

**Same - sex  
Couples and  
the Law**

**A Submission from the New Zealand Education  
Development Foundation**

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***26 April 2000***

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## Executive Summary

- Marriage is an institution that uniquely celebrates the complementarity of the sexes. It unites men and women. It symbolizes the value of working together and it instructs the young to these ends.
- The State has an interest in preserving marriage as an institution. If same-sex couples will be allowed to marry the ideal conception of marriage for raising a family will be diminished.
- Same-sex “marriage” by definition denies children a fundamental right of a live-in mother and father.
- The drive for the registration of same-sex partnerships or “marriage” of same-sex partners assumes the primacy of the rights of the individual. Marriage, however, does not exist in any culture on the basis of human rights.
- Marriage is pivotal to the common good because it is about the welfare of children.
- A claim frequently made by same-sex “marriage” advocates is that the principle or value of tolerance requires legalization of same-sex “marriage.” But this claim confuses tolerance with preference. Marriage is the classic example of a preferred relationship. All societies have three classes of sexual behaviour, preferred, tolerated and prohibited. For example, marriage is preferred, adultery is tolerated and rape or incest is forbidden. The claim for same-sex “marriage” is not a claim for tolerance, but for special preference. Tolerance is not the same as preference, and marriage is preferred, not merely tolerated. Thus, the principle of tolerance does not justify legalization of same-sex “marriage.”
- The advocates of homosexual “marriage” and consequently parenting seeks to establish a general policy and rule of law that homosexual relations are fully equal to—just as good as and legally equivalent in all ways—to heterosexual marriage and parenting.
- The above notion of functional equivalence is profoundly flawed. It is over inclusive. If the guiding principle of marriage is relativism of commitment or intimacy, and it must be if we permit same-sex couples to marry, then there is no meaningful limit. The notion of two is certainly lost because “two” is rooted in the fact that there is male and female.
- Same-sex “marriage” cannot ultimately be separated from same-sex parenting. They need to be considered together.

## Primary concerns

### 1. *The Purpose of Marriage*

Both the discussion and background paper tend to ignore issues relating to the common good. The implication is that law should primarily concern itself with legislative change concerning individual rights. Marriage is not about individual rights. It is about giving preference to a unique relationship between a man and a woman because of what that relationship gives to society.

- First, marriage has long been viewed as a natural institution, meeting and guiding the primary human inclinations toward sexual expression, reproduction, and emotional intimacy. The English political philosopher John Locke describes marriage as humankind's "first Society."
- Second, marriage is a sacramental institution, typically built on sacred promises and overseen by religious communities. In most cultures, powerful religious symbols and rites have sought to idealise and sanction the marital relationship.
- Third, marriage is an economic institution, constituting a primary unit of economic consumption, exchange and production.
- Fourth, marriage is a social institution, nurturing and socialising children and regulating the behaviour of both husbands and wives. It typically links together two extended families, thus widening the network of support, resources, and obligations available to help children and other vulnerable family members. From this perspective, marriage as an institution can be seen as a seedbed of civic virtue, perhaps society's most important contrivance for protecting child well-being, turning children into good citizens, and fostering good behaviour among adults. Primarily for this reason, marriage is widely viewed in human societies as a "social good" worthy of strong support.

Because of the importance of each of these dimensions, marriage is also a legal institution, protected and regulated by a body of law that governs entry into the institution, exit from it, an expectations of behaviour within it, including an enumeration of the rights and duties that flow from the status of being married. One reason that marriage is universal is that, as a natural institution, it is partially rooted in human biology. The love attachments of marriage are more than just social constructs. Unlike most animals, human males and females have a predisposition to have some emotional affinity for each other beyond the sexual act and to establish "pair bonds."

The institution of marriage was designed less for the accommodation of adults in love than for the proper functioning of society, especially regarding the care of children. Indeed, marriage as an institution is historically based on a fundamental realisation - that all affective ties between men and women, no matter how biologically based they may be, are notoriously fragile and breakable. Because of this fact, an important aspect of marriage, in both its legal and religious contexts, are the vows of fidelity and permanence that are almost always a part of the wedding ceremony. In large measure, these promises are designed to bind males to long-term commitment in order to foster the social institution of fatherhood.

## **2. Human Rights and the issues of Tolerance and Discrimination.**

The drive for the registration of same-sex partnerships or “marriage” of same-sex partners assumes the primacy of the rights of the individual. Marriage, however, does not exist in any culture on the basis of human rights. Legally the contest over same sex “marriage” is a classic example of the conflict between two understandings of social order. On the one hand we have the defenders of individual rights. On the other hand we have those who are concerned with civil society or the common good. Marriage is pivotal to the common good because it is about the welfare of children.

A claim frequently made by same-sex “marriage” advocates is that the principle or value of tolerance requires legalization of same-sex “marriage.” But this claim confuses tolerance with preference. Marriage is the classic example of a preferred relationship. The claim that marriage is “preferred” requires some explanation. All societies have three classes of sexual behaviour, preferred, tolerated and prohibited. For example, marriage is preferred, adultery is tolerated and rape or incest is forbidden. Marriage has preferred status because of what it offers to society. It is one of the most highly preferred, historically favoured relations in the law. Thus, the claim for same-sex “marriage” is not a claim for mere tolerance, but for special preference. Tolerance is not the same as preference, and marriage is preferred, not merely tolerated. Thus, the principle of tolerance does not justify legalization of same-sex “marriage” because marriage is much more than a tolerated relation, it is a legally preferred status. Same-sex “marriage” is driven primarily by the alleged needs of individuals.

The enormous importance of marriage for civilised society is perhaps best understood by looking comparatively at human civilisations throughout history. Why is marriage our most universal social institution, found prominently in virtually every known society? Much of the answer lies in the irreplaceable role that marriage plays in childrearing and in generational continuity.

Consider this for a moment. Every child is born of two people, one of his own sex and one of the other, to whom his life is as important as their own and who undertake to instruct him in the ways of the world around him. Can you name the social reformer who could dream of a better arrangement than that?

Simply defined, marriage is a relationship within which a community socially approves and encourages sexual intercourse and the birth of children. It is society's way of signalling to would-be parents that their long-term relationship together is socially important and a public concern, not simply a private affair. The genius of marriage is that, through it, society normally holds the biological parents responsible for each other and for their off-spring. By identifying children with their parents. and by penalising people who do not have stable relationships, the social system powerfully motivates individuals to settle into a sexual union and take care of the ensuing offspring.

Today, many decent, open-minded people are wary of legal classifications that deny benefits to or impose special burdens upon minorities simply on

account of their nonconformist or unpopular lifestyles. History is filled with many examples of religious groups, ethnic minorities, and unpopular political movements that have suffered significant social persecution and legal discrimination because of prejudice against their nonconforming beliefs or behaviours. There is special concern when the group that is disfavoured is demonized with the taint of immorality.

Homosexuals claim to be just another class of people persecuted on account of their minority sexual preferences, and that they are merely the latest victims of excessive and intolerant moral zeal.

However, there are several profound differences between discrimination as we usually understand it and denial of same-sex “marriage.” First, advocates of same-sex “marriage” do not seek protection against persecution; that is already provided by law in New Zealand. Rather, they seek a positive legal preference, and assert a claim to a unique status with attendant special benefits. Second, homosexuals are not mere nonconformists. The characteristic that defines them as a group and as couples is not belief or biology but behaviour—a particular kind of sexual behaviour. Sexual behaviour is not an inherent personal characteristic like race or gender, nor is it an exercise of conscience like religion or speech. Third, the particular kind of sexual behaviour that defines the group seeking same-sex “marriage” undeniably entails uniquely high risks to public health and jeopardizes sexual integrity and social order more than most other sexual practices except perhaps sexual abuse and adultery. Rape is better classified as violent behaviour and incest is still relatively rare.

There are many significant public health concerns about homosexual behaviour that support the historic social preference for male/female marriage. The worldwide AIDS crisis, for example, is a behaviour-driven public health epidemic, and homosexual contact is an especially efficient and statistically significant method of spreading the AIDS virus and many other sexually transmitted diseases.

Same-sex couples are not an impotent minority. They have proven repeatedly that they have significant political influence, and they appear to participate at no proportional disadvantage in the democratic political process. Indeed that has been made obvious by the “Hero” debates of recent years in Auckland. Homosexuals have political clout in most western countries that is, if anything, disproportionately greater than their numbers, about 2 percent of the population.<sup>1</sup> Finally, it is inconsistent for gay and lesbian advocates to appeal to one moral value—equality—at the same time as they repudiate another (i.e., the traditional moral opposition to homosexual practices and exclusive preference for sex within male/female marriage) as an improper basis for marriage laws.

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<sup>1</sup> The persistent claim from the homosexual lobby that this figure should be 10% is completely unfounded. That figure comes from The Kinsey Report released in the 1950s. It has been substantially discredited. Even the 2% is probably high if we exclude bi-sexuals and those who are not life-long homosexuals.

## Parenting by both sexes: a basic issue

Both the common experience of humanity and recent research emphatically support the view that a father and a mother, together, provide the best environment in which to raise a child.

Male/female parenting is best for children because there are gender-linked differences in child-rearing skills; men and women contribute different (gender-connected) attributes to their children's development. While the critical contribution of mothers has long been recognized, recent research validates the common understanding that fathers are also extremely important for the full and healthy development of children.<sup>2</sup>

Experts in many disciplines have reached *surprising unanimity* in their recognition that *men nurture, interact with, and rear competently but differently from women: not worse, not better ... differently.*<sup>3</sup> Thus both mothering **and** fathering are foundational.

When fathers nurture and care for their children, they do so not as "substitute mothers" but differently, as fathers. For example, studies show that fathers play with their infant children more than mothers do. They play more physical and tactile games and use fewer toys when playing with their children.<sup>4</sup> In particular, it has been established that *[m]en encouraged their children's curiosity in the solution of intellectual and physical challenges, supported the child's persistence in solving problems, and did not become overly solicitous with regard to their child's failures.*<sup>5</sup> One study found that six-month-old infants whose fathers were actively involved with them *had higher scores on the Bailey Test of Mental and Motor Development.* Infants whose fathers spend more time with them are more socially responsive and better able to withstand stressful situations than infants relatively deprived of substantial interaction with their fathers.<sup>6</sup>

Erik Erikson noted that father love and mother love are different kinds of love. Fathers love more *dangerously*, he observed, because their love is more *expectant, more instrumental* than that of mothers. Fathers particularly tend to value and foster child interaction with extrafamilial socializing influences, to provide instrumental leadership, to establish and enforce standards regarding unacceptable emotions and behaviours, and absorb hostility from children.

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<sup>2</sup> See generally Preface in *Dimensions Of Fatherhood 14-16* (Shirley M.H. Hanson & Frederick W. Bozett eds., 1985); Alan J. Hawkins et al., *Rethinking Fathers' Involvement in Child Care*, 14 J. Fam. Issues 531, 534 (1993); see also Alan J. Hawkins et al., *Turning the Hearts of the Fathers to the Children: Nurturing the Next Generation*, 33 BYU Studies 273, 279-81 (1993).

<sup>3</sup> Kyle D. Pruett, *The Nurturing Father* 30-31 (1987).

<sup>4</sup> See Kyle D. Pruett, *The Paternal Presence*, 74 Families Soc'y 46, 48 (1993) (citing sources).

<sup>5</sup> See Heidelise Als et al., *Analysis of Face-to-Face Interaction in Infant-Adult Dyads*, in *Social Interaction Analyses* (M. Lamb et al. eds., 1979), cited in Jones. Infants generally remain more still when held by fathers than mothers, and fathers tend to move the infant's body or limbs more often than mothers. Another study reported that fathers of one-year-old children give trucks equally to boys and girls, but give dolls less often to boys.

<sup>6</sup> Ross Parke, *Perspectives on Father Infant Interaction*, in *The Handbook Of Infant Development* 549 (Joy D. Osofsky ed., 1979).

Mothers, on the other hand, provide more expressive, integrative, and nurturing childrearing, and their love is more unconditional. Fathers are relatively more aware of their role in developing values and discipline in children.<sup>7</sup> Fathers have a powerful influence on the academic achievement of children, and many researchers today believe that a father's expectations regarding future roles for his child will have an influence on the child's cognitive competence. Likewise, paternal affection is associated with adolescents having more friends, being happier in relationships, and feeling more secure, calm, and self-confident.<sup>8</sup> Research also shows *there is a lower incidence of sexual involvement in children from father-present homes.*<sup>9</sup>

Paternal investment enriches children in four ways. First, it provides them with a father's physical protection. Second, it provides them with a father's money and other material resources. Third, it provides them with what might be termed paternal cultural transmission: a father's distinctive capacity to contribute to the identity, character, and competence of children. Fourth, paternal investment provides children with the kind of day-to-day nurturing that they want and need from **both** parents—feeding them, playing with them, telling them a story. *In virtually all human societies, children's well-being depends decisively upon a relatively high level of paternal investment.*<sup>10</sup>

In *Sex Culture & Myth*, Bronislaw Malinowski concluded: *The two main consequences of fatherlessness are rising youth violence and declining child well-being. It has been observed that boys living with fathers rarely commit crimes; fatherless boys commonly commit crimes.*<sup>11</sup>

Surveys of child well-being repeatedly show that children living apart from their fathers are far more likely than other children to be expelled or suspended from school, to display emotional and behavioural problems, to have difficulty getting along with their peers, and to get into trouble with the police.

Accordingly, the preconditions for effective fatherhood are ... co-residency with children and a parental alliance with the mother. Bronislaw Malinowski<sup>12</sup> maintains that *the most important moral and legal rule concerning the physiological site of kinship is that no child should be brought into the world without a man—and one man at that—assuming the role of sociological father, that is of guardian and protector, the male link between the child and the rest of the community. This generalization amounts to a universal sociological law. The consequences for children of effective fatherhood are compellingly beneficial.*

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<sup>7</sup> See, e.g., Robert H. Bradley, *Fathers and the School-Age Child*, in *Dimensions Of Fatherhood*.

<sup>8</sup> See Karen W. Bartz, *Selected Child Rearing Tasks and Problems of Mothers and Fathers*, 27 *Fam. Coordinator* 209-14 (1978), cited in Bradley.

<sup>9</sup> Dorothy H. Martin, *Fathers and Adolescents*, in *Dimensions Of Fatherhood*, at 170, 181.

<sup>10</sup> David Blankenhorn. *Fatherless America: Confronting our most urgent social problem* 1. 1995

<sup>11</sup> Pruett see note 4. Research carried out by the N.Z.E.D.F. in Auckland & Christchurch confirm this.

<sup>12</sup> Bronislaw Malinowski, *Sex Culture & Myth* 63. (1962).

It is a matter of serious concern that New Zealand is becoming an increasingly fatherless society. In 1996, an estimated 32 per cent of children under 18 lived in homes in which their fathers did not reside. It is predicted that by 2010 more than one-half of all European children and nearly three-quarters of Maori children under one year will live in a home apart from their fathers.<sup>13</sup> Under these circumstances, and knowing the importance of both father and mother to healthy child development, to legitimate a one-gender style of marriage and consequently parenting is irresponsible.

Parents are important role models for their children of the same gender because *[c]hildren learn to be adults by watching adults*.<sup>14</sup> Children are generally more compliant with the parent of the same sex. The importance of the opposite-gendered parent for the complete emotional and social development of the child is now recognized: *Boys and girls build their notions of their sex roles from experience with both sexes*.<sup>15</sup> The loss of cross-gender parenting can have severe emotional consequences for the child. For example, the absence of a father in the home may result in a daughter having trouble relating to men throughout her adult life.

Indirectly, it is also best for children to be raised by both a father and mother because men mature and become more responsible and relate better to children when they have raised children. Experts say that the transition from adult male to father is more complex than many imagine. They describe fathering as a vital part of the journey toward the complete man. *Fatherhood is the single most creative, complicated, fulfilling, frustrating, engrossing, enriching, depleting endeavor of a man's adult life*.<sup>16</sup> If fathers are involved in the daily physical care of a child in infancy, the probability of the man being involved in physical abuse of any child is dramatically lower. The intimacy of infant care creates a strong barrier against later exploitation of that intimacy, whether physical or emotional. The helplessness of an infant evokes a nurturing response in both men and women. Gender stereotyping is less likely to occur if the father has had an intimate relationship with his child.

## Same-sex parenting

Those who advocate legalization of same-sex “marriage”—and consequently parenting assert essentially two kinds of arguments: human rights or legal and sociological arguments. The human rights arguments assert that to consider homosexual behaviour as a negative factor in the issue of marriage improperly entails classification based on gender, improperly burdens a suspect class, infringes upon a fundamental right of privacy or intimate association, and violates anti-discrimination law.

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<sup>13</sup> Statistics N.Z.

<sup>14</sup> David L. Giveans & Michael K. Robinson, *Fathers and the Preschool-Age Child*, in Jones, Dimensions Of Fatherhood.

<sup>15</sup> William S. Appleton, *Fathers And Daughters* 72 (1981) (emphasis added).

<sup>16</sup> Pruett see note 4.

These arguments all presuppose that the law, by giving preference to heterosexual adults over homosexual adults in parental relationships, is without basis.<sup>17</sup>

However, if we were to accept claims for same-sex marriage, certain public policy arguments should follow:

1. The state should not enforce prejudicial social stigma against parents who engage in homosexual behaviour.<sup>18</sup>
2. Same sex parents can provide parenting that is just as good—as valuable for children—as that provided by heterosexual married couples.<sup>19</sup>
3. Public policy should encourage formation of families, even non-traditional same-sex families, because two parents (even same-sex parents) are better than one.<sup>20</sup>
4. Parenting by an adult who is engaged in homosexual relationship(s) might be the best option for a particular child.<sup>21</sup>

The first of these arguments is an adult agenda argument that essentially ignores the core concern of parenting – the welfare of children. Thus even if it were true, it would not justify a change in marriage law.

The last two policy arguments (3 and 4) are variations of a common theme—that people who engage in extramarital sexual relations, including homosexual relations, may, *in some cases*, provide the best available parenting alternative *for particular children*. This argument recognizes that all parents are imperfect and acknowledges the failures of the alternatives to parenting (e.g., the abuse of institutional care, the limbo of foster care, and the tragedies of other governmental substitutes for in-home parenting, and the disadvantages of single-parenting). However, the critical policy debate is not about recognizing

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<sup>17</sup> See generally Richard F. Duncan, *Wigstock and the Kulturkampf: Supreme Court Story-telling, The Culture War*, and *Romer v. Evans*, 72 Notre Dame L. Rev. 345,348 (1997) (asserting that *Romer* did not recognize special constitutional protections for homosexual activity); Wardle, (arguing that there is no constitutional right to same-sex marriage and no fundamental right that encompasses same-sex marriage).

<sup>18</sup> See, e.g., Robert G. Bagnall et al., *Burdens on Gay Litigants and Bias in the Court System: Homosexual Panic, Child Custody, and Anonymous Parties*, 19 Harv. C.R.-C.L. L. Rev. 497, 534 (1984); Felicia E. Luscius, Case Note, *Adoption of Tammy: Should Homosexuals Adopt Children?*, S.U. L. REV. 171,187 (1994); Darryl Robin Wishard, Comment, *Out of the Closet and into the Courts: Homosexual Fathers and Child Custody*, 93 Dick.L. Rev. 401, 414, 417 (1989).

<sup>19</sup> See, e.g., Julie Shapiro, *Custody and Conduct: How the Law Fails Lesbian and Gay Parents and Their Children*, 71 Ind. L.J. 623, 653 (1996).

<sup>20</sup> See, e.g., Polikoff, *Redefining Parenthood*, at 564-65; Carmel B. Sella, *When a Mother Is a Legal Stranger to Her Child: The Law's Challenge to the Lesbian Nonbiological Mother*, 1 Ucla Women's L.J. 135,150 (1991).

<sup>21</sup> See, e.g., Polikoff, *Redefining Parenthood*, at 564-65; Elizabeth Suckerman, Comment, *Second Parent Adoption for Lesbian-Parented Families: Legal Recognition of the Other Mother*, 19 U.C. Davis L. Rev. 729, 741-42, 753 (1986).

individual exceptions or legitimating homosexual parenting only in *extraordinary* cases. The advocates of legalization of homosexual parenting seek to establish a *general policy* and rule of law that homosexual relations are fully equal—just as good as and legally equivalent in all ways—to heterosexual parenting. That is the core. Thus, the second policy claim raises the fundamental issue: is homosexual parenting generally as good for children as heterosexual parenting?

This is a factual question. It asks a broad question about overall benefits for children, families and society in general, not a narrow question about benefits for a particular child in a particular case. It takes a long-term perspective (what will be the results for society and children over time), rather than a short-term perspective (what seems to be best here and now). *It calls for a finding of normative fact as well as scientific fact.*

### **One-sided advocacy**

The proposed restructuring of the family to legitimate homosexual relations and family relations is among the most advocated of family law reforms to be discussed in recent years. It seeks unrestricted, unconditional parental relationship rights, fully equivalent to those enjoyed by male/female parents. The advocacy includes full equivalent rights for lesbian and male homosexual couples, homosexual adoptive parents, homosexual partners and ex-partners of biological parents and homosexual individuals seeking to adopt children or become parents by means of assisted procreation.

The legalization of homosexual parenting would represent a profound change in the structure of childrearing and the family.

The issue requires a comparison of the general childrearing abilities of heterosexual and homosexual couples and individuals as classes. Advocates of homosexual marriage and parenting cite literature which is supportive of their position. But on close examination, the evidence does not prove that homosexual marriage and parenting are equivalent to heterosexual marriage and parenting or that they are not harmful to children in significant ways.

Most of the studies on homosexual marriage and parenting are based on unreliable quantitative research, flawed methodologically and analytically. Some are of little more than anecdotal quality. For example, in many cases only a few homosexual parents were involved. The studies of Charlotte Patterson, the most prominent advocate in the literature, uses some studies with sample populations as few as five. A fundamental flaw in many studies is that the subjects are self-selected. (They are sometimes recruited through homophile publications.) Volunteers for such studies often have an interest in the outcome of the research. Educated, economically secure white lesbians are over-represented in the samples; poor uneducated minorities are seldom represented. Homosexual male couples are typically not included.

Another common flaw relates to the control groups with which homosexual parents and their children are compared. Married heterosexual families are

seldom used as comparisons. Often the control group includes single heterosexual parents and their children. Most studies compare children in divorced lesbian mother-headed families with children in divorced heterosexual mother-headed families.<sup>22</sup> A properly controlled study would compare children raised by homosexual parents with children in intact families with heterosexual parents.

The studies generally quoted are a totally inadequate empirical basis for setting public policy. And even from this body of research there are indications of some significant potential detriments to children from homosexual parenting.<sup>23</sup>

In a 1993 study, Philip A. Balcastro examined the methodological validity and reliability of fourteen post-1975 published *data-based studies addressing the affects of homosexual parenting on children's sexual and social functioning*.<sup>24</sup> He found that all of the studies lacked external validity. Not a single study remotely represented any sub-population of homosexual parents. With only three exceptions, the studies' designs contained moderate to fatal threats to their internal validity. Seven studies did not utilize a control group and only three studies satisfactorily attempted to match comparison groups. The majority of studies also suffered from internal validity flaws, such as inadequate instrumentation and disparate testing conditions.

Balcastro showed that most of the studies on this topic were biased towards proving homosexual parents were fit parents. Some of the published works, he said, had to disregard their own results in order to conclude that homosexuals were fit parents.<sup>25</sup> His work concluded that *the statement that there are no significant differences in children reared by homosexual parents versus heterosexual parents is not supported by the published research base*.<sup>26</sup>

"Social desirability" bias taints the studies of homosexual parenting. Both researchers and respondents seek to support an outcome that homosexual parenting is as good as heterosexual parenting. This bias influences the research design and analysis, as well as the data gathered. This factor leads to the overwhelmingly one-sided position being taken in social science literature in support of homosexual parenting.

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<sup>22</sup> Balcastro et al., *A Review of Data Based Studies Addressing the Affects of Homosexual Parenting on Children's Sexual & Social Functioning*, 20 J. Divorce & Remarriage 105, 110 (1993).

<sup>23</sup> Lynn D. Wardle. *The Potential Impact of Homosexual Parenting on Children*. University of Illinois Law Review. Volume 1997. No 3, P 845.

<sup>24</sup> Ibid. *A Review of Data Based Studies Addressing the Affects of Homosexual Parenting on Children's Sexual and Social Functioning*, 20 J. Divorce & Remarriage 105, 110 (1993).

<sup>25</sup> See generally Tasker & Columbok who acknowledge multiple sampling flaws but rationalize why they are unimportant, also see a general discussion of this issue, Lynn Wardle *The Potential Impact of Homosexual Parenting*. Illinois Law Review. Vol 1997. Pp.850-853.

<sup>26</sup> Lynn D. Wardle. *The Potential Impact of Homosexual Parenting on Children*. University of Illinois. Law Review. Volume 1997. No 3, pp 845-846.

There have been no substantive studies on this issue in New Zealand, but one report is significant.

*In the early '80s a woman called Cherie Taylor was in a lesbian relationship with a woman and they decided to start a family by artificial insemination. After some years the couple went public with their three children and presented themselves to the media as an example of a normal and near-perfect family.*

*However, in the early '90s Cherie separated from her partner. She now felt she and her partner had deliberately misled the New Zealand public, and sought to repair the damage through publicity. Suitable "penitent" material was published in papers (Rorani, 1994; Taylor, 1994). Among other things, she said the level of violence between her and her partner had been high, and that the children were not happy about the overall arrangement. She had not previously told the media that one of the boys had been in counselling for anger management for years; he was particularly incensed that he could not be told who his father was.*

*Cherie was under immense pressure from the homosexual community to rejoin their ranks and eventually did so. In 1998 she sued her ex-partner for child maintenance, and won.<sup>27</sup>*

The lesson of this episode is that the push for homosexual rights allowed truth to be distorted.

There is consistently an assumption that the positive must be proved. Because it is presumed that no harm can be shown to fall on children of homosexual parents, the implication is that the burden of proof should fall on those who oppose the idea. In reality, because a radical social and moral change is being proposed, the burden of proof should fall on those who want the change. Before any change can be made it should be proven conclusively that same-sex "marriage" and parenting are as productive for children society as heterosexual marriage. That has not been done.

### **"Person" or "individual"**

It is significant that the United Nations Declaration of Human Rights (1948) chose 'person' rather than 'individual' in its text. It did so because 'person' suggests community and inter-relatedness. 'Individual', on the other hand, presupposes a disconnected autonomy.

There is a significant issue here seldom broached in New Zealand. The notion of "discrimination", certainly how it is popularly understood and how it shapes public consciousness, is often rooted in a limited understanding of the meaning of "individual." Human meaning, whatever it might ultimately be about, is always about relationships. Relationships, and our ability to value

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<sup>27</sup> Edited from a paper prepared by Neil Whitehead. Wellington.

and enjoy them, are primarily nurtured in a two-parent, two gendered dynamic family. Individuals simply do not have the right to self realization as the basis only of their own preferences.

Implicit in the discussion paper there is the idea that changing social conditions should of necessity bring about legal change. As a theory, however, it is not developed. Briefly let me make this point. A statement in the form 'you ought to do X,' "it is right to do X," or, "X is good" will establish rightness only if there is a set of rules that gives the speaker the power to totally shape the question. But it is precisely the question of who has the power to set such rules for validating evaluations that is the central problem of ethics and indeed legal theory. There is no one who can be said, a priori, to have that power unless the question being posed is also being begged. We are always left with the problem of who has ultimate authority.<sup>28</sup> What is the social ethic shaping the thinking?

It is not absurd to hold that homosexual adoption and de-facto marriage in New Zealand would undermine the family. The acceptance of homosexual and de facto marriage implies beliefs which are incompatible with the common pursuit of good which people seek to obtain in marriage and family life. They remove the common good, a correct shared belief about the nature of marriage, and substitute – in the guise of something praiseworthy and just – a view that will lead to suffering and unhappiness for children.

## **Marriage and the interests of the State.**

In 1997 the Attorney General of Vermont (USA) filed a "Motion to Dismiss" after a same-sex couple filed a lawsuit for the acceptance of same-sex "marriage." The arguments of the Attorney General are very helpful. The following is an attempt to summarize them.<sup>29</sup>

- The State has an interest in promoting traditional marriage because it unites men and women. Marriage is an institution that uniquely celebrates the complementarity of the sexes. It symbolizes the value of overcoming difficulties and working together and it instructs the young to these ends.
- The State has an interest in promoting a nurturing setting that provides both male and female role models. Marriage is built on male and female inclusion consequently children see the uniqueness and characteristics of each sex. In so doing they learn lessons for later life.
- The State has an interest in furthering the ties between birth and child rearing. Single parents continue to grow in numbers and although many do a good job, children and single parents do not have the benefits of families with two parents. Same-sex couples cannot provide a child by natural means. It can be reasonably stated that the increased creation of children

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<sup>28</sup> See Arthur Allen Leff *Unspeakable Ethics, Unnatural Law*, Duke Law Journal. Volume 1979, Dec. No 6. Pp 1229-1249.

<sup>29</sup> See David Orgon Coolidge. *The Question of Marriage in Homosexuality and American Life*. (ed) Christopher Wolfe. Spence. Dallas 1999. pp 235-236 and *Baber v Vermont*, Superior Court Document No. S1009-98 Cnc, State of Vermont's *Motion to Dismiss*. (Nov 10, 1997)

through technological or surrogacy tends to separate the connection between procreation and parental responsibility.

- The State has an interest in preserving marriage as an institution. If same-sex couples are allowed to marry, the ideal of marriage as a model for raising a family will be diminished. In its place marriage will be about tax status or some means to gain economic benefits from the state.
- The State has an interest in using the law to make normative statements. The law still has a role in reflecting and shaping value judgements. Law does this in a variety of ways, it criminalized sexual relations with children under sixteen, it prohibits bigamy and incest and in New Zealand (still) it criminalizes prostitution.
- The State has an interest in minimizing surrogacy contracts and sperm donation in order to avoid increased child custody and visitation disputes. Same-sex couple biologically need assistance from a third person. That will lead to a demand for more surrogacy and sperm donation. Custody cases will increasingly arise. The State will wish to keep these at a minimum.

## Answers to the 16 Questions In the Ministry of Justice Discussion Paper.

Q1 *What are your views about same-sex couples being able to marry?*

Same-sex couples should not be permitted to marry because:

- 1) The nature of marriage would be fundamentally changed.
- 2) Same-sex “marriage” cannot offer to society what male/female marriage does, therefore it does not require the protection of the law.
- 3) Same-sex “marriage” denies children the fundamental right of a mother and father.
- 4) Same-sex “marriage” would create added burdens of welfare and litigation on the State as suits relating to surrogacy increased.
- 5) The State would have to use the law to change public opinion and certainly opinion based on deep religious commitment, and schools would have to be used as instruments of state propaganda to teach the equivalence of homosexual sexual relations and male/female sexual relations.
- 6) Same-sex “marriage” is a claim for a preferred status by those who do not qualify to have that preferred status.

Q2 *If same-sex couples can't marry, what do you think about same-sex couples being able to formalize their relationship in some other way, such as registration?*

Provision could be made for same sex couples to formalize their relationship through the common law means that already exist. These should be registered.

Q3 *How do you think registration should work?*

N.A.

Q4 *What are your views about opposite-sex de facto couples being able to formalize their relationship in some other way, such as registration?*

As for homosexual couples.

Q5 *Do you think same-sex couples should have the same rights as opposite-sex couples to jointly adopt children?*

Same-sex couples should not be able to adopt children for the following reasons:

- 1) The “paramountcy principle”—that in adoption the best interests of the child are paramount—should be set out in any new Adoption Act.
- 2) The existence of many non-traditional families in today’s society does not mean, of itself, that the principles which underpinned the present Adoption Act may now be abandoned. Social science data, natural law and received wisdom show clearly that children are

nurtured best in a family with a mother and a father committed to each other in marriage.

- 3) The importance of fathers, in particular, must be fully understood. A leading social scientist has concluded that “Separation of children from their fathers is the leading cause of declining child well-being in our society. It is also the engine driving our most urgent social problems, from crimes to adolescent pregnancy to child abuse to domestic violence against women.”
- 4) Section 4 (2) of the Adoption Act is still appropriate. Except in some special cases which may occasionally arise, it is not in the best interests of the child for a single person other than the birth mother or father to adopt that child.
- 5) The proposal to restructure the family to legitimate homosexual family relations is supported only by flawed social science data. Homosexual couples do not give children the nurture they need. The Adoption Act should not treat same-sex couples in the same way as married couples. Same-sex couples should not be permitted to adopt.
- 6) The current preoccupation with individual rights and the notion of discrimination is superficial. It does not distinguish between ‘individual’ and ‘person’. It fails to attend to the concept of the common good, or understand the benefits to society and children which flow when children are nurtured by a mother and a father committed to each other in marriage.

Q6 *In what circumstances do you think a same-sex couple ought to be able to have joint legal parent status?*

- 1) Joint legal parent status should never be given to same-sex couples where neither is the actual birth parent.
- 2) To give joint legal parent status would be to deny a child the right to a father and a mother and deny the natural mother or father that right.

Q7 *What are your views about same-sex couples being able to be joint parents of a child from an assisted human reproductive procedure that they both agree to?*

We are opposed to this on the simple grounds that it legally denies a child a basic human right of a mother and father.

Q8 *What is your opinion of a same-sex couple both having the right to parental leave if one of them gives birth or adopts a (baby) child?*

Only a birth parent(s) should be entitled to parental leave.

- Q9 *What are your views about same-sex and opposite-sex couples being assessed in the same way for income support purposes?*
- 1) Joint income and asset testing could apply to registered defacto couples by means of common law.
  - 2) Same-sex couples do not contribute to society in the same way that married couples do. Joint income and asset testing should apply to same-sex couples.
- N.B. Under present law a married couple is disadvantaged e.g. a couple does not receive twice as much as two single people. This aspect of the law needs review.
- Q10 *What are your views about same-sex and opposite-sex couples being assessed in the same way for tax credit entitlement?*
- Same as for Q9.
- Q11 *What are your views about same-sex couples being assessed in the same way as opposite-sex couples when it comes to deciding whether people are eligible for legal aid?*
- Same as for Q9 and Q10.
- Q12 *What do you think about there being a law on dividing property when same-sex relationships break down?*
- This should be established by those in same-sex relationships to suit own needs.
- Q13 *What are your views on the law of custody and access being changed to take account of same-sex relationships?*
- 1) A same-sex partner wanting custody of, or access to, a child after a relationship has broken down should be eligible to apply only if he/she is the natural parent.
  - 2) Custody and access should be given only to a registered parent living in a committed heterosexual partnership.
- Q14 *What is your opinion of the law being changed to recognise same-sex couples when a partner dies without a valid will?*
- Such a change in the law would intrude on intergenerational connection and distort the way society maintains its blood familial lines. It would fail to recognise the intergenerational function of male/female marriage. However, if it is considered that the law should be changed in order to avoid supposed injustice, then the rights that are given should be less than the rights enjoyed by married partners.
- Q15 *What are your views about same-sex partners being able to make claims against the estate of a dead partner who hasn't properly provided for them?*

Same as for Q14.

Q16 *In your opinion what areas of the law need to be changed so that same-sex relationships are recognized in the way opposite-sex relationships are when a partner dies?*

Same as for Q14 and Q15.

**N.B. We have a profound misgiving concerning the above questions. They do not easily allow for a serious examination of the fundamental role marriage plays in social order. The questions are skewed to attend to individual rights of a very small minority -- .0042 of the population at the expense of the common good.**

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