

**Submission to the Senate Legal and Constitutional Legislation Committee  
for inquiry into amendments to the  
Marriage Act 1961 and the Family Law Act 1975**

**By Julie Debeljak\* and Dr Sarah Middleton\*\***

It is our view that the Senate should *not* approve the proposed amendments for the following reasons, based on human rights and family law considerations.

**Part A: Human Rights Considerations**

**Amending the *Marriage Act 1961* to define marriage as the union of a man and a woman to the exclusion of all others, voluntarily entered into for life; and to confirm that unions solemnized overseas between same sex couples will not be recognized as marriages in Australia**

The proposed amendments to the *Marriage Act 1961* have implications for the human rights of Australians. Indeed, the proposed amendments may constitute a violation of various international human rights obligations of Australia, especially when considered in light of recent comparative jurisprudence on the subject matters of the proposed amendments.

Under the *International Covenant on Civil and Political Rights* (1966) ('ICCPR'), to which Australia is a party, Australia is committed to the protection and promotion of various human rights, including the right to privacy (art 17), the right to marry and found a family (art 23), and the right to be free from discrimination based on sexual orientation (art 26).

In the past, under the individual communications process in the *First Optional Protocol to the ICCPR*, the Human Rights Committee ('Committee') has found Australia to be in violation of such rights because of its different treatment of same-sex couples. In particular, in the *Toonen* case,<sup>1</sup> the criminalisation of adult, consensual homosexual activity was found to violate the right to privacy, and in the *Young* case,<sup>2</sup> the denial of a pension on the basis of the applicant's sexual orientation was in violation of the art 26 right of non-discrimination.

In the future, the proposed amendment to define marriage in a manner that excludes same-sex couples may also be found to violate these ICCPR rights.

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<sup>1</sup> Human Rights Committee, *Communication No 488/1992: Australia 04/04/94* UN Doc CCPR/C/50/D/488/1992 (1994) ('*Toonen v Australia*').

<sup>2</sup> Human Rights Committee, *Communication No 941/2000: Australia 18/09/2003* UN Doc CCPR/C/78/D/941/2000 ('*Young v Australia*').

It is true that, to date, the Committee has taken a very narrow approach to the right to marry. In the case of *Joslin et al v New Zealand*,<sup>3</sup> the Committee decided that given the express wording of '[t]he right of men and women of marriageable age to marry', that the right did not include marriage of same-sex persons. It relied on the principle of '*generalalia specialibus non derogant*', a rule of construction that requires specific provisions of a statute to prevail over general provisions. In other words, the express reference to the opposite sexes in art 23 would override the general right to non-discrimination based on sexuality under art 26.<sup>4</sup>

However, this decision can be criticised on a number of bases and may not be considered a stable precedent.

First, the Committee has not consistently adopted this rule of statutory construction, undermining its application in this instance.<sup>5</sup>

Secondly, the Committee does not follow a system of precedent, such that the Committee need not follow this reasoning in future communications.

Thirdly, human rights are evolving. As societal attitudes change and mature, so does the content of human rights guaranteed in the ICCPR. Accordingly, with time, the Committee may re-consider the wording of art 23 to sanction same-sex marriage.

Fourthly, in the later case of *Young*, the Committee recognised that a distinction between same-sex couples and heterosexual couples violates the art 26 right to non-discrimination (as distinct from recognition of sexuality as an unlawful ground of discrimination). This is likely to be the first of many cases addressing this dubious distinction<sup>6</sup> and, as values and morals evolve, art 26 may be understood to override the language of art 23.

Fifthly, and most importantly, the Committee's decision was made before and is inconsistent with more recent human rights jurisprudence under domestic bills of rights. In particular, the jurisprudence of the Canadian judiciary under the *Charter of Rights and Freedoms* (1982) ('*Charter*'),<sup>7</sup> and its acceptance by numerous Canadian governments and legislatures, is instructive. The common law defined marriage in traditional heterosexual terms, much the same way that art 23 defines marriage as between a man and a woman. In essence, numerous judges have held that the exclusion of same-sex marriage under the common law unjustifiably violates the *Charter* right to equality on the basis of sexuality. Factors considered by the judges in coming to this conclusion include:

- the fact that same-sex and heterosexual couplings feature the same conjugal and other incidents of marriage;
- that procreation and child-rearing are no longer the definitive feature of heterosexual marriage;
- that the restriction on same-sex marriage based on the procreation argument was over-inclusive because it allowed non-procreative heterosexuals to marry, and under-inclusive because it denied same-sex parents the legal right to marry;

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<sup>3</sup> Human Rights Committee, *Communication No 902/99: New Zealand* ('*Joslin et al v New Zealand*').

<sup>4</sup> See S Joseph, J Schultz, and M Castan, *The International Covenant on Civil and Political Rights: Cases, Materials and Commentary* (2<sup>nd</sup> ed, Oxford University Press, Oxford, 2004), [20.29].

<sup>5</sup> See above, n 4.

<sup>6</sup> See above, n 4 at [23.67B].

<sup>7</sup> *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act 1982*, being Schedule B to the *Canada Act 1982* (UK) c 11 ('*Charter*').

- that the common law exclusion of same-sex marriages did not reflect the capacities, needs and circumstances of same-sex couples; and
- that the difference in treatment of heterosexual and same-sex couple perpetuates the perception that the latter are less worthy of societal recognition and support.

Notably, the Canadian Federal government and many provincial governments and legislatures have responded positively to these judicial decisions. The Federal government, whose heads of power include marriage, has announced that it will not challenge the judicial decisions in the Supreme Court of Canada, and many provinces now allow same-sex couples to marry. Such positive reactions are all the more remarkable, given the capacity of the Federal and provincial legislatures to re-enact judicially invalidated legislation notwithstanding the *Charter* for renewable five year terms, under s 33 of the *Charter*. In other words, there appears to be a lack of political will to deny same-sex couples the equal right to marry. (See Appendix A for a more complete discussion of the Canadian situation).

It is further relevant to note that Canada is not the only western democratic state supporting same-sex marriage. In the United States ('US'), some states now allow same-sex marriage, including Massachusetts and California. In response to this, President George W Bush announced federal legislation to alter the *United States Constitution* ('*US Constitution*') so as to define marriage as exclusively between a man and a woman. This legislation was resoundingly rejected in the Senate. In addition, numerous European States now recognise same-sex marriage, including Denmark and the Netherlands.

Thus, given recent developments with respect to recognition of same-sex marriage in numerous comparable States, and the fact that human rights law is constantly evolving, both the strength of the Committee's reasoning in *Joslin* must be questioned.

The proposed amendments may also be found to violate the right to found a family. Under art 23, those enjoying the 'right' to marry, also have the 'right' to found a family. As attitudes and jurisprudence evolve, the recognition of the 'right' of same-sex couples to marry will include a 'right' to found a family. Moreover, to date, the Committee has left open the issue of whether same-sex couples, with or without children, constitute a family.<sup>8</sup>

In light of the above considerations, Australians, and particularly the Australian Senate, must carefully question the merits of the proposed amendments. Adoption of these amendments will not only undermine equality in Australia, but it will entrench inappropriate attitudes about the legitimacy, value and worth of same-sex intimate relationships. The Canadian jurisprudence identifies and convincingly undermines the flawed assumptions underlying the exclusion of same-sex couples from the institution of marriage. In addition, Australia will be traveling against the increasing international trend to recognise the human rights of same-sex couples. Furthermore, the proposed amendments seem inconsistent with the Australian government's previous attitudes on same-sex issues. The Australian government has responded positively to the views of the Committee in *Toonen* and *Young*: indeed, it even passed legislation to remedy the discriminatory treatment previously suffered by gay men and lesbians.<sup>9</sup> This constructive engagement with the Committee on rights issues must be viewed in context: the Australian government has not altered any other domestic laws in response to other Committee findings of violations of the ICCPR, suggesting an unique commitment to protecting and promoting the human rights of gay men and women.

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<sup>8</sup> See above, n 4 at [20.07].

<sup>9</sup> The Australian Government responded by enacting the *Human Rights (Sexual Conduct) Act 1994* (Cth), which led to the invalidation of the Tasmanian law criminalising consensual adult homosexual activity under s 109 of the Australian Constitution.

## **Amending the *Family Law Act 1975* to prevent intercountry adoptions by same sex couples under multilateral or bilateral agreements or arrangements**

The proposed amendment to prevent inter-country adoptions by same-sex couples under multilateral or bilateral agreements or arrangements may also violate Australia's international human rights obligations.

As mentioned above, current jurisprudence indicates that the 'right' to found a family depends on having the 'right' to marry. As States increasingly recognise the 'right' of same-sex couples to marry, they in turn recognise the 'right' of same-sex couples to found a family. Denial of rights of adoption would violate this right, as well as the right to be free from discrimination under art 26, particularly given the *Young* case.

In this context, one must consider General Comment 19 of the Committee. The Committee states that '[t]he right to found a family implies, in principle, the possibility to procreate and live together.'<sup>10</sup> This conception of the basis of familial relations is problematic. Regard must be had to the Canadian jurisprudence (see Appendix 1) which clearly states that excluding same-sex couples from the institution of marriage on the basis of their inability to procreate is not justified. Indeed, procreation for heterosexual marriage no longer reflects the essential characteristic of marriage, such that it ought not be used as the justification for excluding same-sex couples from the institution. Accordingly, the right to found a family should not centre around procreation; rather, it should centre around the basic human desire for intimate partnerships, and the capacities, needs and circumstances of the varied types of partnerships – desires that are shared by all humans, regardless of their sexual preference and their status as a heterosexual or same-sex couple.

In Canada, Charter jurisprudence has resulted in some provinces removing bans on adoption by same-sex couples. See Appendix 2 for a discussion.

### **Part B: Family Law Considerations**

Currently, there is no definition of marriage in the *Marriage Act 1961* (Cth). However s 46 of the Act does contain a statement of the legal understanding of marriage, in the words that Commonwealth authorised marriage celebrants must say before they solemnise a marriage. Those words are: "Marriage, according to law in Australia, is the union of a man and a woman to the exclusion of all others, voluntarily entered into for life". Accordingly, marriage law in Australia currently encompasses *only* heterosexual unions and excludes same-sex marriage.

The Government's proposed amendment to include a formal definition of marriage in the *Marriage Act* should be rejected for the following reasons:

1. Given doubts over the validity of the current legal definition of marriage under Australian law from a human rights perspective (see previous discussion), formally including such definition in the *Marriage Act* seems premature and ill conceived, especially in the absence of any compelling reason for such change.
2. No compelling reason for inserting this definition into the *Marriage Act* has been put forward by the Government. The proposed amendment will not change the substantive law of marriage in Australia; it will simply formalise the currently accepted definition of marriage. In our view, this proposed amendment does little more than send out a moral and political message to the

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<sup>10</sup> Human Rights Committee, *General Comment 19*, [5].

community. The message being sent is made clear by the second reading speech delivered by Mr Ruddock, which contains claims including the following:

- This bill is necessary because there is significant community concern about the possible erosion of the institution of marriage.
- [The institution of marriage] is vital to the stability of our society and provides the best environment for the raising of children.

Notably, these claims made in support of the proposed amendments are unsubstantiated.

Furthermore, despite the rhetoric about the need to prevent ‘erosion of the institution of marriage’, the greatest erosion to the institution of marriage over the past 20 years is the increasing societal trend of heterosexual de facto cohabitation and parenting. The acceptance of this trend by society and Governments alike is evidenced by the plethora of legislative rights afforded to such partners. In these circumstances, it is somewhat hypocritical for the Government to seek to justify the proposed amendments on the basis of the need to preserve the institution of marriage. The real issue at the heart of the proposal is clear: the perceived threat is not to the institution of marriage, *per se*, but to the heterosexual model of relationships and family formation. If this is the underlying policy, it should be clearly stated and not submerged into more politically acceptable rhetoric.

3. The current definition of marriage (and that sought to be included in the *Marriage Act*) presumes a particular type of family formation, namely, that based on a heterosexual relationship. This view of marriage – which has implications for societal views of what is ‘family’ – simply does not accommodate the reality of an ever-increasing number of Australian same-sex partners and their children. Furthermore, failing to legally recognise same-sex relationships does little to improve the lives of children who are raised in such families. Rather, it is likely to exacerbate any difficulties that such children may face socially, by entrenching discriminatory views into the law.

This argument also pertains to the other proposed amendments (concerning recognition of overseas same-sex marriages and adoption by same-sex couples), in so far as they send out a message of disapproval of family formations based upon a same-sex relationship.

4. The proposed amendments do not sit well with developments at the State and Territory level which over the past decade have increasingly afforded legal recognition in various areas to same-sex partners. (See for example *Property Relationships Act 1984* (NSW); *Property Law Act 1958* (Vic), Part IX). In particular, recent reforms in Tasmania, including the establishment of a system of relationship registration for same-sex couples and others, should not be overlooked.
5. The proposed amendments also do not sit well with views being expressed by the Family Court of Australia. Increasingly, the Family Court is calling upon State and Federal Governments to amend/initiate legislation to embrace a more diverse view of family and relationships than the traditional heterosexual nuclear family.

Some of the most poignant comments are found in the judgment of *Re Patrick* ((2002) 28 Fam LR 579). This case involved a gay man’s application for contact with a child who had been conceived with his sperm. Although the application for contact was successful, the relevant presumptions of parentage which apply in cases of artificial insemination, denied the man the legal status of “parent”.

In handing down judgment, Guest J gave consideration to the manner in which reform could be achieved to give greater legal recognition to non-traditional families at both the Federal and State levels. His Honour noted that whilst the *Family Law Reform Act 1995* (Cth) enacted notions of parental responsibility, they failed in significant respects to move beyond the general situation of a child being born into and/or living in a heterosexual household. Accordingly, his Honour recommended a review of the federal law in this area so that non-traditional families are not precluded from the substantial protections of the Act. In particular, his Honour drew attention to the inadequate current definition of ‘parent’ in s 60H, highlighting the need for clarification:

That section was drafted with a heterosexual model in mind and thus fails to recognise the complexity of family forms that might be created through artificial insemination. Given the diversity of gay and lesbian families and the varying role donors play in the lives of children conceived using their donated sperm, the legislature needs to reassess s 60H of the Act and to consider the ramifications of its application in cases such as this.<sup>11</sup>

In exploring the concept of “family”, Guest J saw no reason why such concept should not include a homo-nuclear family, as part of the diverse configuration of families reflected in our community. His Honour said:

The term ‘family’ has a flexible and wide meaning. It is not one fixed in time and is not a term of art. It necessarily and broadly encompasses a description of a unit which has ‘familial characteristics’.<sup>12</sup>

In concluding, Guest J succinctly stated the case for reform in this area:

Having regard to the issues addressed in this judgment, it is time that the legislature considered some of the matters raised, including the nature of parenthood, the meaning of ‘family’, and the role of the law in regulating arrangements within the gay and lesbian community. The child at the centre of this dispute is part of a new and rapidly increasing generation of children being conceived and raised by gay and lesbian parents. However, under the current legislative regime, Patrick’s biological and social reality remains unrecognised. While the legislature may face unique challenges in drafting reform that acknowledges and protects children such as Patrick and the family units to which they belong, this is not a basis for inaction.<sup>13</sup>

See also, for example, *Re Mark: An Application Relating to Parental Responsibility* (2003) FLC 93-173; *Re Kevin (Validity of Marriage of Transsexual)* (2003) FLC 93-127;

## **Conclusion**

The Australian Parliament and the Senate Legal and Constitutional Legislation Committee must consider Australia’s international human rights obligations when enacting domestic legislation. This is necessary not only to avoid potential violations of Australia’s international legal obligations, but also to demonstrate its domestic commitment to the evolving human dignities and values that Australia has announced to the international community that it will abide by. The proposed amendments relating to same-sex marriage and adoption risk violating the rights of same-sex couples and gay men and lesbians.

The implications of the proposed amendments for the development of Australian family law need also to be carefully considered.

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<sup>11</sup> (2002) FLC 93-096 at 88928.

<sup>12</sup> (2002) FLC 93-096 at 88927.

<sup>13</sup> (2002) FLC ¶93-096 at 88929.

It is hoped that this Submission alerts the Australian Parliament to this fact, and that it persuades the Senate Legal and Constitutional Legislation Committee to recommend the rejection of the proposed amendments.

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## APPENDIX 1 – SAME-SEX MARRIAGE IN CANADA

### Introduction

In Canada, the Federal government has jurisdiction over the regulation of marriage. Marriage was regulated under the common law of Canada. Recently, two provincial courts held that restrictions on same-sex marriage unjustifiably violate the *Charter*, such that same-sex marriage is now permitted under the common law of those two provinces. The provincial court reasoning will be discussed, before turning to the responses of the various federal and provincial legislatures and government.

As background, under s 1 of the *Charter*, all rights are guaranteed subject ‘to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.’ In order to assess whether there has been an unjustified limitation placed on a *Charter* right, a two step analysis is required: first, the court must establish whether a *Charter* right has been violated (or limited) by the legislation; and, secondly, if a *Charter* right has been violated, the court must establish whether the impugned legislation is justified under s 1. In order to satisfy the second requirement, the limitation must be first, ‘prescribed by law’ and, secondly, a ‘reasonable limit’ that is ‘demonstrably justified in a free and democratic society.’ For a limit to be reasonable, the object of the legislation must be ‘of sufficient importance to warrant overriding a constitutionally protected right or freedom’.<sup>14</sup> Whether a limit is demonstrably justified is assessed by a proportionality test: there must a rational connection between the rights-limiting measures adopted and the reasonable objective;<sup>15</sup> the means chosen by the legislature must ‘impair “as little as possible” the right in question’;<sup>16</sup> and there must be proportionality between the negative effects of the legislation, and the objective identified as being of sufficient importance.

If the judiciary rules that legislation is an unjustified violation of *Charter* rights and invalidate that legislation, the Federal and provincial parliaments have the power to re-enact that legislation notwithstanding the *Charter* for up to five years at a time under s 33. This means that the legislation operations free from the protections of the *Charter*.

### The Court Decisions

In May 2003, in *EGALE No 1*,<sup>17</sup> the British Columbia Court of Appeal held that the common law bar to same-sex marriages violated s 15(1) because ‘the same-sex couples’ sexual orientation is the only distinction differentiating heterosexual couples from homosexual couples in terms of access to the institution of marriage.’<sup>18</sup> This was based on the fact that ‘same-sex unions can feature the same conjugal and other incidents of marriage, except for heterosexual intercourse’ and ‘that heterosexual procreation is no longer viewed as the central characteristic of marriage.’<sup>19</sup>

Having found a violation, the court then had to consider whether the violation was nonetheless justified under s 1. The court held that the violation was not justified under the s 1, failing the reasonableness test – ‘procreation between a husband and wife can no longer be regarded as a sufficiently pressing and substantial objective’ to justify the limits.<sup>20</sup> In obiter, the common law would have also failed the proportionality test. The Court held that there was no rational connection between the objectives of the common law rule and the restriction of same-sex marriage. The

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<sup>14</sup> *R v Oakes* [1986] 1 SCR 103, 138.

<sup>15</sup> *Ibid* 139.

<sup>16</sup> *Ibid*.

<sup>17</sup> *EGALE Canada Inc v A-G (Canada)* [2003] BCJ No 994 (‘*EGALE No 1*’).

<sup>18</sup> *Ibid* [90] read with [92].

<sup>19</sup> *Ibid* [90].

<sup>20</sup> *Ibid* [124].

legislation failed the rational connection test because: (a) there was no rational connection between the importance of procreation (and child-rearing) and the restriction of same-sex marriage; (b) it was over-inclusive in that it allowed non-procreative heterosexuals to marry; and (c) it was under-inclusive because it denied same-sex parents and intended parents the legal right to marry.<sup>21</sup> Moreover, the Court held that the common law bar was not a minimum impairment of the equality right but rather a complete exclusion ‘from the institution of marriage based upon a protected personal characteristic.’<sup>22</sup> Furthermore, the court found the limitation disproportionate.<sup>23</sup>

The Court remedied the unjustified violation by altering the common law definition of marriage to include same-sex couples, rather than declaring the common law invalid.<sup>24</sup> Any other remedy, including the recognition of parallel institutions such as registered domestic partnerships, would not meet the requirements of ‘true equality’.<sup>25</sup> The Court did, however, suspend the remedy until July 2004, allowing all jurisdictions time to comply with the decision.<sup>26</sup> It also acknowledged that the representative arms ‘have options available’ if the ‘result is unacceptable’, including the abolition of marriage altogether or the invocation of the s 33 override.<sup>27</sup>

In June 2003, the Ontario Court of Appeal, in *Halpern*<sup>28</sup>, held that the heterosexual common law definition of marriage violated ‘the dignity of persons in same-sex relationships’<sup>29</sup> in violation of s 15(1). The Court held that the common law created a formal distinction, based on the prohibited analogous ground of homosexuality in a discriminatory manner.<sup>30</sup> In relation to discrimination, the contextual factors taken into account were the historical disadvantage of gay men, lesbians and same-sex couples, the lack of correspondence between the common law requirement and the capacities, needs and circumstances of same-sex couples, the under-inclusiveness of any ameliorative purpose of the common law requirement, and the fact that the different treatment ‘perpetuates the view that same-sex relationships are less worthy of recognition than opposite-sex relationships.’<sup>31</sup>

Having found a violation, the court then had to consider whether the violation was nevertheless justified under s 1. The violation was not justified, again failing the reasonableness test. The objective justifications argued in favour of the definition of marriage – including that marriage unites the opposite sexes, encourages procreation and childrearing, and promotes companionship – were held not to be pressing and substantial.<sup>32</sup> In obiter, the Court also held that the common law failed the proportionality test along similar lines to *EGALE No 1*.<sup>33</sup> The Court remedied the violation by altering the common law definition of marriage to include same-sex relationships.<sup>34</sup>

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<sup>21</sup> Ibid [126] – [128].

<sup>22</sup> Ibid [129] read with [131].

<sup>23</sup> Ibid [130] read with [131].

<sup>24</sup> This was done after considering the extensive report of the Law Commission of Canada which canvassed, *inter alia*, same-sex marriage (Law Commission of Canada, *Beyond Conjuality: Recognising and Supporting Close Personal Committed Relationships* (2001), cited and discussed in *EGALE No 1* [2003] BCJ No 994 [152] – [156]). The report concluded that, after wide public consultation which included the federal and provincial governments, there were Canadian’s in favour of same-sex marriage and Canadian’s that were not. The Court of Appeal concluded that further consultation will not change the divisiveness of the issue: at [156].

<sup>25</sup> Ibid [156].

<sup>26</sup> Ibid [161].

<sup>27</sup> Ibid [157].

<sup>28</sup> *Halpern v A-G (Canada)* [2003] OJ No 2268 (*‘Halpern’*).

<sup>29</sup> Ibid [108].

<sup>30</sup> Ibid [72], [76], [108].

<sup>31</sup> Ibid [82] – [87], [88] – [95], [96] – [99], [107].

<sup>32</sup> Ibid [114] – [125].

<sup>33</sup> Ibid [127] – [142].

<sup>34</sup> Ibid [148]. To remedy the violation through invalidating the heterosexual definition of marriage would be to deny all persons the benefits of marriage, and leave same-sex couples susceptible to abuse for this denial, ‘a result that does nothing to advance the goal of s 15(1) of promoting concern, respect and consideration for all persons’: at [150].

The Court did not suspend its remedy, as the remedy posed no harm to the public, did not threaten the rule of law and did not deny any group the benefits of marriage.<sup>35</sup>

In July 2003, the British Columbia Court of Appeal decided to lift the suspension of its remedy in *EGALE No 2*.<sup>36</sup> This was based on the immediate relief granted in the *Halpern* case, the Federal Government's decision not to appeal either *EGALE No 1* or *Halpern*, and the fact that Attorney-General of Canada consented to, and the Attorney-General of British Columbia did not oppose, the lifting of the suspension.<sup>37</sup>

### **The Governmental and Parliamentary responses**

The Federal Government indicated it would not appeal from the decisions in *EGALE No 1* and *Halpern*, and promised to introduce legislation to extend the definition of marriage to include same-sex marriages.<sup>38</sup> In September 2003, a parliamentary motion was put to reaffirm the traditional heterosexual definition of marriage and required parliament to exercise "all necessary steps" to safeguard this definition. The motion was voted down, 137-132. This compares with an earlier motion, which passed 216-55 in 1999 after the *M v H* ruling,<sup>39</sup> stating that the heterosexual definition of marriage would continue.<sup>40</sup> In 1999, most of the Government's parliamentarians supported the motion, but by 2003 the Government's new policy was to support same-sex marriage.

The Federal Government has drafted legislation re-defining marriage as follows: 'Marriage, for civil purposes, is the lawful union of two persons to the exclusion of all others.'<sup>41</sup> The Government has referred the draft to the Supreme Court asking, inter alia, if same-sex marriage is consistent with the *Charter* and if the freedom of religion protects religious bodies from having to marry persons of the same-sex if it is against their religious beliefs.<sup>42</sup> The Supreme Court is yet to consider the reference. However, the hearing date has been set for 6 October 2004. Accordingly, the final resolution of the issue remains to be seen. The strategy adopted by the Prime Minister indicates that he

accepts, either on his own or because of pressure by others within his Cabinet, ... that the prohibition of same-sex marriage constitutes such a serious and unjust discrimination that the government must now redefine marriage, despite the inevitable controversy and internal divisions this initiative precipitates.<sup>43</sup>

In terms of provincial responses to the Court rulings, in both Ontario and British Columbia, the governments and parliaments have not challenged the court rulings in the Supreme Court of Canada, nor have they invoked the s 33 override.<sup>44</sup>

In Quebec, both the Quebec Superior Court and the Court of Appeal have ruled that the exclusion of same-sex marriage is an unjustified violation of the *Charter*.<sup>45</sup> The Superior Court had initially

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<sup>35</sup> Ibid [153].

<sup>36</sup> *EGALE Canada Inc v A-G (Canada)* [2003] BCJ No 1582 [8] ('*EGALE No 2*').

<sup>37</sup> Ibid [3] – [7].

<sup>38</sup> See Ibid [4]; Janet L Hiebert, 'From Equality Rights to Same-Sex Marriage – Parliament and the Courts in the Age of the *Charter*' [2003] *October Policy Options* 10, 13 ('Equality Rights to Same-Sex Marriage').

<sup>39</sup> *M v H* [1999] 2 SCR 3.

<sup>40</sup> Hiebert, above n 38 at 13; Christopher P Manfredi, 'Same-Sex Marriage and the Notwithstanding Clause' [2003] *October Policy Options* 21, 21.

<sup>41</sup> Hiebert, above n 38 at 14. This is very close to the definition in *Halpern* [2003] OJ No 2268 [148]: "marriage" is defined as 'the voluntary union for life of two persons to the exclusion of all others.'

<sup>42</sup> Hiebert, above n 38 at 14.

<sup>43</sup> Ibid.

<sup>44</sup> *The Association for Marriage and the Family in Ontario v Hedy Halpern et al; Interfaith Coalition on Marriage and Family v Hedy Halpern et al* (Unreported, Supreme Court of Canada, 9 October 2003).

suspended its ruling for two years to allow Parliament and Government to deal with the ruling. However, the Court of Appeal lifted the two suspension, meaning marriage certificates could be issued to same-sex couples. In July 2003, the Federal Government withdrew its appeal to the Supreme Court of Canada.

In the Yukon Territory, the Supreme Court has heard argument on the issue of the heterosexual exclusivity of the common law definition of marriage and its decision is pending.

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<sup>45</sup> *Hendricks v Canada (A-G)* (Quebec court of Appeal, 2004).

## **APPENDIX 2 – ADOPTION BY SAME-SEX COUPLES**

The issue of same-sex adoption was on the agenda following *M v H*,<sup>46</sup> which was decided before the same-sex marriage cases. *M v H* concerned the heterosexual definition of “spouse” under the *Family Law Act* (‘FLA’).<sup>47</sup> The provisions relating to property settlements and spousal support upon the dissolution of a relationship did not extend to same-sex common law relationships.

An overwhelming majority of the Supreme Court of Canada held that the spousal definition violated the *Charter* right to equality.<sup>48</sup> The majority opined that the failure to recognise same-sex relationships under the FLA stereotyped lesbians and gay men as being less capable of establishing long-term conjugal relationships, and promoted the idea that same-sex relationships are less worthy of state recognition and protection.<sup>49</sup> The definition of “spouse” denied same-sex couples the equal benefit of laws designed to protect their economic interests on the breakdown of a conjugal relationship because of their sexual orientation in violation of s 15(1).

The Supreme Court went on to hold that the violation was not justified under s 1. The objective of the law – the equitable resolution of economic disputes upon the dissolution of financially inter-dependent conjugal relationships – was upheld as being reasonable (that is, pressing and substantial such that it is of sufficient importance to justify overriding *Charter* rights). However, there was no rational connection between this objective and the exclusion of same-sex, financially inter-dependent, conjugal relationships. Moreover, other legal remedies available to resolve economic disputes upon the dissolution of same-sex relationships, such as the common law and contract, were not adequate alternative remedies to the FLA.

In response to this ruling, the Saskatchewan Parliament amended legislation in order to equalise the legal rights of same-sex couples, heterosexual common law couples and married couples. This involved amending 24 statutes, including adoption laws. This was achieved by the extension of the definition of “spouse” to include same-sex couples.

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<sup>46</sup> *M v H* [1999] 2 SCR 3.

<sup>47</sup> *Family Law Act*, RSO 1990, c F-3 (‘FLA’).

<sup>48</sup> This was an 8-1 decision, with the majority opinion jointly written by Cory and Iacobucci JJ, with Lamer CJ, L’Heureux-Dube, McLachlin, Binnie, Bastarache and Major JJ concurring. Gonthier J dissented.

<sup>49</sup> The majority held that the purpose of equality rights are to ‘prevent the violation of essential human dignity and freedom through the imposition of disadvantage, stereotyping, or political or social prejudice’, and to ‘promote a society in which all persons enjoy equal recognition at law as human beings or as members of Canadian society, equally capable and equally deserving of concern, respect and consideration’: *M v H* [1999] 2 SCR 3, 46. This wording came from the earlier case of *Law v Canada (Minister of Employment and Immigration)* [1999] 1 SCR 497, 549.