

**Brief to the Standing Committee on Justice and Human Rights
on the Issue of Same-sex Marriage**



**LAW COMMISSION OF CANADA
COMMISSION DU DROIT DU CANADA**

11th Floor, Trebla Building
473 Albert Street
Ottawa, ON K1A 0H8
(613) 946-8980
www.lcc.gc.ca

30 January 2003

Ottawa (Ontario)

Check against delivery

The Law Commission of Canada would like to thank the Standing Committee on Justice and Human Rights for the opportunity to present the results of its research and consultations on the issue of same-sex marriage, and the way in which governments should support relationships of a personal nature.

The Law Commission is an independent federal agency whose mandate is to provide advice on improvements to, and modernization and reform, of the law of Canada. In the Preamble to its legislation, there are important principles that guide the work of the Commission:

- its work must be open, inclusive, and accessible to all Canadians;
- it must view the law and the legal system in a broad social and economic context;
- it must be responsive and accountable by working in partnership with a wide range of interested groups and individuals;
- it must be innovative in its research methods; and
- it must take account of the impact of the law on different groups and individuals when making its recommendations.

In January 2002, the Minister of Justice tabled “Beyond Conjuality: Recognizing and Supporting Close Personal Adult Relationships”, a report prepared by the Law Commission of Canada (<http://www.lcc.gc.ca/en/themes/pr/cpra/report.asp>). The Report deals with the issues that are under review by this Committee.

In pursuit of its mandate to consider measures that will make the legal system more efficient, economical, accessible and just, the Law Commission of Canada examined the regulation of close personal adult relationships. The goal was to determine how well law and policy were responding to contemporary realities and emerging needs. In all its work, the Law Commission addresses law reform issues first by considering how the law is lived by Canadians and how society and values have evolved. The Commission seeks to narrow the gap between law and reality.

From 1999 to 2001, numerous research papers were commissioned that are available on our web site (<http://www.lcc.gc.ca/en/ress/rr.asp#cpra>), and several consultations were held with Canadians, ranging from expert study panels and consultations with community groups to an interactive consultation on the Internet.

Beyond Conjuality

The Commission concluded that Canadians enjoy a wide variety of close personal adult relationships – many marry or live with conjugal partners while others may share a home with parents, grandparents or a caregiver. Canadian law supports and recognizes close personal relationships between adults; however, it has focused on conjugal relationships to the exclusion of others.

The Law Commission noted particularly that governments regulate and recognize personal relationships in two very distinct ways. It is important to distinguish these two roles.

First, through a number of statutes, governments provide benefits or impose obligations on the basis of relationships. The objectives of these laws are to recognize the economic and psychological interdependency that often characterize personal relationships. For

example, the rollover provisions in the *Income Tax Act* facilitate transactions between conjugal couples in order to recognize and support their economic interdependence. In the *Evidence Act*, the restrictions placed on testimony by married spouses aim at protecting intimacy and open communication in psychologically interdependent relationships. The governments' objectives are related to the functions that relationships serve – functions that can exist in a number of different relationships. In order to more fully support these objectives and to support the values of equality and autonomy, the Law Commission recommends that governments re-examine their laws. This approach is described in detail in Chapter 3 of the Report, and I would be pleased to answer any questions you may have regarding it.

The second role of governments is dealt with in Chapter 4 of the Report. It is quite a different role that aims at providing the citizens with the means to ensure stability and certainty in their personal relationships. In this context, governments provide legal structures that help people regulate their own affairs and protect their expectations.

The legal organization of personal relationships

The Commission reviewed the history and context surrounding all the options contained in the Discussion Paper issued by the Department of Justice as well as others. Please consult Chapter 4 of our Report.

Starting at p. 113, the Report first examines the role of the State in creating legal structures that allow citizens to regulate their affairs. It then examines the current legal infrastructures that support relationships in our society – private law, ascription, models of registration in some provinces and marriage. The Commission notes the inadequacies of our current legal infrastructures. Our law currently does not provide sufficient recognition and legal infrastructures for relationships other than conjugal. The Commission concluded that the diversity of relationships in Canada warranted an expansion of the range of mechanisms available to citizens to regulate their own affairs.

The Law Commission canvassed the options presented by the Department of Justice's Discussion Paper. It considered the option of substituting marriage with a registration scheme. *Registrations* certainly provide an orderly framework in which people can express their commitment to each other, and voluntarily assume a range of legal rights and responsibilities. These regimes also provide for an orderly and equitable resolution of the registrants' affairs should their relationship break down. The Law Commission recommended that registration systems be developed by Parliament and the provinces and be available to both conjugal and non-conjugal couples. Non-conjugal units should also be able to access the registration system and choose from a variety of different models that best represent the interdependent nature of their relationship. This option is of importance for members of the disabled community and for older adults living with their children. It also promotes the values of equality and choice, which were values that were identified as important throughout our consultations.

Second, our Report considered that replacing marriage with registration, that is, leaving marriage solely to religious organizations (the last option presented by the Department of Justice) would prevent some conjugal couples from exercising a choice that they cherish – namely civil marriage. Our report recognized that it is important for our society to offer more not less choices to a society that is more diversified.

“ ...One disadvantage of leaving the solemnization of marriage to religious authorities is that the option of marrying in a secular ceremony would be lost. This may constitute a serious disadvantage, given that civil marriage ceremonies constitute a growing proportion of marriages solemnized in many Canadian jurisdictions...
...Eliminating marriage as a choice for conjugal couples prevents them from continuing to use a legal mechanism that many regard as fundamental to their commitment.”
(p.124)

In a way, the Commission considered that registration schemes needed time to become accepted by the population and that a move to make them the sole legal way in which to recognize personal relationships was premature.

The Commission then considered the civil marriage option, that is, removing religious organizations from the legal definition of marriage. Under this option, churches would continue to perform weddings, but legal consequences would arise only when a registration or ceremony is performed before a civil authority. This is the situation in many countries, France for example. The advantage of this option is that the distinction between the Church and the State is clearly articulated and both orders find their place without the current overlap of roles. However, this option would require citizens who intend to have a religious ceremony to also arrange for a marriage in front of state officials, requiring additional time and the appropriate personnel and facilities on the part of the State.

The Commission also considered the question of same-sex marriage.
Its reasoning was as follows:

Marriage, from the point of view of secular state authority, is a means of facilitating in an orderly fashion the voluntary assumption of mutual rights and obligations by adults committed to each other's well being.

A review of the history of state regulation of marriage helps illuminate that the state interest in marriage is not connected to the promotion of any particular conception of appropriate gender roles. Nor is the state reserving marriage to procreation and the raising of children. People may marry even if they cannot or do not intend to have children. The purposes that underlie contemporary state regulation of marriage are to provide an orderly framework in which couples can express their commitment to each other and voluntarily assume a range of legal rights and obligations. The law also attempts to provide for an orderly and equitable resolution of married spouses' affairs if their relationships break down.

There are diverse views on same-sex marriage, with strong feelings on each side of the issue. For those same-sex couples who wish to marry, the prohibition on same-sex marriage represents a rejection of their personal aspirations and the non-recognition of their personhood. They feel that without equal access to the institution of marriage, their ability to celebrate their love and their lives on equal terms is undermined. They feel that they are denied a fundamental personal choice.

On the other side are those who argue, equally passionately, that marriage has always been defined as, and should remain limited to, the union of a man and a woman. For the opponents of same-sex marriage, it is a matter of preserving a time-tested and even sacred institution. Although a number of religious institutions are now celebrating same-sex commitment ceremonies, some of the opposition to expanding the entitlement to marry to include same-sex couples stems from religious beliefs. Many feel that Parliament should not redefine a concept that they consider inseparable from its societal and religious meanings and origins.

Others point to the universality of the recognition of the heterosexual aspects of marriage and find it difficult to accept that marriage be extended to same-sex couples.

In its public consultations, the Law Commission received many submissions both for and against same-sex marriage. Public polls indicate that Canadians are increasingly accepting of the idea of same-sex marriage although there remains strong opposition to it in certain segments of the population.

Nevertheless, the issue of same-sex marriage cannot be avoided. Several cases challenging the current exclusion are now before the courts. The status quo or even the creation of a registration system will not prevent the Charter challenges. The introduction of a registration scheme should not be seen as a policy alternative to reforming marriage. Registration schemes in lieu of allowing same-sex couples to access marriage are seen, by those in favour of same-sex marriage, as creating a second-class category of relationships.

Nevertheless, the argument that marriage should be reserved to heterosexual couples cannot be sustained in a context where the state's objectives underlying contemporary state regulation of marriage are essentially contractual ones, relating to the facilitation of private ordering. There is no justification for maintaining the current distinctions between same-sex and heterosexual conjugal unions in light of current understandings of the state's interests in marriage. The secular purpose of marriage is to provide an orderly framework in which people can express their commitment to each other, receive public recognition and support, and voluntarily assume a range of legal rights and obligations.

...whether or not denial of same-sex marriage infringes the Charter, adherence to the fundamental values of equality, choice and freedom of conscience and religion requires that restrictions on same-sex marriage be removed; the status quo reinforces the stigmatization felt by same-sex couples. If governments are to continue to maintain an institution called marriage, they cannot do so in a discriminatory fashion.

It is important to recognize that the removal of restrictions on same-sex marriages does not eliminate the need for the enactment of registration schemes for several reasons. First, international developments in the recognition of registration schemes may justify the establishment of Canadian registration schemes to provide conjugal and non-conjugal unions with legal mechanisms that are recognized internationally. Second, establishing registration schemes provides choices for Canadians. The ability to choose how one wants to regulate one's personal relationships is an important feature of living in a democracy. This ought to be preserved and enhanced.

Finally, it is also important to emphasize that civil recognition of same-sex marriage does not alter the right of religious denominations to perform wedding ceremonies without state interference according to the values and traditions of their faith. While the state could recognize same-sex marriages for the purposes of civil marriage, it could not take any position on religious marriages. As is the case now, some religious institutions would choose to sanctify same-sex unions as marriages, while others would not. As it does now, the state would recognize the marriage performed during a religious ceremony by a person authorized to do so under provincial and territorial marriage statutes. The preconditions for each type of marriage, religious and secular, could differ as it often does today. For example, as mentioned earlier, the Roman Catholic Church does not permit divorce and will not perform a religious ceremony if one of the intending spouses has been divorced. Nonetheless, Canadian law permits both a civil divorce and a civil remarriage, whatever the religion of the parties. This is a result that should be celebrated in a society that values religious pluralism.

It then recommended that

Parliament and provincial/territorial legislatures should move toward removing from their laws the restrictions on marriages between persons of the same sex.

The Law Commission of Canada recognizes that part of the difficulty facing this Committee and our society on the issue of marriage relates to its many interpretations. Marriage describes a social custom, a religious concept, and a legal contract. As we point out in the Report, marriage as a social custom has certainly evolved over time. There is also variation in the religious conceptions of marriage, as evidenced recently by the recognition of same-sex marriage by some religious institutions.

As a legal concept, marriage allows people to voluntarily assume rights and obligations towards each other in a way that is publicly recognized and supported. The State's role in marriage is to provide a legal framework to facilitate an assumption of rights and obligations. The overlap in the definitions of the term can be compared to other religious or social customs that relate to the laws of the State, such as baptism that correspond to the obligation of naming a child. In the same way, the State's involvement in marriage is of a secular nature.

To allow people to express their commitment is to the benefit of the State. When the State maintains an institution such as marriage, it must be prepared to justify distinctions that prevent access to this institution. Such exclusions must also be re-evaluated over time in light of social changes.

The distinction based on sexual orientation that is in our marriage laws is now challenged in our society and the State must justify it. The consultation and research done by the Law Commission concluded that such distinction could not be justified rationally in light of the secular objectives pursued by the State in its regulation of marriage.

In conclusion, we urge the Committee to adopt the following recommendations:

1. Encourage the government to pursue a comprehensive review of its laws and policies as we recommend in our report. Real injustices are being lived by Canadians and it is important that we develop laws and policies that are neither over-inclusive nor under-inclusive of relationships in a way that defeats the objectives of the legislation. For example, we have recommended that sections of the *Employment Insurance Act* be modified so that people who work for family members are not penalized for being presumed to be involved in a fraudulent transaction. These provisions have a particular impact on the spouses and partners of small business owners, often women.
2. Recommend the development of registration systems for people in close personal relationships irrespective of whether their relationship is "conjugal" or not. It would be unfortunate to miss the opportunity of creating registration systems that could respond to the evolution of our society's needs in terms of diversity of relationships.
3. Remove restrictions on the ability of same-sex couples to marry while preserving the ability of religious organizations to decide, according to their beliefs, who can

marry. The wording of section 367 of the Quebec Civil Code may be useful in this context:

367. No minister of religion may be compelled to solemnize a marriage to which there is any impediment according to his religion and to the discipline of the religious society to which he belongs.

4. Not remove civil marriage as an option for Canadians as is proposed in the third option of the Discussion Paper. In our view, it would be premature to do so without having developed registration systems that are well accepted by the Canadian public.

Thank you.