age or infertility. They are still married because their sexual union is naturally designed to give life, even if it cannot give life at a particular point in time, or ever. Marriage between a man and a woman always has an inherent capacity

1. Robert P. George, *In Defense of Natural Law*. Clarendon Press, Oxford, 1999, p.168.



for, and orientation towards, the generation of children, whether that capacity is actualized or not.

How does marriage between a man and a woman make a unique contribution to society?

Marriage makes a unique and irreplaceable contribution to society because a stable, loving marriage provides the best conditions for raising children. Through marriage, children are able to grow up knowing that they were created through an act of intimate love and with the knowledge that their mother and father have committed to each other for life. Marriage also contributes uniquely to society in modelling the way women and men live interdependently, recognising the equal dignity, beauty and value of the other, and committing to seek the good of each other. The family based on marriage is also the best social framework for the promotion of inter and intra-generational biological connectivity, which is an important and vital social good.

Marriage: discrimination against same-sex couples?

Unjust discrimination against persons is always wrong, but participation in particular social institutions is not always equally available to all persons within society. Distinguishing between certain groups is essential for the maintenance of the validity of the institution; e.g. university access is based on academic merit and not simply on the desire to attend a university. Women's and girls' only schools and colleges are permitted to deny entry to men, because society recognises that receiving men into the institution would change its essential character.

It is not unjust discrimination against homosexual couples to uphold marriage as being between a man and a woman. Marriage and same-sex unions are essentially different realities. Justice, in fact, requires society to recognise and respect this difference.

Marriage: a basic human right?

"The right to marry and found a family" is affirmed in the Universal Declaration of Human Rights (1948). International law has always understood and affirmed the enduring, unchanging truth that marriage is a life-giving union of a man and a woman. The United Nations Human Rights Committee, which monitors international human rights treaties, has stated that the right to marry "implies, in principle, the possibility to procreate".² The right to marry is a fundamental human right. However, to respect this right means to accept the objective reality of marriage as a union of a man and a woman that is inherently procreative.

2. UN Human Rights Committee General Comment No 19.



Why should secular society recognise, structure and encourage marriage?

Secular society has always recognised marriage as a public institution because the marital relationship makes a unique and essential contribution to the common good. Marriage is pre-political and the state has in this sense inherited marriage. The state should not alter and supply different reasons for an institution which it has inherited; rather it can only consider the reasons why this institution has deserved – and still deserves – social recognition and support. The primary reason why nation states have been interested in marriage and why it has attracted public support is because of its procreative aspect, encompassing the generation and raising of children:

“Because married couples ensure the succession of generations and are therefore eminently within the public interest, civil law grants them institutional recognition. Homosexual unions on the other hand, do not need specific attention from the legal standpoint since they do not exercise this function for the common good”.³

Companionship and love are undoubtedly important, but it is not the role of the state to legislate on the basis of private affections. Procreation, however, constitutes the public reason for marriage, because the creation and raising of children is publicly significant, with immense implications for the common good. The family, based on marriage, is the basic unit on which society and the extended family is built. As such, the state has an interest in and duty to ensure children are raised, as far as possible, by their natural families.⁴

The state cannot grant the legal status of marriage to same-sex unions without failing in its duty to promote and defend marriage as an institution essential to the public good.

While same-sex couples can have children by means of donor sperm or eggs, or through adoption, their relationship does not inherently have the possibility of creating children. For same-sex couples, having a child will always involve the use of one or more persons outside their relationship. This is unjust to children and destructive of their family connectedness. This practice should not be publicly endorsed or encouraged, because it involves a profound loss and deprivation for the child concerned: the loss of a pre-eminent and vital relationship with their biological father or mother.

Although it is deeply natural and good to desire children, the child should always be seen as a *gift* – a person whose rights and dignity must always be respected.

3. Congregation for the Doctrine of the Faith, *Considerations regarding proposals to give legal recognition to unions between homosexual persons*, June 3, 2003. Available at: http://www.vatican.va/roman_curia/congregations/cfaith/documents/rc_con_cfaith_doc_20030731_homosexual-unions_en.html

4. UN Convention on the Rights of the Child, Article 7(1).



As affirmed by international law, children have a right to their biological heritage⁵. It is a grave injustice to deliberately deprive children of the experience of being loved and raised by their natural mother and father⁶ and to prevent them from having a developing and ongoing relationship with their biological siblings.

Religious freedom at risk for all Australians

Some proponents of same-sex marriage have argued that in the event of marriage being redefined, the Catholic Church and other religious communities will be “protected” or “exempted” from being required by law to perform same-sex marriages. Such proposals fail to understand the immensely powerful role and influence of the law in our society. Changing the *Marriage Act* would, in practice, compel Catholics and other faith communities to recognise and accept same-sex marriage in their schools, charities, social welfare, health care and adoption services.

An ‘exemption’ would only apply to religious celebrants, and would offer no legal protection for the vast majority of Catholics and other Australians with a religious and/or conscientiously-held belief that marriage is a union of a man and a woman.

The *Marriage Equality Amendment Bill 2010*, with or without any accompanying ‘exempting’ legislation, poses a grave danger to religious freedom. It would threaten the right of Catholics and all Australians who believe in marriage to live, teach and publicly practise their belief that marriage is a union of a man and a woman.

In March 2012 the European Court of Human Rights handed down a judgment reaffirming its earlier decision that same-sex marriage is not a human right under the European Convention on Human Rights. However, the Court added that:

“Where national legislation recognises registered partnerships between same sex, member states should aim to ensure that their legal status and their rights and obligations are equivalent to those of heterosexual couples in a similar situation.”⁷

Mr Neil Addison, an English barrister who specialises in discrimination law, explained that what this means is that:

“Once same-sex marriage has been legalised then the partners to such a marriage are entitled to exactly the same rights as partners in a heterosexual

5. UN Convention on the Rights of the Child, Article 30.

6. UN Convention on the Rights of the Child, Article 7(1).

7. “Gay Marriage is not a human rights, according t European ruling” *The Telegraph* (UK), 21 March 2012.



marriage. This means that if same-sex marriage is legalised in the UK it will be illegal for the Government to prevent such marriages happening in religious premises.”⁸

Australia is not a party to the European Convention on Human Rights and is not bound by the decisions of the European Court of Human Rights. But this reasoning is likely to be followed by Australian courts and tribunals to read down ‘exemptions’ intended to protect religious freedom.

The meaning of marriage is important for all of us

The philosopher Ronald Dworkin, himself a supporter of homosexual marriage, explains why there is a strong case for not changing the meaning of marriage. He begins with the premise that the institution of marriage is:

“a unique and immensely valuable cultural resource. Its meaning and hence its value have developed over centuries, and the assumption that marriage is the union of a man and a woman is so embedded in our common understanding that it would become a different institution were that assumption now challenged and lost. Just as we might struggle to maintain the meaning and value of any other great natural or artistic resource, so we should struggle to retain this uniquely valuable cultural resource.

I believe that argument to be the strongest that can be made against gay marriage. It raises a larger and even more important issue. Who should have control, and in what way, over the moral, ethical, and aesthetic culture in which we must all live and that defines the meaning of our social and legal institutions and shapes our lives in many other ways?”⁹

We should not treat lightly those legal and social norms which limit marriage to persons of opposite sex. Often out of a sense of not wanting to unfairly discriminate, we can think that allowing equal status to other forms of unions somehow seems just. However, when we equate same-sex relationships with marriage, it further undermines our understanding of family by wrongly implying that biological connectivity of children with their parents and siblings is not important. In addition, it mistakenly says that having both a mother and a father is an unnecessary and superfluous duplication. Contrary to everything we intuitively and sociologically know about effective parenting, it adds further confusion by saying that mothers can ‘father’ just as well as men, and that fathers can ‘mother’ just as well as women.

When we permit same-sex relationships to mimic marriage we also say that a child gains no benefit from the knowledge that they were created through an intimate act of love between their parents. As a result, our understanding of

8. Ibid.

9. Ronald Dworkin, “Three Questions for America”, *The New York Review of Books*, September 21, 2006.



children also changes. Instead of seeing children principally as gifts created in love we begin to treat them as an entitlement.

When legislatures act to change laws, social norms change as a consequence, and these impact on all members of the community. Because marriage is one of the greatest resources of society, one that encourages men and women to commit to each other for life and to love and raise their children together, any change in the definition of marriage away from procreation to simply an emotional union will fundamentally alter society's values. Professors David Tubbs and Robert George explain the impact of a change in the definition of marriage:

"the legal recognition of same-sex partnerships as marriages is likely to further destabilize an institution already damaged by the casual acceptance of cohabitation and unwed childbearing as well as by the high rate of divorce. If a desire to stamp social approval on homosexual conduct and relationships leads to a redefinition of marriage that detaches it not only from biological complementarity and procreation but also from the related norm of sexual exclusivity, what will be left of the institution?"¹⁰

Legislation similar to the *Marriage Equality Amendment Bill 2010* is being considered in the United Kingdom. As the Catholic Bishops of England and Wales stated recently in their letter of 10 March 2012:

"The law helps to shape and form social and cultural values. A change in the law would gradually and inevitably transform society's understanding of the purpose of marriage. It would reduce it just to the commitment of the two people involved. There would be no recognition of the complementarity of male and female or that marriage is intended for the procreation and education of children."¹¹

I reiterate strongly the declaration of the English and Welsh bishops that we have a duty to all married couples, and to future generations, to do all we can "to ensure that the true meaning of marriage is not lost".¹² The real and distinctive meaning of marriage – a meaning cherished and preserved for countless generations of the human family – must not be taken away because of a deeply misguided idea that marriage only means any kind of committed relationship between two individuals.

Marriage: our common heritage

Pope Benedict XVI has reminded us that marriage between a man and a woman is a fundamental element of the "common patrimony" of humanity – our most

10. David L. Tubbs & Robert P. George, "Redefining Marriage Away", *City Journal*, Summer 2004.

11. *A Letter on Marriage*. Catholic Bishops Conference of England and Wales. 10-11 March 2012. Available at: <http://www.catholic-ew.org.uk/content/download/28460/194403/file/abps-letter-marriage-march-2012.pdf>.

12. Ibid.



precious heritage as human beings. Marriage is the place where sexuality is truly humanized, where man and woman through their exclusive commitment to each other create a family and pass this love on to their children and to future generations:

"We have a positive idea to offer, that man and woman are made for each other ... that marriage develops, first of all as a joyful and blessing-filled encounter between a man and a woman, and then, the family, which guarantees continuity among generations and through which generations are reconciled to each other and even cultures can meet."¹³

I urge you once again to recognise that marriage is an institution between a man and a woman, uniquely designed for the gift of children, and to support the essential and irreplaceable contribution marriage makes to our society.

Thank you for the opportunity to make this submission on such an important matter of national interest.

Yours sincerely,

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13. Press interview with Pope Benedict XVI, Castel Gandolfo, Italy, August 5, 2006.