

Submission to the Government Administration Committee

Marriage (Definition of Marriage) Amendment Bill

25 October 2012

1. Introduction

This submission is made by the New Zealand Campaign for Marriage Equality, in favour of the Marriage (Definition of Marriage) Amendment Bill (the **Bill**).

The New Zealand Campaign for Marriage Equality is an independent, nationwide coalition of individuals, groups and community organisations that have come together to support marriage equality and the Bill. Although our members come from a diverse range of backgrounds, we have no political affiliations as a group. Our members include supporters of political parties on both the right and the left, as well as non-aligned members.

2. Summary

We support the Bill, for four key reasons.

One law for all: Under the current law, heterosexual couples can marry but same-sex couples cannot. In our submission, there is no good reason for the Marriage Act to treat same-sex couples differently. Both heterosexual and same-sex couples form relationships based on their love for each other. Both types of couples commit to each other, come together in sexual union, form a household, and support each other and any children they may have.

Strengthening families: Marriage is seen by many as the definitive social expression of love and commitment, and research shows that married couples live longer, happier and healthier lives. These benefits, which strengthen families, should also be available to same-sex couples and their children. Marriage also strengthens society as a whole. We all benefit when more people, including same-sex couples, are in long-term, committed relationships.

A diverse, inclusive society: Passing the Bill will send a strong signal that all members of our community, whatever their sexual orientation, should have the same opportunities and be treated with the same dignity and respect. The Bill also has the effect of updating our Adoption Act, which currently allows individual gay men and lesbians to adopt, but does not allow gay and lesbian couples to adopt.

Marriage has evolved: In earlier times, married women had no legal identity and could not own property, divorce was not permitted under any circumstances, mixed-race marriages were not permitted, and marital rape was allowed. The institution of marriage has changed over time to reflect society's standards, and opening up marriage to same-sex couples is consistent with this.

In this submission we address each of the key reasons why the Bill should be passed, propose some amendments, and respond to the concerns that have been raised about the Bill.

3. One law for all

The law currently treats same-sex couples differently

The Marriage Act currently allows heterosexual couples to marry, but does not allow same-sex couples (that is, two men or two women) to marry.¹ The Act therefore treats heterosexual couples and same-sex couples differently.

In the *Quilter* case 15 years ago, the Court of Appeal ruled by a 3:2 majority that this different treatment is not discriminatory in a technical sense under the New Zealand Bill of Rights Act. Underlying this conclusion was a concern that any change to the definition of marriage should be made by Parliament directly, rather than by a judicial decision.² That is exactly what is now proposed.

If the Marriage Act were to come before the courts today, it is very likely that the courts would rule that the Act is discriminatory. This is because the Court of Appeal's reasoning in *Quilter* has been superseded by the Supreme Court's decision 3 years ago in *Air New Zealand v McAlister*, which takes a "purposive and untechnical approach" to discrimination.³ Indeed, just 6 months ago, the Court of Appeal ruled that the Supreme Court's decision in *McAlister* now "reflects the [minority] approach taken by Tipping J in *Quilter*", who ruled that the Marriage Act is prima facie discriminatory.⁴

This is also consistent with multiple court decisions from Canada,⁵ the United States,⁶ South Africa⁷ and other countries around the world subsequent to *Quilter*, in which similar legislation overseas has been found to be discriminatory.

More broadly, whether or not the Marriage Act is discriminatory in a technical sense under the Bill of Rights Act (and we submit that, for the reasons set out above, it *is* discriminatory), there can be no dispute that the Marriage Act treats same-sex couples differently from heterosexual couples. The law should only treat people differently if there are good reasons to do so. For the reasons set out below, we submit that there are no good reasons.

¹ *Quilter v Attorney-General* [1998] 1 NZLR 523 (CA), ruling that under the Marriage Act, a man and a woman – that is, heterosexual couples – can marry, but two men or two women – that is, same-sex couples – cannot.

² *Quilter*, above n1, at 567, 571.

³ *Air New Zealand v McAlister* [2009] NZSC 78 at [51].

⁴ *Ministry of Health v Atkinson* [2012] NZCA 184 at [104]. In *Quilter*, Tipping J observed at 573 that the courts must "give substance to the principle of equality under the law and the law's unwillingness to allow discrimination on any of the prohibited grounds unless the reason for the discrimination serves a higher goal ...".

⁵ *Halpern v Canada* (2002) 95 CRR (2d) 1 (Ontario), *Hendricks v Quebec* [2002] RJQ 2506 (Quebec), *Barbeau v British Columbia* (2003) BCCA 251 (British Columbia), *Dunbar & Edge v Yukon and Canada* (2004) YKSC 54 (Yukon), *Vogel v. Canada* (Manitoba), *Boutillier v Canada and Nova Scotia* (Nova Scotia), *NW v Canada* (2004) SKQB 434, 246 DLR (4th) 345 (Saskatchewan).

⁶ *Goodridge v Dept of Public Health* (2003) 798 NE 2d 941 (Massachusetts), *In re Marriage Cases* (2008) 183 P 3d 384 (California), *Varnum v Brien* (2009) 763 NW 2d 862 (Iowa). See also, addressing similar issues, *Perry v Schwarzenegger* (2010) 704 F Supp 2d 921 (Northern District of California), affirmed *Perry v Brown* (2012) 671 F 3d 1052 (9th Circuit Court of Appeals), *Gill v Office of Personnel Management* (2012) 682 F 3d 1 (1st Circuit Court of Appeals), *Massachusetts v United States* (2012) 698 F Supp 2d 234 (1st Circuit Court of Appeals), *Golinski v Office of Personnel Management* (2012) 824 F Supp 2d 968 (Northern District of California), *Windsor v United States* (Second Circuit Court of Appeals, 18 October 2012).

⁷ *Minister of Home Affairs v Fourie* [2005] ZACC 19, 2006 (1) SA 524 (CC).

No relevant differences between heterosexual and same-sex couples

The essence of marriage is the state's recognition and approval of a couple's choice, based on their love for one another, to: (1) make a commitment to each other; (2) come together in sexual union; (3) form a household; and (4) support one another and any children they may have.⁸

There are no relevant differences between heterosexual and same-sex couples in any of these respects. They both form their relationships based on their love for each other. They both commit to each other, come together in sexual union, form a household, support each other, and support any children they may have.

Consistent with this, just two years ago in the *Perry* case, a Californian Court heard extensive evidence about the nature of heterosexual and same-sex relationships, and concluded that:

Same-sex couples are identical to opposite-sex couples in the characteristics relevant to the ability to form successful marital unions. Like opposite-sex couples, same-sex couples have happy, satisfying relationships and form deep emotional bonds and strong commitments to their partners. Standardized measures of relationship satisfaction, relationship adjustment and love do not differ depending on whether a couple is same-sex or opposite sex.⁹

The American Psychological Association, the American Psychiatric Association, the National Association of Social Workers, the American Medical Association, the American Academy of Pediatrics and the American Psychoanalytic Association have recently reached similar conclusions.¹⁰

Opponents of the Bill have pointed to one difference between heterosexual couples and same-sex couples, namely that heterosexual couples can procreate naturally and that same-sex couples cannot. But this cannot be a defining characteristic of marriage. If it were, we would not allow infertile heterosexual couples, or elderly couples, to marry. No such restrictions exist in the Marriage Act, and nor should there be any such restrictions.¹¹

⁸ *Perry v Schwarzenegger* (2010) 704 F Supp 2d 921 (Northern District of California), slip op at 13, 67.

⁹ *Perry*, above n 8, at 77.

¹⁰ The associations reported in July 2012 that "empirical research demonstrates that the psychological and social aspects of committed relationships between same-sex partners closely resemble those of heterosexual partnerships. Like heterosexual couples, same-sex couples form deep emotional attachments and commitments. Heterosexual and same-sex couples alike face similar issues concerning intimacy, love, equity, loyalty, and stability, and they go through similar processes to address those issues. Empirical research also shows that gay and lesbian couples have levels of relationship satisfaction similar to or higher than those of heterosexual couples": Brief of American Psychological Association, the American Psychiatric Association, the National Association of Social Workers, the American Medical Association, the American Academy of Pediatrics and the American Psychoanalytic Association and others, 10 July 2012, filed in *Golinski v Office of Personnel Management* (2012) 824 F Supp 2d 968, at 10, citing LA Kurdek, *Change in Relationship Quality for Partners from Lesbian, Gay Male, and Heterosexual Couples*, 22 J Fam Psychol 701 (2008), LA Kurdek, *Are Gay and Lesbian Cohabiting Couples Really Different from Heterosexual Married Couples?*, 66 J Marriage & Fam 880 (2004), GI Roisman et al, *Adult Romantic Relationships as Contexts for Human Development: A Multimethod Comparison of Same-Sex Couples with Opposite-Sex Dating, Engaged, and Married Dyads*, 44 Developmental Psychol 91 (2008), KF Balsam et al, *Three-Year Follow-Up of Same-Sex Couples Who Had Civil Unions in Vermont, Same-Sex Couples Not in Civil Unions, and Heterosexual Married Couples*, 44 Developmental Psychol 102 (2008); LA Peplau & KP Beals, *The Family Lives of Lesbians and Gay Men*, in Handbook of Family Communication 233, 236 (AL Vangelisti ed, 2004).

¹¹ As the US Supreme Court has ruled, "it would demean a married couple were it to be said marriage is simply about the right to have sexual intercourse": *Lawrence v Texas* (2003) 539 US 558 at 567.

Further, many same-sex couples do have children, whether from previous relationships or with the help of IVF treatment, a sperm donor or a surrogate, through fostering, or through adoption as a single person. There is no basis for treating couples who have children in any of these ways differently from couples who procreate naturally.

Because there are no relevant differences between heterosexual couples and same-sex couples, our marriage laws should likewise make no such distinction. There should be one law for all.

4. **Strengthening families**

The Bill will strengthen families, with positive effects for both same-sex couples and their children. US President Barack Obama has said that extending marriage rights to same-sex couples “doesn’t weaken families; that strengthens families. It’s the right thing to do.”¹² Likewise, UK Prime Minister David Cameron has said:

I once stood before a Conservative conference and said it shouldn’t matter whether commitment was between a man and a woman, a woman and a woman, or a man and another man. You applauded me for that. Five years on, we’re consulting on legalising gay marriage. And to anyone who has reservations, I say: Yes, it’s about equality, but it’s also about something else: commitment. Conservatives believe in the ties that bind us; that society is stronger when we make vows to each other and support each other. So I don’t support gay marriage despite being a Conservative. I support gay marriage because I’m a Conservative.¹³

Marriage strengthens families by providing both tangible and intangible benefits. Most importantly, marriage has a significant cultural and social meaning. Many people – although not all – see marriage as the definitive expression of love and commitment, and weddings are societal celebrations of that commitment. Many people do not see civil unions as having the same significance and meaning as marriage. Opening up marriage to same-sex couples gives them the opportunity to share in an institution with this important social and cultural meaning.

Research has also shown that marriage has more tangible benefits. Those in marriage tend to live longer, happier and healthier lives.¹⁴ Consistent with this, the Court in the *Perry* case concluded that the evidence shows that:

Marriage benefits both spouses by promoting physical and psychological health. Married individuals are less likely to engage in behaviors detrimental to health, like smoking or drinking heavily. Married individuals live longer on average than unmarried individuals. ... Marital benefits, legal protections and social support resulting from marriage can increase wealth and improve psychological well-being for married spouses.¹⁵

¹² <http://cnsnews.com/news/article/obama-same-sex-marriage-strengthens-families>.

¹³ <http://www.guardian.co.uk/politics/2011/oct/05/david-cameron-conservative-party-speech>.

¹⁴ Williams Institute, *Same-Sex Couples and Marriage*, August 2012, at 13, citing Herek, *Social Science Perspective on Legal Recognition*, at 8-9; Holning Lau and Charles Q Strohm, *The Effects of Legally Recognizing Same-Sex Unions on Health and Well-Being*, 29 *Law & Ineq* 107 (Winter 2011).

¹⁵ *Perry*, above n 8, at 69-70.

The research also shows that same-sex couples gain social support from their families and a greater level of commitment to each other when they can marry.¹⁶

The tangible and intangible benefits of marriage strengthen couples, and should be available to both heterosexual and same-sex couples. Further, allowing same-sex couples to marry will also benefit the children of those couples. Opponents of the Bill often argue that marriage should be restricted to heterosexual couples, because it benefits the children of such couples. But to the extent that the children of heterosexual couples benefit from the institution of marriage, so too will the children of same-sex couples. Indeed, in *Perry*, the Court found that “the children of same-sex couples benefit when their parents can marry”.¹⁷

And marriage not only strengthens individual families; it strengthens society as a whole. We all benefit when more people are in long-term, committed relationships in which they form stable households and support one another and any children that they have.¹⁸

5. A diverse, inclusive society

Diversity is a strength

New Zealand is a diverse country. Instead of overlooking our differences, we now recognise that diversity is a strength. Forbes magazine reports that “diversity is a key driver of innovation and is a critical component of being successful on a global scale”.¹⁹ Leading New Zealand cities²⁰ and businesses²¹ all recognise that diversity is a strength.

¹⁶ Williams Institute, above n 13, at 15, citing MV Lee Badgett, *Social Inclusion and the Value of Marriage Equality in Massachusetts and the Netherlands*, J Social Issues, Vol 67, No 2, pp 316-334 (2011), Christopher Ramos, Naomi G Goldberg, MV Lee Badgett, *The Effects of Marriage Equality in Massachusetts: A Survey of the Experiences and Impact of Marriage on Same-Sex Couples* (Williams Institute, May 2009).

¹⁷ *Perry*, above n 8, at 84. Conversely, discrimination against same-sex couples and the social stigma that results from the denial of legal equality can detrimentally affect the children of same-sex couples. Children with gay and lesbian parents may see their family as “less worthy” than other families headed by parents to whom the State grants the status of marriage. See Williams Institute, above n 13, at 19, citing Lamb, *Mothers, Fathers, Families, and Circumstances*, at page 106, Loes van Gelderen, Nanette Gartrell, Henny MW Bos, Floor B van Rooij and Jo MA Hermanns, *Stigmatization Associated With Growing Up in a Lesbian-parented Family: What Do Adolescents Experience and How Do They Deal With It?*, Children & Youth Servs Rev, Vol 34, Issue 5, pages 999-1006 (March 2012), Nanette K. Gartrell and Henny M. W. Bos, *Adolescents of the USA National Longitudinal Lesbian Family Study: Can Family Characteristics Counteract the Negative Effects of Stigmatization?*, Family Process Vol 49, No 4, 559–572 (Dec 2010), American Psychological Assoc, *Lesbian & Gay Parenting* (2005).

¹⁸ *Perry*, above n 8, at 111 (“The state regulates marriage because marriage creates stable households, which in turn form the basis of a stable, governable populace”).

¹⁹ Forbes, *Global Diversity and Inclusion Fostering Innovation Through a Diverse Workforce*, at http://www.forbesmedia.com/files/Innovation_Through_Diversity.pdf.

²⁰ For example, Auckland City (“The preservation and celebration of Auckland's diversity, history and culture is important in building a vibrant and strong city”) at <http://www.aucklandcouncil.govt.nz/EN/newsevents/culture/Arts/Pages/home.aspx> and Palmerston North City (“diversity is our strength”) at <http://www.pncc.govt.nz/about/>.

²¹ For example, Genesis Energy (noting its “strong belief that this diversity brings us strength”) at <http://www.genesisenergy.co.nz/about-us/careers/our-culture.cfm>, PwC (“Strength in diversity”) at http://www.seek.co.nz/advhomes/pricewater/8280545_1.htm.profile, Downer (seeing “diversity as a strength and competitive advantage”) at [http://www.downer.co.nz/Documents/Corporate-Governance/Diversity-and-Inclusiveness-Policy-\[website-version\].pdf](http://www.downer.co.nz/Documents/Corporate-Governance/Diversity-and-Inclusiveness-Policy-[website-version].pdf), and Vodafone (“we believe that diversity is a key driver of creativity, leadership and innovation. We're building a culture that values the differences among us ... We value people for who they are and what they contribute - not what they are”) at <http://www.vodafone.co.nz/careers/our-world/diversity.jsp>.

The LGBT community contributes to this diversity, and to the strength that comes from diversity. Lesbians, gay men, bisexuals and transgender people are members of communities large and small throughout the country, and make significant contributions to all facets of life. Local communities have also acknowledged this contribution. For example, in Auckland, which is home to New Zealand's largest LGBT population,²² Auckland Tourism, Events and Economic Development has provided \$100,000 in support of the Auckland Pride Festival, which is launching in 2013.²³

The Bill recognises this diversity, and sends a strong signal that the law considers gay men and lesbians to be full members of society.

Public opinion also recognises this, with significantly more people supporting same-sex marriage than opposing it. A One News Colmar Brunton Poll conducted in May 2012 reports that 63% of New Zealanders believe that same-sex couples should be allowed to marry. Less than half of that number oppose same-sex marriage. And support is even stronger among people under 35: 76% support same-sex marriage.²⁴

An inclusive society

Many people see marriage as the most socially valued form of relationship. Given this, the exclusion of same-sex couples from marriage sends a signal that the gay men and lesbians who form same-sex relationships are less worthy than other members of society. The Court in the *Perry* case observed that a law that excludes same-sex couples from marriage "places the force of law behind the stigmas against gays and lesbians",²⁵ and that such a law:

results in frequent reminders for gays and lesbians in committed long-term relationships that their relationships are not as highly valued as opposite-sex relationships.²⁶

US research has identified that where relationships are less valued, this can lead to adverse health outcomes for those affected, including depression, anxiety, substance use disorders and suicide attempts.²⁷ Although other forms of legal recognition have a positive health effect, marriage appears to boost emotional health to a greater extent than being in a civil union.²⁸ Based on this body of research, the American Medical Association, the American Psychiatric Association and other leading

²² Hughes, A and Saxton, P, *Geographic micro-clustering of homosexual men: Implications for research and social policy* (2006).

²³ http://www.gaynz.com/articles/publish/2/article_11870.php.

²⁴ http://www.colmarbrunton.co.nz/images/Views_on_same_sex_marriage_May_2012.pdf. Likewise, a Research NZ poll in September 2012 (with a smaller sample size) found that 49% of New Zealanders support the Bill, with only 32% opposing it : http://www.researchnz.com/press_releases.html#samesex.

²⁵ *Perry*, above n 8, at 85.

²⁶ *Perry*, above n 8, at 94.

²⁷ Williams Institute, above n 13, at 14, citing MV Lee Badgett, *et al*, *Written Testimony: S598, The Respect for Marriage Act: Assessing the Impact of DOMA on American Families*, pages 10-11 (Williams Institute, 2011), Ilan H Meyer, *Prejudice, social stress, and mental health in lesbian, gay, and bisexual populations: Conceptual issues and research evidence*, Vol 129, No 5 Psychological Bulletin, pages 674-97 (2003), Ilan H Meyer, *Minority Stress and Mental Health in Gay Men*, 36 J of Health & Soc Behav 38 (1995).

²⁸ Williams Institute, above n 13, at 15, citing Richard G Wight, *et al*, *Stress and Mental Health Among Midlife and Older Gay-Identified Men*, 102 Am J Public Health 503 (March 2012).

health organisations have adopted policy positions calling for equal treatment of same-sex couples under state family laws, including marriage laws.²⁹

Excluding same-sex couples from marriage also has broader potential consequences. For example, New Zealand's youth suicide rate is the highest in the OECD, and the issue is particularly acute among LGBT youth.³⁰ In a comprehensive University of Auckland survey of over 9,100 secondary students in 2007, 20% of students attracted to the same sex or both sexes reported making a suicide attempt within the previous year – *5 times higher* than the proportion of students attracted to the opposite sex. Further, youth attracted to those of the same sex or both sexes are *3 times more likely* to be bullied at school, and to be victims and perpetrators of violence and to be imprisoned.³¹

Marriage equality in itself will not solve these distressing statistics. But it will provide a further signal to the LGBT community, including young people coming to terms with their sexuality, that they can lead healthy and productive lives with those who they fall in love with. It will signal that they are family, and that they can have families of their own.

More broadly, the Bill sends a strong message that all members of our community, whatever their sexual orientation, should be treated with the same dignity and respect and should have the same opportunity to commit to marriage.

Effect on adoption laws

The Adoption Act currently allows married couples and single people to adopt.³² Because same-sex couples cannot marry, the Adoption Act has the bizarre consequence of allowing single gay men and lesbians to adopt, but not allowing a gay or lesbian couple to adopt.³³

If the Bill is passed, then married same-sex couples will be able to adopt, removing the inconsistency between allowing single gay men and lesbians to adopt, but not allowing gay and lesbian couples to adopt.

The primary effect of the removal of this inconsistency will be to allow same-sex couples who already have children to formalise their parental rights and responsibilities. Data from Child Youth and Family

²⁹ Williams Institute, above n 13, at 14. The American Medical Association "(1) recognizes that denying civil marriage based on sexual orientation is discriminatory and imposes harmful stigma on gay and lesbian individuals and couples and their families; [and] (2) recognizes that exclusion from civil marriage contributes to health care disparities affecting same-sex households": <http://www.ama-assn.org/ama/pub/about-ama/our-people/member-groups-sections/glb-t-advisory-committee/ama-policy-regarding-sexual-orientation.page>. Likewise, the American Psychiatric Association adopted a "Position Statement in Support of Legal Recognition of Same-Sex Civil Marriage" in 2005, and the American Psychological Association passed a "Resolution on marriage equality for same-sex couples" in 2011.

³⁰ www.oecd.org/dataoecd/20/42/43589854.pdf.

³¹ www.fmhs.auckland.ac.nz/faculty/ahrg/_docs/2007-samesex-report20.pdf, Swearer, Turner, Givens and Pollack "You're So Gay!": Do Different Forms of Bullying Matter for Adolescent Males?", *School Psychology Review*, 2008, Volume 37, No 2, pp. 160–173, Stonewall School report 2012 at http://www.stonewall.org.uk/at_school/education_resources/7957.asp.

³² Adoption Act 1955, s 3.

³³ The purpose of the current Adoption Act is therefore not to prevent gays and lesbians from adopting, because single gay men and lesbians can already adopt. Instead, the Adoption Act – which was passed in the 1950s – simply reflected the categories that existed at that time: married couples and single people.

show that 70% of adoptions in New Zealand are undertaken within *existing* family structures. There are less than 80 non-family adoptions each year.³⁴

Many same-sex couples already have children, whether through previous relationships, assisted reproductive technology, or otherwise. The removal of the inconsistencies in the Adoption Act will mean that same-sex couples with children can obtain the legal protections they deserve, and will make life more secure for them and their children.

Opponents of the Bill argue that “deliberately depriving a child of a mum or a dad is not in the child’s best interests”.³⁵ However, this does not explain why the law allows single gay men and lesbians to adopt, but not same-sex couples. Further, the American Psychological Association, the American Psychiatric Association, the National Association of Social Workers, the American Medical Association, the American Academy of Pediatrics and the American Psychoanalytic Association all reported in July 2012 that “assertions that heterosexual couples are better parents than same-sex couples, or that children of lesbian or gay parents fare worse than children of heterosexual couples, have no support in the credible scientific research literature.”³⁶ The associations concluded that:

every relevant study to date shows that parental sexual orientation per se has no measurable effect on the quality of parent-child relationships or on children’s mental health or social adjustment, ... nor does empirical research support the proposition that having a homosexual parent affects the development of children’s gender identity.³⁷

the abilities of gay and lesbian persons as parents and positive outcomes for their children are not areas where credible scientific researchers disagree.³⁸

³⁴ <http://www.cyf.govt.nz/documents/about-us/adoption-data-1955-2011.pdf>.

³⁵ Protect Marriage New Zealand brochure.

³⁶ Associations’ *Golinski* brief, above n 10, at 15. The Associations report that dozens of empirical studies are “impressively consistent in their failure to identify deficits in parenting abilities or in the development of children raised in a lesbian or gay household. Their findings are summarized in reviews of empirical literature published in respected, peer-reviewed journals and academic books and empirical studies”, such as J Stacey & TJ Biblarz, *(How) Does the Sexual Orientation of Parents Matter?*, 66 Am Soc Rev 159 (2001), EC Perrin & Comm on Psychosocial Aspects of Child & Fam Health, *Technical Report: Coparent or Second-Parent Adoption by Same-Sex Parents*, 109 Pediatrics 341 (2002), CJ Patterson, *Family Relationships of Lesbians and Gay Men*, 62 J Marriage & Fam 1052 (2000), N Anderssen et al, *Outcomes for Children with Lesbian or Gay Parents: A Review of Studies from 1978 to 2000*, 43 Scand J Psychol 335 (2002), JG Pawelski et al, *The Effects of Marriage, Civil Union, and Domestic Partnership Laws on the Health and Well-being of Children*, 118 Pediatrics 349, 358-60 (2006), JL Wainright et al, *Psychosocial Adjustment, School Outcomes, and Romantic Relationships of Adolescents With Same-Sex Parents*, 75 Child Dev 1886 (2009) at 1895, AE Goldberg, *Lesbian and Gay Parents and Their Children: Research on the Family Life Cycle*, in Am Psychol Ass’n, *Contemporary Perspectives on Lesbian, Gay, and Bisexual Psychology* (2010), GM Herek, *Legal Recognition of Same-Sex Relationships in the United States: A Social Science Perspective*, 61 Am Psychol 607, 614 (2006).

³⁷ Associations’ *Golinski* brief, above n 10, at 18, citing J Stacey & TJ Biblarz, *(How) Does the Sexual Orientation of Parents Matter?*, 66 Am Soc Rev 159 (2001) at 176 and EC Perrin & Comm on Psychosocial Aspects of Child & Fam Health, *Technical Report: Coparent or Second-Parent Adoption by Same-Sex Parents*, 109 Pediatrics 341 (2002) at 342.

³⁸ Associations’ *Golinski* brief, above n 10, at 20. Although opponents of the Bill cite a recent study by M Regnerus, the leading US medical, psychological and pediatric organisations reported in July 2012 that “the Regnerus study sheds no light on the parenting of stable, committed same-sex couples”. Regnerus’ study did not include a category for the families of “same-sex couples”. Instead, he compared heterosexual families with families in which children believed that at some time between their birth and 18th birthday, their mother or father “ever had a romantic relationship with someone of the same sex”. Regnerus himself acknowledges that “child outcomes in stable, ‘planned’ GLB families and those that are the product of previous heterosexual unions are quite likely distinctive” from the children studied Regnerus. Associations’ *Golinski* brief, above n 10, at 22-23.

Others have argued that while lesbian couples would make good parents, “there is a dearth of data on gay male adoption”.³⁹ This is incorrect. New Zealand’s Advisory Committee on Assisted Reproductive Technology (ACART) conducted an extensive review of the evidence in June 2012 and concluded that although there is more evidence in relation to lesbian couples than gay male couples, “a comparison between planned gay father families and heterosexual families found no significant differences between family types in regard to children’s wellbeing”.⁴⁰

6. Marriage has evolved

The Bill is not the first piece of legislation to make a change to the institution of marriage. Marriage has evolved over time, with regular changes to its meaning. For example:

- Polygamous marriages were permitted in biblical times. For example, Abraham had three wives⁴¹, Jacob had two wives⁴², King David had at least 5 wives⁴³, and Solomon had “seven hundred wives of royal birth”.⁴⁴ Polygamous marriages have also occurred more recently, and it wasn’t until 1862 that the United States passed the Morrill Anti-Bigamy Act banning bigamy and polygamy. Today, polygamous marriages are not acceptable, and the institution of marriage is limited to couples.
- Traditionally, marriage meant that “the two spouses became one person for legal purposes; and the husband constituted the controlling mind and representative of that person”.⁴⁵ Thus an English judge ruled a hundred years ago that “[m]arriage, therefore, must by common law have implied, on the part of the wife, ... a complete surrender of her will to the will of her husband”.⁴⁶ This is now seen as an antiquated view, and is no longer part of our concept of marriage.
- At common law until the 19th century, marriage meant that the “husband received ownership of, or control over, most of his wife’s assets” as at the date of the marriage, or subsequently acquired by the wife.⁴⁷ The New Zealand Parliament passed multiple laws progressively

³⁹ John Roughan, http://www.nzherald.co.nz/adoption/news/article.cfm?c_id=1500906&objectid=10813350.

⁴⁰ Advisory Committee on Assisted Reproductive Technology, *Proposed Amendments to Guidelines on Surrogacy Arrangements involving Providers of Fertility Services and Guidelines on Donation of Eggs or Sperm between Certain family Members: Consultation document* (June 2012). Likewise, the leading US medical, psychological and pediatric organisations have said that “more research has focused on lesbian mothers than on gay fathers and thus our knowledge of them is broader, but the studies that exist of gay fathers also find that they are as fit and able parents as heterosexual fathers”: Associations’ *Golinksi* brief, above n 10, at 16, citing RH Farr et al, *Parenting and Child Development in Adoptive Families: Does Parental Sexual Orientation Matter?*, 14 *Applied Developmental Sci.* 164 (2010) at 176, EC Perrin & Comm on Psychosocial Aspects of Child & Fam Health, *Technical Report: Coparent or Second-Parent Adoption by Same-Sex Parents*, 109 *Pediatrics* 341 (2002), at 342, CJ Patterson, *Gay Fathers*, in *The Role of the Father in Child Development* 397, 413 (ME Lamb ed, 4th ed 2004), S Erich et al, *Gay and Lesbian Adoptive Families: An Exploratory Study of Family Functioning, Adoptive Child’s Behavior, and Familial Support Networks*, 9 *J Fam Soc Work* 17 (2005), S Erich, et al, *A Comparative Analysis of Adoptive Family Functioning with Gay, Lesbian, and Heterosexual Parents and Their Children*, 1 *J GLBT Fam Stud* 43 (2005).

⁴¹ Sarah, Hagar (Gen16:3) and Keturah (Gen 25:1).

⁴² Leah and Rachel (Gen 29:23, 28).

⁴³ Michal (1 Sam 18:27, 19:11, 25:44; 2 Sam 3:13-14), Abigail of Carmel (1 Sam 25:39, 1 Chr 3), Ahinoam of Jezreel (1 Sam 25:43, 1 Chr 3), Eglah (2 Sam 3:5, 1 Chr 3), and Bathsheba (2 Sam 12:24).

⁴⁴ 1 Kings 11:3.

⁴⁵ *Fisher on Matrimonial and Relationship Property* at [1.4]; *Perry*, above n 8, at 62-63.

⁴⁶ *Johnson v Clark* [1908] 1 Ch 303, 313 per Parker J.

⁴⁷ *Fisher on Matrimonial and Relationship Property* at [1.4]; *Perry*, above n 8, at 62-63.

reforming what is now seen as an outdated concept.⁴⁸ Indeed, it was not until 1976 that our marriage laws “finally laid to rest all proprietary incapacities of married women”, by providing that the “rights, privileges, powers, capacities, duties and liabilities of a married woman” are the same as those of a married man.⁴⁹

- Prior to 1867 in New Zealand, “there was no provision for divorce in New Zealand”. This was an absolute rule, based on the argument that the traditional and religious meanings of marriage did not allow for divorce.⁵⁰ The position progressively evolved over time, first with the Divorce and Matrimonial Causes Act 1867, which allowed for divorce but only on the grounds of adultery. Additional grounds of divorce were added in 1898, and again in 1907, 1920, 1921 and 1966. Since 1980, no-fault divorce has been available on the grounds that the parties have separated for at least two years and have irreconcilable differences.⁵¹
- As recently as 1985, marital rape was still allowed under New Zealand’s criminal law. It was only in 1985 that an amendment to the Crimes Act was passed that made rape within the marital home a criminal offence.⁵² More than two decades later, there can be no doubt that marital rape is seen as abhorrent and worthy of criminal sanction.
- Finally, until 1967, mixed-race couples were not permitted to marry in many states in the United States. That restriction on marriage was found to be unconstitutional, again changing the traditional conception of marriage.⁵³ Although mixed-race restrictions had been common as little as 45 years ago, they are now seen as abhorrent and marriage has evolved in a way that no longer encompasses such restrictions.

These examples show that the institution of marriage has evolved to reflect society’s expectations. What was once acceptable – such as views against mixed-race marriages and the inferiority of and subjugation of women – are no longer acceptable, and the institution has been updated to reflect this. Opening up marriage to same-sex couples is consistent with the evolution of the institution of marriage over time.

7. Response to the arguments against the Bill

Traditional meaning

Opponents of the Bill say that marriage has traditionally been a union between a man and a woman. But, as we have shown, the institution of marriage has evolved over time. It does not have a fixed historical meaning. Further, if history were a good argument against change, then women would still have no separate legal identity and would not be allowed to own property, married couples would not be allowed to divorce, marital rape would be legal and mixed-race couples would not be allowed to marry. Just because something was done in the past doesn’t mean that it was the right thing to do.

⁴⁸ Married Women’s Property Protection Acts of 1860 and 1870, the Married Women’s Property Acts of 1884, 1894, 1908 and 1952, and the Matrimonial Property Acts of 1963 and 1976. See *Fisher on Matrimonial and Relationship Property* at [1.7].

⁴⁹ *Fisher on Matrimonial and Relationship Property* at [1.7], Matrimonial Property Act 1976, s 49.

⁵⁰ *Fisher on Matrimonial and Relationship Property* at [1.8], n 4.

⁵¹ Family Proceedings Act 1980, s 39. See generally <http://www.teara.govt.nz/en/divorce-and-separation/>

⁵² Crimes Amendment Act (No 3) 1985.

⁵³ *Perry*, above n 8, at 62, citing *Loving v Virginia* (1967) 388 US 1.

Religious meaning

New Zealand's Christian communities are not in agreement about whether same-sex couples should be allowed to marry, with a number supporting marriage equality.⁵⁴ Further, opponents of the Bill who cite religion in support of their arguments miss the distinction between civil marriage, which is regulated by the State, and holy matrimony, which is a matter for the Church. The Bill only deals with civil marriage. Holy matrimony remains a matter for individual religions, and individual churches can decide not to join same-sex couples in holy matrimony.

Religious freedom

Although some opponents of the Bill accept that the Bill does not affect holy matrimony, they argue that the Bill may impinge on religious freedoms because religious ministers also undertake a public function in performing civil marriages, and that religious ministers may therefore be required to perform same-sex civil marriages.⁵⁵

This is a difficult issue. On the one hand, religious freedom is a very important principle in our society. On the other hand, equality is likewise an important principle. Consider a minister of religion refusing to perform a civil marriage for a mixed-race couple. Many people would say that, to the extent the minister is undertaking a public function, he or she should be required to perform a civil marriage for that couple. Are same-sex marriages really any different?

Our group has different views on this issue, and therefore makes no submission in relation to it. However, if the Committee wishes to ensure that ministers of religion are not required to perform same-sex civil marriages, we have proposed an amendment to the Bill in the Appendix that addresses this issue.

At most, this exception should apply to religious ministers, and to religious bodies that are not supplying services and facilities to the general public. There should be no exception for religious bodies, individuals or organisations that offer their services to the public at large, such as photographers or bed and breakfast owners, as opponents of the Bill appear to suggest.⁵⁶

Children

Some opponents of same-sex marriage, such as the founder of the Institute for American Values, David Blankenhorn, have argued against same-sex marriage on the basis that "children have the right, insofar as society makes it possible, to know and to be cared for by the two parents who brought them into this world".⁵⁷

However, Blankenhorn made a dramatic announcement in June 2012. In an opinion piece in the New York Times, he said that "as a marriage advocate, the time has come for me to accept gay marriage and emphasize the good that it can do".

⁵⁴ Letter from more than 50 Anglican, Methodist and Presbyterian ministers of religion and others dated 19 August 2012, at <http://stmatthews.org.nz/news.php?nid=260&sid=88>.

⁵⁵ Opinion of Ian Bassett dated 27 August 2012.

⁵⁶ Opinion of Ian Bassett dated 27 August 2012.

⁵⁷ Blankenhorn wrote a book, *The Future of Marriage*, in 2007 in opposition to same-sex marriage, and testified in 2010 in the *Perry* case against same-sex marriage.

Blankenhorn said:

The time for denigrating or stigmatizing same-sex relationships is over. Whatever one's definition of marriage, legally recognizing gay and lesbian couples and their children is a victory for basic fairness ... Instead of fighting gay marriage, I'd like to help build new coalitions bringing together gays who want to strengthen marriage with straight people who want to do the same.⁵⁸

As we have pointed out, the purpose of marriage is not limited to couples who have children. Further, the leading medical, psychological and social work organisations in the US have concluded credible scientific researchers do *not* disagree about the ability of gay men and lesbians as parents and the positive outcomes for their children.

More fundamentally, the Bill will not stop the children of opposite-sex couples from having a married mother and father. Instead, the Bill will also allow the children of same-sex couples to have married parents, giving those children the same benefits as the children of opposite-sex married couples. Having two loving parents who have had their relationship formalised by law can only be in the best interests of the child.

The slippery slope

Opponents also ask "what is to stop [marriage] being redefined again to allow, for example, polygamy?"⁵⁹ But the course of history has been in the *opposite* direction. As we have shown, polygamy was permitted in biblical times, but society has since made it clear that polygamy is no longer acceptable.

Marriage reflects our contemporary standards. If we do not take issue with same-sex relationships, we allow same-sex couples to marry. By contrast, if we have issues with polygamous relationships, we do not allow them to marry. They are different issues, and allowing one does not mean that we need to allow the other.

Further, the slippery slope argument is not supported by history. For example, opponents of the Homosexual Law Reform Act 1986 claimed that it would lead to a variety of social ills.⁶⁰ None of these have happened. Likewise, opponents of the Civil Unions Act 2004 claimed that the Act would be "destructive of the very foundations of society".⁶¹ Again, this has not happened. Given this history, claims that the Bill will result in negative consequences are simply not credible.

Effect on existing marriages

There is no evidence that allowing same-sex couples to marry will weaken heterosexual marriages. As the late Hon Brian Donnelly MP said during the first reading of the Civil Union Bill, "My own candle will not glow more dimly if I should light somebody else's".⁶² The only result will be more light. So it is

⁵⁸ http://www.nytimes.com/2012/06/23/opinion/how-my-view-on-gay-marriage-changed.html?_r=0.

⁵⁹ Protect Marriage New Zealand brochure.

⁶⁰ See, for example, the speeches in opposition to the Bill during the Parliamentary debate at (23 October 1985). 466 NZPD 7621.

⁶¹ Garth George, "More to this Bill than appeasing such a tiny minority", New Zealand Herald, 2004.

⁶² First Reading of the Civil Union Bill, 24 June 2004, reported at 618 NZPD 13927.

with allowing same-sex couples to marry. Likewise, the Court concluded in the *Perry* case that the evidence established that:

Permitting same-sex couples to marry will not affect the number of opposite-sex couples who marry, divorce, cohabit, have children outside of marriage or otherwise affect the stability of opposite-sex marriages.⁶³

Similarly, Prime Minister John Key has said “my view is that if two gay people want to get married I can't see why it would undermine my marriage with Bronagh”.⁶⁴

Civil unions are enough

Finally, opponents argue that same-sex couples already have “legal recognition and protection” under the Civil Union Act.⁶⁵ But the social and cultural meaning of a civil union is quite different to the meaning of a marriage. Civil unions are still seen by many as a “second best” to marriage. For example, since 2005, 2,817 opposite-sex couples have chosen civil unions, and 167,992 opposite-sex couples have chosen marriage.⁶⁶ That is, just 1.6% of heterosexual couples chose civil unions over marriage in New Zealand.

It would not be acceptable to tell a couple of a particular race or religion that they are entitled to civil unions but not marriage, and that this was enough for them. The same is true for same-sex couples. Their exclusion from marriage sends a clear signal that same-sex relationships are inferior to heterosexual relationships, and that members of the LGBT community are less worthy than other members of society.

8. Conclusion

For these reasons, the Committee should recommend that the Bill be passed, with the amendments set out in the Appendix.

The Campaign would like to appear before the Committee to speak to its submission.

⁶³ *Perry*, above n 8, at 83.

⁶⁴ http://www.nzherald.co.nz/nz/news/article.cfm?c_id=1&objectid=10823210.

⁶⁵ Protect Marriage New Zealand brochure.

⁶⁶ http://www.stats.govt.nz/browse_for_stats/people_and_communities/marriages-civil-unions-and-divorces/civil-unions-marriages-provisional.aspx.

Appendix: Proposed amendments to the Bill

1. References to married couples

By defining marriage as not limited by sex, sexual orientation or gender identity, we consider that the Bill by necessary implication amends all references in other legislation to married couples and spouses to include couples of the same sex, sexual orientation or gender identity.

We submit that this should be made explicit.

We do not consider that this should be done through the definition of the term “spouse”. That term is not defined in the Marriage Act, but is used throughout other legislation. The High Court recently ruled in *Re AMM* that although the term has a narrow meaning that is “ordinarily used to refer only to married persons”, it also has a broader potential meaning that can also include de facto and/or civil union partners under specific definitions in other legislation⁶⁷ or by the interpretation of the courts.⁶⁸ We do not consider that these context-specific meanings should be up-ended by the Bill.

Instead, we submit that the Bill address the issue by inserting the following into the Marriage Act:

A reference in this or any other Act to a married couple or a member of a married couple shall include a reference to a couple married under this Act, regardless of their sex, sexual orientation or gender identity.

2. Gender identity

The transition of transgender persons is addressed under the Births, Deaths, Marriages and Relationships Act. That Act allows the Family Court to make an order changing the sex to be shown on a person’s birth certificate. In such a case, section 30(2) provides that the Registrar of Births must change the sex recorded on that person’s birth certificate, unless that person is already married. Presumably, the purpose of this exclusion is to prevent two people of the same sex from being married.

If same-sex couples are allowed to get married, this purpose will fall away. As a result, the section should be repealed by the Bill. Indeed, if it is not repealed, a married transgender person who wishes to transition but stay with his or her husband or wife must first get divorced, then transition, and then re-marry again. There is no basis for requiring such a convoluted procedure. We submit that section 30(2) should simply be removed.

3. Religious freedom

As we have said, our group has differing views as to whether ministers of religion performing public functions in officiating civil marriages should be exempt from marrying all couples.

⁶⁷ *Re AMM* High Court Wellington CIV 2010-485-328, 4 June 2010 at [44].

⁶⁸ *Re AMM* High Court Wellington CIV 2010-485-328, 4 June 2010 at [4], [50], [70] (ruling that the term “two spouses” in the Adoption Act includes de facto partners).

However, if the Committee wishes to ensure that ministers of religion are not required to perform same-sex civil marriages, we submit that the Bill insert the following into the Marriage Act:

- (1) Notwithstanding the Human Rights Act, an exempt minister of religion shall not be required to solemnise any marriage in violation of his or her religious beliefs.
- (2) Notwithstanding the Human Rights Act, an exempt religious body shall not be required to provide services or facilities for a purpose directly related to the solemnisation or celebration of a marriage in violation of his or her religious beliefs, unless that religious body provides such services or facilities to the general public.
- (3) A minister of religion or religious body may apply to become exempt [following the same process as set out in section 32B-E of the Marriage Act].

We consider the proviso to sub-clause (2) to be important. To the extent that a religious body provides services or facilities to its own congregation only, then the sub-clause may apply. But to the extent that the body provides such services or facilities to the general public, then there is no basis to allow the religious body to discriminate.