

Family Policy Institute (FPI)

Submission

Discussion Paper 152

Single Marriage Statute

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PREAMBLE

1. Family Policy Institute (FPI) recognize the State's obligations to provide legal recognition and protection to citizens who choose to enter marriage, civil unions, polygamous marriages or other protected relationships. We further recognize the State's obligations to protect men, women and children in these relationships and to enforce its contractual obligations to ensure a just and equitable society.
2. We further recognize the State's objectives to rationalize the marriage laws pertaining to the protected relationships currently on South Africa's statute books; to prescribe the validity requirements for protected relationships or for marriage and life partnerships; to provide for the registration of protected relationships or marriage and life partnerships and to provide formal recognition of protected relationships or marriage and life partnerships to facilitate and enable enforcement of their rights.
3. However, we disagree that the current definition of marriage as defined in the Marriage Act of 1961, and further agreed upon by virtually all people groups for centuries as a union between a man and a woman, should be redefined as proposed in the Discussion Paper 152 as: *"monogamous protected relationships or monogamous marriage or life partnerships means the relationship of two people regardless of their sex, sexual orientation or gender identity, to the exclusion of all others, unless dissolved by divorce or death of one or both parties."*
4. We will argue that the State can rightfully fulfill its constitutional obligations to recognize, protect and regulate all forms of protected relationships without redefining monogamous heterosexual marriage, a social institution that pre-dates governments and served humanity in every nationality and culture for millennia. Redefining marriage therefore is unnecessary, unreasonable and contrary to the common good.

5. We will further argue that the State is obligated to strengthen and uphold the laws protecting marriage as a comprehensive union of one man and one woman to the exclusion of all others. Moreover, we will argue that marriage is unique in that it is a public good for all people regardless of nationality, culture, ethnicity, religion, belief, sexual preference or gender identity.
6. We will again argue that the State's obligation to protect and uphold the laws surrounding monogamous heterosexual marriage in no way deny or diminish civil unions, be they opposite sex, same-sex or transgender. Neither does the State's protection of marriage deny or diminish polygamous or other customary marriages.
7. We will set out our arguments on what marriage is, what marriage is not, the State's rightful obligations to protect marriage and other protected relationships in law, and the legislative proposals to achieve these goals - without redefining marriage.
8. We will set out our reasons for opposing the redefinition of monogamous heterosexual marriage in the proposed Single Marriage Statute and provide arguments, although not comprehensively, why the long-term implications of redefining civil marriage will be detrimental to the health and welfare of children, the stability of the family, social cohesion and economic prosperity and stability.
9. We will then argue that the State's responsibility to preserve, strengthen and uphold the laws that protect monogamous heterosexual marriage is consistent with its international obligations to protect the natural family – the most basic unit of society.
10. Finally, we will argue that redefining monogamous heterosexual marriage adds nothing to civil unions, be they same-sex, opposite sex or transgender relationships. In fact, protecting monogamous heterosexual marriage in law enhances and strengthens the social order that benefits all citizens regardless of nationality, culture, religion, belief, ethnicity, sexual preference or gender identity. Marriage has always been a public good for all people, in every culture across all nationalities for millennia.

WHAT MARRIAGE IS

What Marriage Is - A Correct View of Marriage – Why Marriage?

11. To fully comprehend the implications of redefining a bedrock civil institution, the State must first have a correct view of marriage. Until a few years ago, no society has viewed marriage as anything other than a conjugal partnership: a male-female union. Marriage is the most ancient and venerable of social institutions. It predates every human institution known to mankind, which includes civil government and religion.
12. Marriage is a comprehensive union. The State has excellent reasons to recognize it, and excellent reasons to enact the correct view of it. These reasons are rooted not in some obscure ideology or private interest, but variously and deeply in human nature and the common good of all society, which reason and experience lay bare. Whatever practical realities may draw the State into recognizing marriage in the first place (e.g., children's needs), the State, once involved, must get marriage *right* to avoid obscuring the shape of this human good.¹
13. Marriage is correctly described as a 'cornerstone' institution because it anchors society to the family, the building blocks of every successful civilisation. Research on social dysfunction indicate the breakdown of marriage and the family are key contributors to social ills like alcohol and substance abuse, anti-social behaviour, school and college drop-outs, teen pregnancies, sexual promiscuity, gangsterism, sexual abuse and many others. However, intact and stable marriages generally provide very different outcomes for social stability, health and the welfare of nations.
14. Marcia Barlow, the V.P. of International Programs at United Families International and a Masters Graduate of the Harvard University Kennedy School of Government, aptly sums up the profound contribution of marriage and the family it forms to social cohesion and stability, "*Family Capital is greatly diminished when families disintegrate*

¹ "What Marriage Is" Chapter 6, A Cruel Bargain? Page 83. Chapter 5, Justice & Equality – page 80

*or fail to form, and it is **maximized when adults marry and create a stable unit and environment for all members, especially children to flourish.***"

15. Marriage has always been a social good for all cultures and always has been a union between a man and woman for millennia. What makes marriage a public good for all cultures is its link to children's welfare. Only marriage between a man and woman is deepened by procreation and calls for that broad sharing of domestic life uniquely fit for family life. Research overwhelmingly shows children fare best on every social indicator in a family where both married biological parents are present.

16. Child Trends, a research institution in the US concludes, *"Research clearly demonstrates that family structure matters for children, and the family structure that helps children the most is a family headed by two biological parents in a low conflict marriage. Children in single-parent families, children born to unmarried mothers, and children in stepfamilies or cohabiting relationships, face high risks of poor outcomes. There is thus value for children in promoting strong, stable marriages between biological parents. It is not simply the presence of two parents, but the presence of two biological parents that seems to support children's development."*²

17. David Blankenhorn writes, *"If you've been trained, as anthropology field researchers typically are, to begin at the beginning – to start with the most fundamental issues – you will report a cluster of related facts: Humans are social; they live in groups. They strongly seek to reproduce themselves. They are sexually embodied. They carry out sexual (not asexual) reproduction. And they have devised an institution to bridge the sexual divide, facilitate group living, and carry out reproduction. All human societies have this institution. They call it marriage."*³

² *Child Trends research brief* (June 2002): 1-2, 6, <http://www.childtrends.org/files/MarriageRB602.pdf>.

³ David Blankenhorn, *The Future of Marriage* (2007; New York: Encounter Books, 2009).

18. We will refer to the arguments set out in the Paper, *What Marriage Is*, authored by, Sherif Girgis, Ryan T. Anderson and Robert P. George to identify and defend the reasons for the historic consensus that marriage has always been the union of a man and woman - as it is consistent with the views of Family Policy Institute (FPI). This scholarly work was originally published in the *Harvard Journal of Law and Public Policy* and has been cited and debated by scholars and activists across the world.
19. In this paper, *Girgis, Anderson and George* argue that while personal problems give rise to personal solutions, marriage – like any social institution – addresses needs that can only be resolved socially. The universal social need presented by relationships that can produce new, dependent human beings explain why every society in the history of our race that has regulated men and women’s sexual relationships - has recognized marriage.⁴
20. This is the only way to account for the remarkable fact that almost all cultures have regulated male-female sexual relationships. These relationships alone produce new human beings. For these new and highly dependent people, there is no path to physical, moral and cultural maturity without a long and delicate process of ongoing care and supervision - one to which men and women typically bring different strengths, and for which they are better suited the more closely related they are to the children. Unless children do mature, they will never become healthy, upright, productive citizens. But regularly producing such citizens is nearly impossible unless men and women commit their lives to each other and any children they might have. So, it is a summary, but hardly an exaggeration, to say that *civilization depends on strong marriages*.
21. The authors claims may be put succinctly as follows: There is a distinct form of personal union and corresponding way of life, historically called marriage, whose basic features do not depend on the preferences of individuals or cultures. Marriage is, of its essence, a comprehensive union: a union of will (by consent) and body (by sexual

⁴ What Marriage Is – Chapter 3, The State and Marriage page 38

union); inherently ordered to procreation and thus the broad sharing of family life; and calling for permanent and exclusive commitment, whatever the spouses' preferences. It has long been and remains a personal and social reality, sought and prized by individuals, couples, and whole societies. But it is also a moral reality: a human good with an objective structure, which it is inherently good for us to live out. Marriage has always been the main and most effective means of rearing healthy, happy, and well-integrated children. The health and order of society depend on the rearing of healthy, happy, and well-integrated children. That is why law, though it may take no notice of ordinary friendships, should recognize and support marriages. There can thus be no right for nonmarital relationships to be recognized *as marriages*. There can indeed be much harm, if recognizing them would obscure the shape, and so weaken the special norms, of an institution on which social order depends. So, it is not the conferral of benefits on same-sex relationships (or other civil unions) itself but *redefining marriage in the public mind* that bodes ill for the common good. Indeed, societies mindful of this fact need deprive no same-sex attracted people of practical goods, social equality or personal fulfillment.⁵

What Marriage is - Comprehensive Unifying Goods: Procreation and Domestic Life.

22. In defining what marriage is as an institution, *Girgis, Anderson and George* argue⁶:

- (a) Besides uniting spouses in every basic dimension (body and mind), marriage unites them in pursuit of every basic kind of good. In particular, marriage calls for the wide-ranging co-operation of a shared domestic life, for it is uniquely ordered to having and rearing children. The comprehensive good of family life enriches a marriage as such, and lack of children is a lack for marriage, in a way that is not true for best friends, roommates, or teammates. Most people acknowledge this fact about marriage. The conjugal view of marriage best explains it.

⁵ *What Marriage Is* Introduction, pages 6 - 7

⁶ *What Marriage Is* Chapter 2 Comprehensive Union, pages 28 - 29

- (b) By 'shared domestic life' we mean more than the courteous noninterference that two mismatched freshman roommates might achieve by winter break. Spouses unite the whole of their selves (mind and body), and the demands of marriage are shaped by those of parenting. So, marriage requires co-ordination (compatibility) of the whole of the spouses' lives as well as some positive co-operation in the major dimensions of human development, which are, after all, the major dimensions of child development: physical, intellectual, social, moral, aesthetic, and so on. In all these ways, again, the goods to which marriage is aimed are comprehensive.
- (c) The idea that we are trying to explain is *not* that the relationship of marriage and the comprehensive good of rearing children always go together. It is that, like a ball and socket, they fit together: that family life specially enriches marriage; that marriage is especially apt for family life, which shapes its norms. In short, marriage is ordered to family life because the act by which spouses make love also make new life; one and the same act both seals a marriage (consummation) and brings forth children. That is why marriage alone is the loving union of mind and body fulfilled by procreation—and rearing—of whole new human beings.

What Marriage Is - Comprehensive Commitment: A Rational Basis for Norms of Permanence and Exclusivity.

23. The authors argue further⁷:

- (a) Marriage involves acts that unite spouses comprehensively, and it unites them in pursuit of a comprehensive range of goods. So, in virtue of both these facts, marriage alone requires comprehensive commitment, whatever the spouses' preferences. But as a union of spouses in mind *and body*, ordered to having and rearing children in the context of broad life sharing, marriage both makes sense of permanent and exclusive commitment, and requires it to get off the ground. Our point here is subtle and sometimes misunderstood: While people in other bonds may wish for, promise, and live out permanent sexual exclusivity, only marriage objectively requires such a commitment if it is to be realized fully. Only in marriage is there a principled basis for these norms apart from what spouses happen to prefer.

- (b) Moreover, their mind-body union is ordered to the comprehensive good of rearing new members of the human family – their children – an open-ended task calling for the co-ordination of their whole lives, which in turn requires undivided commitment. Thus, the norms of marriage, a union specially enriched by family life, fittingly create the stability and harmony suitable for rearing children. Sociology and common sense agree that such stability is undermined by divorce, which deprives children of an intact biological family and by infidelity - which betrays and divides one's attention to spouse and children, often with children from other couplings. The intrinsic connection between marriage and children therefore reinforces the reasons spouses have to stay together and faithful for life.

⁷ *What Marriage Is*, Chapter 2 Comprehensive Union pages 32, 33 and 36

- (c) Finally, as most people acknowledge, marriage involves a bodily, as well as mental union of spouses, a special link to children and domestic life, and permanent and exclusive commitment. All three elements converge in, and go to constitute, the conjugal view (of marriage). The firm links between stable marriage and children's welfare, and between children's welfare and every dimension of the common good, give the State strong reasons to recognize, preserve and protect marriage in law and not redefine it.

WHAT MARRIAGE IS NOT

24. To fully comprehend what marriage is, we must also understand what marriage is not. Again, we refer to the arguments set out in the Paper, *What Marriage Is*, to analyse what the authors describe as the "Revisionist view of marriage." The revisionist view sees marriage as the union of two people who commit to romantic partnership and domestic life: essentially an emotional union, merely enhanced by whatever sexual activity they find agreeable. Such committed romantic unions are seen as valuable while the emotions last. The State recognizes them because it has an interest in their stability, and in the needs of spouses and any children they choose to rear.⁸
25. Marriage is not and can never be the union of two people regardless of sex, sexual orientation or gender identity. Marriage is, and always has been – through thousands of years of human history – the union of a man and a woman primarily ordered to family life. Various cultures have embraced polygamous marriages over the centuries. However, in every culture that has done so, these marriages have always been between a man and various numbers of women – never between the same sex. Marriage is a bond of a special kind. It unites spouses in body as well as mind and heart, and it is especially apt for, and enriched by, procreation and family life. In light of both these facts, it alone objectively calls for commitments of permanence and exclusivity. Spouses vow their *whole* selves for their *whole* lives.

⁸ *What Marriage Is*, Introduction, page 4

This comprehensiveness puts the value of marriage in a class apart from the value of other relationships.⁹

26. What we are addressing here is the very foundation of human civilization. The sexual complementarity of a man and woman in marriage is essential for the propagation of the human race. Marriage is the only union inherently ordered to procreation and thus the broad sharing of family life. As a result, marriage is unique.

27. Protecting the unique definition and value of marriage in law in no way deny or diminish same-sex unions. However, equating marriage with unions that are not marriage and cannot by its nature fulfill the conjugal obligations necessary to promote family life, undermine what society needs to flourish and maintain social order.

28. Some argue simply that the State should grant people certain legal benefits if they provide one another with domestic support and care. But such a scheme would not be marriage, nor could it make sense of the features of marriage law. Take Oscar and Alfred. They live together, support each other, share domestic responsibilities, and have no dependents. Because Oscar knows and trusts Alfred more than anyone else, would like Alfred to be the one to visit him in the hospital if he is ill, give directives for his care if he is unconscious, and inherit his assets if he dies first. Alfred feels the same about Oscar. Each offers the other security amid life's hardships, and company in its victories. They face the world together. So far, you may be assuming that Oscar and Alfred have a sexual relationship. But does it matter? What if they are bachelor brothers? What if they are college best friends who never stopped rooming together, or who reunited as widowers? In these cases, most agree, they would not be spouses. And yet they would be, by most revisionists' arguments. Assuming a general policy of recognizing committed dyads, should the benefits that Oscar and Alfred receive depend on whether their relationship is or can be presumed to be sexual? Would it

⁹ *What Marriage Is*, Chapter 3 – The State and Marriage, page 37

not be patently unjust if the State withheld benefits from them only because they were not having sex with each other?¹⁰

29. The revisionist difficulty linking sex and marriage, or marriage and exclusivity, also arises for marriage and family life. If rearing children might hamper as well as help emotional attachment, how can revisionists explain the fact that family life by its nature enriches marriage – but only marriage? That rearing children is more deeply linked to marriage than any other kind of bond, even stable ones that might sometimes involve childrearing in practice (as between, say, widowed cohabiting sisters)? This, too, only the conjugal view can explain.¹¹
30. If the (State) insist as a matter of principle that we should recognize same-sex relationships as marriages, the same principle will require the State to accept (and favor legally recognizing) polyamorous and non-sexual relationships as marriages. If the State argues conjugal marriage laws unjustly discriminate against same-sex relationships, the State will have no way of showing why the same is not true of multiple-partner and non-sexual ones.

WHY THE STATE SHOULD NOT REDEFINE MARRIAGE

31. Again, we refer to the arguments against the State redefining monogamous heterosexual marriage in law as set out in the Paper, *What Marriage Is*, because they are consistent with the views of FPI. The authors arguments depend on three simple ideas¹²:
 - (a) Law tends to shape beliefs.
 - (b) Beliefs shape behaviour.
 - (c) Beliefs and behaviour affect human interests and human well-being.

¹⁰ *What Marriage Is*, Chapter 1 Challenges to Revisionists, page 16, 19 and 20

¹¹ *Id.*

¹² *What Marriage Is*, Chapter 4 What's the Harm, pages 54, 55

Taking these truths for granted, we argue that an unsound law of marriage will breed mistaken views – not just of marriage, but of parenting, common moral and religious beliefs, even friendship – that will harm the human interests affected by each of these.

Weakening Marriage: making it harder to realise

32. No one acts in a void. We all take cues from cultural norms, shaped by the law. For the law affects our ideas of what is reasonable and appropriate. It does so by what it prohibits - you may think less of drinking if it were banned, or more of marijuana use if it were allowed – but also by what it approves. State subsidies for heavy metal promote a different view of musical merit than State sponsorship of chamber music. A school board curriculum of quack science and chauvinistic history will impart a different message about knowledge than one with more rigorous standards. Of this point revisionists hardly need convincing. They find civil unions insufficient even when these offer same-sex unions all the legal benefits of marriage. There is only one way to explain this: Those who argue for the redefinition of marriage agree that it matters what California or the United States (or South Africa), calls a marriage, because this affects how Californians or Americans (or South Africans) come to think of marriage.

33. Prominent Oxford philosopher Joseph Raz, no friend of the conjugal view, agrees: *“One thing can be said with certainty about recent changes in marriage law (in the US). They will not be confined to adding new options to the familiar heterosexual monogamous family. They will change the character of that family. If these changes take root in our culture then the familiar marriage relations will disappear. They will not disappear suddenly. Rather they will be transformed into a somewhat different social form, which responds to the fact that it is one of several forms of bonding, and that bonding itself is much more easily and commonly dissoluble. All these factors are already working their way into the constitutive conventions which determine what is appropriate and expected within a conventional marriage and transforming its significance.”*¹³

¹³ Joseph Raz, “Autonomy and Pluralism” in *The Morality of Freedom* (Oxford: Clarendon Press, 1988) 393

34. Redefining civil marriage would change its meaning for everyone. Legally wedded opposite-sex unions would increasingly be defined by what they had in common with same-sex relationships. This wouldn't just shift opinion polls and tax burdens. Marriage, the human good, would be harder to achieve. For you can realise marriage only by choosing it, for which you need at least a rough, intuitive idea of what it really is. By warping people's view of marriage, revisionist policy would make them less able to realise this basic way of thriving – much as a man confused about what friendship requires, will have trouble finding a friend.
35. People forming what the State called “marriage” would increasingly be forming bonds that merely resembled the real thing in certain ways, as a contractual relationship might resemble a friendship. The revisionist view would distort their priorities, actions, and motivations, to the harm of true marriage. But it's wrong – and counterproductive – to obscure basic goods as a means to social ends. Obscuring the good of marriage to make it harder to live out, is thus the first harm of redefinition: other harms are the effects of misunderstanding, and failing to live out, true marriage.

Making Mother or Father Superfluous

36. Conjugal marriage laws reinforce the idea that the union of husband and wife is, on the whole, the most appropriate environment for rearing children – an ideal supported by the best available social science. Recognising same-sex relationships as marriages would legally abolish that ideal. No civil institution would reinforce the notion that men and women typically have different strengths as parents; that boys and girls tend to benefit from fathers and mothers in different ways. To the extent that some continued to see marriage as apt for family life, they would come to think – indeed, our law, public schools, and media would teach them, and variously penalize them for denying – that it matters not, even as a rule, whether children are reared by both their mother and their father, or by a parent of each sex at all. But as the connection between marriage and parenting is obscured, as we think it would be eventually, no arrangement would be proposed as ideal. And here is the central

problem with either result: it would diminish the social pressures and incentives for husbands to remain with their wives and children, or for men and women having children to marry first. Yet the resulting arrangements – parenting by divorced or single parents, or cohabiting couples – are demonstrably worse for children. So even if it turned out that studies showed no differences between same and opposite sex parenting, redefining marriage would undermine marital stability in ways that we know do hurt children.¹⁴

37. As Rutgers University sociologist David Popenoe concludes, *“The burden of social science evidence supports the idea that gender-differentiated parenting is important for human development and that the contribution of fathers to childrearing is unique and irreplaceable.”* He continues, *“We should disavow the notion that mommies can make good daddies, just as we should disavow the popular notion... that daddies can make good mommies... The two sexes are different to the core, and each is necessary - culturally and biologically – for the optimal development of a human being.”*

In summary of the relevant science, University of Virginia sociologist W. Bradford Wilcox finds much the same¹⁵: *“Let me now conclude our review of the social scientific literature on sex and parenting by spelling out what should be obvious to all. The best psychological, sociological, and biological research to date now suggests that – on average – men and women bring different gifts to the parenting enterprise, that children benefit from having parents with distinct parenting styles, and that family breakdown poses a serious threat to children and to the societies in which they live.”*

¹⁴ *What Marriage Is*, Chapter 4 - What's the Harm? Page 58, 59

¹⁵ (W. Bradford Wilcox, “Reconcilable Differences: What Social Sciences Show about the Complementarity of the Sexes and Parenting,” *Touchstone* 18, no. 9 (November 2005): 36.

ARGUMENTS AGAINST REDEFINITION

38. The heart of our arguments against redefinition is this: if the law defines marriage to include same-sex and (transgender) partners, many will come to misunderstand marriage. They will not see it as essentially comprehensive, or thus (among other things) as ordered to procreation and family life – but essentially as a mere emotional union. They will therefore tend not to understand or respect the objective norms of permanence or sexual exclusivity that shape it. Nor, in the end, will they see why the terms of marriage should not depend altogether on the will of the parties, be they two or ten in number, as the terms of friendships and contracts do. That is, to the extent that marriage is misunderstood, it will be harder to see the point of its norms, to live by them, and to urge them on others. And this, besides making any remaining restrictions on marriage arbitrary, will damage the many cultural and political goods that get the State involved in marriage in the first place. We list them in summary form here to orient readers.¹⁶ Each will be discussed, and its connection to marriage policy:

(a) *Real Marital Fulfillment*. No one deliberates or acts in a vacuum. We all take cues from cultural norms, which are shaped by the law. To form a marriage, one must at least have a rough intuitive idea of what it is. The revisionist proposal would harm people (especially future generations) by warping the idea of what marriage is. It would teach that marriage is about emotional union and cohabitation, without any inherent connections to bodily union or family life. As people internalize this view, their ability to realise genuine marital union would diminish. This would be bad in itself, since marital union is good in itself. It would be the subtlest but also the primary harm of redefinition; other harms would be the effects of misconstruing marriage, and so not living out and supporting it.

(b) *Spousal Well-being*. Marriage tends to make spouses healthier, happier, and wealthier than they would otherwise be. But what does this, *is marriage*, especially through its distinctive norms of permanence, exclusivity, and

¹⁶ *What Marriage Is*, Introduction: pages 7, 8

orientation to family life. As the State's redefinition of marriage makes these norms harder to understand, cherish, justify, and live by, spouses will benefit less from the psychological and material advantages of marital stability.¹⁷

- (c) *Child Well-Being.* If same-sex relationships are recognized as marriages, not only will the norms that keep marriages stable be undermined, but the notion that men and women bring different gifts to parenting will not be reinforced by any civil institution. Redefining marriage would thus soften the social pressures and lower the incentives – already diminished these last few decades – for husbands to stay with their wives and children, or men and women to marry before having children. All this would harm children's development into happy, productive, upright adults.
- (d) *Friendship.* Misunderstandings about marriage will also speed up society's drought of deep friendship, with special harm to the unmarried. The State will have defined marriage mainly by *degree* or *intensity* – as offering the most of what makes any relationship valuable: shared emotion and experience. It will thus become less acceptable to seek (and harder to find) emotional and spiritual intimacy in nonmarital friendships. These will come to be seen not as different from marriage (and thus distinctively appealing) but simply as less. Only the conjugal view gives marriage a definite orientation to bodily union and family life. Only the conjugal view preserves a richly populated horizon with space for many types of communion, each with its own scale of depth and specific forms of presence and care.
- (e) *Religious Liberty.* As the conjugal view comes to be seen as irrational, people's freedom to express and live by it will be curbed. Thus, for example, several states (in the US) have forced Catholic Charities to give up its adoption services or place children with same-sex partners against Catholic principles. Some conjugal marriage supporters have been fired for publicizing their views. If civil marriage is

¹⁷ What Marriage Is, Introduction: page 8

redefined, believing what virtually every human society once believed about marriage – that it is a male, female union – will be seen increasingly as a malicious prejudice, to be driven to the margins of culture.

(f) *Limited Government.* The state is (or should be) a supporting actor in our lives, not a protagonist. It exists to create the conditions under which we and our freely formed communities can thrive. The most important free community, on which all others depend, is marriage; and the conditions for its thriving include both the accommodations for couples and the pressures on them to stay together that marriage law provides. Redefining civil marriage will further erode marital norms, thrusting the state even more deeply into leading roles for which it is poorly suited: parent and discipliner to the orphaned, provider to the neglected, and arbiter of disputes over custody, paternity, and visitations. As the family weakens, our welfare and correctional bureaucracies grow.¹⁸

LEGISLATIVE PROPOSALS SINGLE MARRIAGE STATUTE

39. We have set out our arguments above for the preservation and protection of the established definition of marriage as a monogamous union of a man and woman to the exclusion of all others, not because we believe other unions are not worthy of recognition or protection in law, but because marriage is a public good for all people regardless of nationality, ethnicity, culture, belief, religion, sex, sexual orientation or gender identity. Every individual owes his or her existence to the biological fact that a man and a woman came together in a sexual relationship so new life could be conceived. This new life had to be nurtured by its mother and supported by the vital contribution of its father. The family this union finds serves as the most basic and natural social unit for the development, nurturing and support of new human beings.

¹⁸ What Marriage Is, Introduction: page 9

40. Marriage is not the invention of governments or any other human institution including religion. *Girgis, Anderson* and *George*¹⁹ argue that there is simple and decisive evidence that the conjugal view of marriage is not peculiar to religion, or any religious tradition. Ancient thinkers who had no contact with religions such as Judaism or Christianity – including Xenophanes, Socrates, Plato, Aristotle, Musonius Rufus, and Plutarch – reached remarkably similar views of marriage. To be sure, the world’s major religions have also historically seen marriage as a conjugal relationship, shaped by its social role in binding men to women and both to the children born of their union. But this suggests only that no one religion invented marriage. *It is rather marriage – the demands of a natural institution – that has helped to shape our religious and philosophical traditions.*

41. Both social science and history play merely supporting roles in our argument. Children’s need for intact families, amply confirmed by social science, is the hook that pulls the law into regulating marriage in the first place. But once the State decides to recognize marriage at all, it is obligated to get marriage *right*, so as to avoid obscuring its distinctive structure and value. Our argument for that structure and value is mainly philosophical, and merely supported by social science at two points: first, the outcomes of different parenting arrangements tend to support our argument that a man and a woman’s sexual relationship is specially related to rearing children. Second, the practices of different kinds of relationships support our arguments that male-female unions call for permanent and exclusive commitment – that there is a rational basis for these norms. Quite apart from the spouses preferences – in a way that isn’t true of other bonds.

¹⁹ What Marriage Is, Introduction: pages 10 and 11

42. Significantly, preserving and protecting monogamous heterosexual marriage in law is consistent with the State's international obligations. [*The United Nations Universal Declaration of Human Rights*](#) declares in Article 16:

- (a) Men and women of full age, without any limitations due to race, nationality or religion, have the right to marry and to found a family. They are entitled to equal rights as to marriage, during marriage and at its dissolution.
- (b) Marriage shall be entered into only with the free and full consent of the intending spouses.
- (c) The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.

43. We therefore believe the State can achieve all of its objectives *"to provide for the recognition, in terms of option one, of protected relationships, or, in terms of option two, of marriages and life partnerships, entered into by parties regardless of the religious, cultural or any other beliefs of the parties, or the manner in which the relationship was entered into; to provide for the requirements for entering into a protected relationship or a marriage or a life partnership; to provide for registration of protected relationships or marriages and life partnerships; to provide for the legal consequences of entering into protected relationships or marriages and life partnerships; and to provide for matters incidental thereto"* - without redefining marriage.

44. We note the State's objectives to rationalise *"the fragmented way in which relationships and marriages were recognised under the RCMA, the Marriage Act and the Civil Union Act and that legislative benefits should be extended to all relationships worthy of protection, to ensure a fair outcome to the parties when disputes arise. It is further noted that the state was ordered in December 2020 to adopt amending or new legislation to recognise marriages concluded under the tenets of Muslim law and to regulate the consequences arising from such recognition; and the State's international obligations to take appropriate and reasonable measures to eradicate discrimination against women in relationships, and to prevent child marriages."*

45. We further note, *“The objects of the legislation are to rationalise the marriage laws pertaining to all types of relationships; to prescribe the validity requirements, in terms of option one, for protected relationships, or, in terms of option two, for marriages and life partnerships; to provide for the registration of protected relationships or marriages and life partnerships; and to provide formal recognition of protected relationships or marriages and life partnerships to facilitate and enable enforcement of their rights.”*
46. We conclude, therefore, that the State can achieve all of the legislative objectives stated above without having to redefine marriage as proposed in the SALRC Discussion Paper 152 for the reasons stated in this Submission. We must emphasise the point eloquently made by *Girgis, Anderson and George*²⁰ that marriage is not a legal construct with totally ammeable contours – it is not “just a contract.” Instead, some sexual relationships are instances of a distinctive kind of bond that has its own value and structure, *which the State did not invent and has no power to redefine.*
47. The State is within its rights to recognise only true marriages. People who cannot enter marriages so understood (for whatever reasons) are not denied a right to *marriage*, even when they cannot control the factors that keep them single. All legal recognition divides the world in two: what is recognized and everything else. Laws that distinguish marriage from other bonds will always leave some arrangements out. You cannot move an inch toward showing that marriage policy violates equality, without first showing what marriage is and why it should be recognized legally at all.
48. Marriage is a kind of union shaped by its comprehensiveness and thus, among other things, fulfilled by procreation and childrearing. Only this can account for its essential features, which make less sense in other relationships. Because marriage uniquely meets essential needs in such a structured way, it should be regulated for the common good, which can be understood apart from specifically religious arguments. The needs of those who cannot prudently or who do not marry (even owing to naturally occurring

²⁰ What Marriage Is, Chapter 5, Justice and Equality, page 80

factors), and whose relationships are thus justifiably regarded as different in kind, can be met in other ways.”²¹

49. We therefore support the Single Marriage Statute that includes chapters identifying and defining the different options under which citizens can formalise their marriages, protected relationships or life partnerships, e.g.:

- I. **Marriage:** defined as the monogamous union of a man and woman to the exclusion of all others unless dissolved by divorce or death of one or both parties. We further propose that the distinction of *husband* and *wife* be retained in the definition of marriage.
- II. **Civil Unions:** defined as monogamous unions of two people regardless of sex, sexual orientation or gender identity to the exclusion of all others unless dissolved by divorce or death of one or both parties. In this definition, the term *spouse* can be used interchangeably.
- III. **Customary Marriage:** (defined as polygynous or potentially polygynous protected relationship) means a relationship in which a male party may, during the subsistence of the relationship, be in a relationship with a female person or female persons.
- IV. We propose that Muslim marriages be recognised, protected and regulated under the **Customary Marriages** provisions. However, Muslim citizens must have the freedom to choose to marry under the **Marriage** provision or the **Civil Union** provision as they see fit. The Single Marriage Statute does not prescribe the cultural or religious formulas that solemnise marriage, civil unions or customary marriages. This means Muslim or any other religious citizens can select from any of the above protected relationship provisions according to their personal requirements.

²¹ What Marriage Is, Conclusion: page 97

- V. We further support the proposal that men and women receive equal recognition and rights in the Marriage, Civil Unions and Customary Marriages provisions to eradicate discrimination against one or other party
- VI. We support option two as proposed in the SALRC Discussion Paper 152, that the Bill be titled, “Registration and Recognition of Marriages and Life Partnerships Bill.” We do so because we believe that marriage must be recognised in the Bill as a distinct union alongside other life partnerships.
- VII. We support the validity requirements as set out in the SALRC Discussion Paper 152 without exception, *“the validity requirements of marriages and life partnerships (option one and two) are that all the parties must be at least 18 years or older on the date of entering into the marriage or life partnership; all the parties must give free and informed consent to enter into a marriage or life partnership; and all the parties must have capacity to enter into a marriage or life partnership. We propose further if the parties do not comply with the requirements the relationship is void.*
- VIII. We believe it is the State’s responsibility and obligation to strengthen the laws to prohibit sham/bogus marriages using all the powers at its disposal to abolish this practice. State and religious marriage officers must be held responsible for every union they solemnise and stringent oversight must be implemented to eradicate fraud and protect citizens.
- IX. We support the introduction of pre-marital counselling and education to adequately prepare prospective couples for marriage and other protected relationships. However, this must not be a State responsibility. NGO’s and religious institutions are best positioned to fulfil this important function. State involvement in civil marriage and other protected relationships must be limited to regulation.

RELIGIOUS FREEDOMS

50. The Bill of Rights in the Constitution guarantees every citizen freedom of religion, belief and opinion²² including the freedom of conscience and thought. As a consequence, the State is obligated to uphold the provisions of the Bill of Rights and secure these rights for all its citizens. No citizen, therefore, should be compelled by the law to violate their conscience, beliefs or religious convictions. The State is also obligated to reasonably balance the rights of its citizens as set out in the Bill of Rights especially when those rights come into conflict.
51. We are, therefore, deeply concerned that the redefinition of marriage as proposed in the SALRC Discussion Paper 152 will create a conflict of rights that will trigger a slew of court battles. This will undoubtedly create conflict between the different parties fighting to secure their rights and may destabilise social cohesion. The current three Acts on our statutes books in particular, the Marriage Act of 1961 and the Civil Union Act of 2006, make provision for marriage officers to register marriages or civil unions that do not violate their conscience or conflict with their deeply held religious beliefs and convictions. This has worked well for religious and civil marriage officers because neither are compelled by law to violate their conscience or beliefs by solemnising marriages or civil unions that conflict with their religious beliefs and convictions.
52. The proposed redefinition of marriage under the Single Marriage Statute will remove these distinctions in that marriage will be defined as both opposite sex, same sex and transgender unions. Consequently, religious marriage officers will no longer secure the option - under the proposed Single Marriage Statute - to register to solemnise marriages that are consistent with their religious beliefs and convictions. As we understand it, if marriage is redefined to include opposite sex, same sex and transgender unions, religious and civil marriage officers will be compelled to solemnise all marriages under the Single Marriage Statute or face legal action. Church buildings, chapels and wedding venues run by people of faith will also face the same

²² Constitution of the Republic of South Africa 1996, Section 15.

dilemma – accommodate the ceremonies of unions that violate their conscience and conflict with their religious beliefs and convictions - or face potentially ruinous civil law suits. Several religious venues in South Africa have already been sued for affirming their religious beliefs and convictions. The constitutional rights of religious citizens have consequently been seriously eroded simply because they refused to violate their conscience and uphold their rights to religious belief.

53. The legislative proposals we have set out above will protect the rights of all citizens by not compelling them by law to violate their conscience, and religious beliefs and convictions. Marriage officers must be given the option to register to solemnise Marriages or Civil Unions or Customary Marriages. They can of course register for one, two or all three provisions. But they must be given the freedom to choose to register to solemnise marriages or civil unions that are consistent with their religious beliefs and convictions. We further propose that Church venues and wedding chapels also register to specify which unions they are willing to accommodate in accordance with their religious beliefs and convictions.
54. By licensing oneself for only certain types of services, we can avoid the situation where religious convictions need to be used as a reason for the refusal to register a marriage, which has in the past lead to litigation. Instead, ‘conscientious objectors’ could merely decline an offer to register or officiate a wedding on the basis that they do not have the requisite qualifications to do so. By taking this approach the State opens a reasonable avenue to circumvent unnecessary challenges to the legislation and maintain peace amongst the populace.
55. Businesses that offer services to the wedding industry like cake shops, photographers, bridal boutiques, florists etc must also be made exempt in law from providing services for the ceremonies of unions that violate their conscience and conflict with their religious beliefs and conscience.

56. The Department of Home Affairs (DHA) must ensure there are sufficient civil marriage officers in every region and province to solemnise civil unions. This is the responsibility of the State and not religious institutions. Religious institutions and religious marriage officers must not be burdened with what is essentially a State responsibility.

ENDS.