VANESSA WITHY

THE FIGHT FOR TRUE EQUALITY: CIVIL UNIONS VERSUS SAME-SEX MARRIAGE ASSESSING THE SIGNIFICANCE OF CIVIL UNIONS ON THE RIGHT TO FREEDOM FROM DISCRIMINATION ON THE BASIS OF SEXUAL ORIENTATION

LLB(HONS) RESEARCH PAPER
LAW AND SOCIAL POLICY (LAWS 527)

FACULTY OF LAW
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2005

CONTENTS

ABSTRACT

In April 2005 the Civil Union Act 2004 and the Relationships (Statutory References) Act 2005 came into force, creating the new institution of civil unions and providing same-sex couples with the option of having their relationship legally registered. In enacting this legislation, the Government purported to be creating a positive human rights culture by removing all discrimination in the law that was based on sexual orientation. The primary purpose of this paper is to examine the effectiveness of civil unions in fulfilling this human rights aim. In order to do this, the paper considers what is meant by the concept of discrimination as well as the corresponding right to equality, and ultimately advocates the application in New Zealand of the substantive equality model that has emerged out of Canadian jurisprudence. It is then argued that overseas developments warrant revision of the majority decision of the Court of Appeal in *Quilter*, and that the a New Zealand Court would feel compelled to find that the prohibition on same-sex marriage was discrimination *per se* because it denigrates same-sex relationships. Having come to this conclusion, the paper considers the effect of civil unions in remedying this affront to dignity by applying the Canadian substantive equality model. It is concluded that the creation of a separate but equal institution does not go far enough to eliminate the *prima facie* discrimination that exists under the Marriage Act 1955. Finally, a potential justification under section 5 of the New Zealand Bill of Rights Act 1990 is considered and dismissed. It is concluded that notwithstanding the creation of civil unions, maintaining a prohibition of same-sex marriage is an affront to the dignity of same sex couples.

The text of this paper is approximately 15, 500 words.

I INTRODUCTION

"Discrimination is unacceptable in a democratic society because it epitomises the worst effects of the denial of equality, and discrimination reinforced by law is particularly repugnant. The worst oppression will result from discriminatory measures having the force of law."[1] Throughout history, homosexual couples as well as homosexual individuals have suffered immensely as a result of discrimination.[2] This discrimination has not been limited to social prejudice, but has frequently been perpetuated through provisions of the law. Under section 19 of the New Zealand Bill of Rights Act 1990 (NZBORA), however, the government has an obligation to ensure the right to freedom from discrimination on the basis of sexual orientation under New Zealand law.[3]

In 2004 the New Zealand Government introduced legislation into the House that was intended to finally rid the country of any legal discrimination on the basis of sexual orientation. This goal was to be achieved by way of a two step process. The Civil Union Act 2004 (CUA) was to provide the vehicle through which same-sex couples could officially register their relationship, whilst the Relationships (Statutory References) Act 2005 (RSRA) was to confer on civil union partners the equivalent rights and obligations as married couples. The intention of this paper is to assess the effectiveness of these two pieces of legislation in achieving this objective and ultimately determine whether civil unions are an adequate policy alternative to same-sex marriage.

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[1] *Andrews v Law Society of British Columbia* [1989] 1 SCR 143, 172 (SCC) McIntyre J.
[2] *Halpern v Canada* (AG) (2003) 225 DLR (4th) 529 (Ont CA).
[3] See page 9 for the text of section 19.

The paper begins by traversing the legal progression that resulted in the conception of civil unions, and explains the policy background to the enactment of the CUA and RSRA. It will be illustrated that one of the primary motivations driving the creation of the new institution was to fulfil human rights imperatives by removing any potential discrimination under the current law on the ground of sexual orientation.

It will then be considered what is meant by the nebulous concept of discrimination, and how New Zealand courts could be guided by the developed Canadian jurisprudence in the application of that concept given the immaturity of our jurisprudence. After outlining the importance of upholding equality from both human rights and social policy perspectives, there will follow a discussion of the role of discrimination in the context of the same-sex marriage debate. It will be illustrated that since the *Quilter v Attorney-Genera (Quilter)*[4] decision, in which the majority concluded that the prohibition on same-sex marriage did not constitute discrimination, foreign jurisdictions have increasingly diverged from the approach that was taken by the court. It will be argued that these developments would warrant an entirely fresh look at the issue if it once again came before a New Zealand court, notwithstanding the enactment of the CUA and the RSRA.

Having reached this conclusion, the paper will then assess the significance that civil unions have on the discrimination analysis. This analysis will employ the Canadian substantive equality model, and leads to the conclusion

[4] *Quilter v Attorney-General* [1998] 1 NZLR 523 (CA).

that the creation of a 'separate but equal' institution does not remedy the affront to dignity caused by the distinction drawn under the Marriage Act (MA). The final section of the paper considers whether or not this *prima facie* discrimination can be cured by a justification under section 5 of the NZBORA.

It will be concluded that although there are positive aspects to civil unions, the government has been unsuccessful in achieving its stated policy goals. Civil unions do not go far enough to remedy the violation of the right to freedom from discrimination on the basis of sexual orientation and are therefore an inadequate policy alternative to same-sex marriage.

II THE LEGAL EVOLUTION THAT RESULTED IN CIVIL UNIONS

Although New Zealand was rather slow off the mark to decriminalise homosexuality, the country has since been quite progressive in the provision of rights for same-sex couples. This section of the paper seeks to provide a brief overview of the history of the treatment of same-sex couples in New Zealand.

A Historical Treatment of Same-Sex Couples

It was not until 1986 that New Zealand decriminalised homosexuality, and even at this late stage there was an intense 15 month debate that divided the nation. However, from that point onwards legal recognition of same-sex relationships has advanced rapidly. Perhaps most significantly, sexual orientation was included in the Human Rights Act 1993 as a ground for

challenging discrimination. This provision prompted numerous amendments to legislation that failed to provide same-sex couples with equivalent protections as heterosexual couples in particular areas of law. An example of this is the Property (Relationships) Act 1976 (amended in 2001) which mandated a fifty-fifty split of relationship property at the breakdown of same-sex de facto relationships as well as heterosexual de facto and marriage relationships.

However, the piecemeal method of amending individual pieces of potentially discriminatory legislation was not particularly effective, and the movement for legal recognition of same-sex relationships on a more fundamental level began in the late 1990s. In 1998 the Court of Appeal decision of *Quilter* held that the MA could not be interpreted to allow for members of the same-sex to marry with, highlighting the current pertinence of the issue.[5] A majority of the Court also concluded that the restriction on marriage was not discrimination. Soon after the decision the Ministry of Justice published a backgrounding and discussion paper designed to outline the issues involved and to encourage public feedback.[6] The backgrounding paper highlighted a number of the key areas in which same-sex couples were excluded from the benefits accorded to heterosexual couples, while the discussion paper invited feedback on how same-sex relationships should be treated in these areas. Additionally, it introduced the prospect of relationship registration as an alternative to same-sex marriage.

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[5] This decision will be discussed in greater depth in *Part II: What is Discrimination?*

[6] Ministry of Justice *Same-Sex Couples and the Law- Backgrounding the Issues: Consultation Paper* (Wellington, 1999); Ministry of Justice *Same-sex couples and the Law: Discussion Paper* (Wellington, 1999).

In 1999, under the belief that the Ministry's papers were not sufficiently thorough, the Law Commission followed up with a report of their own that canvassed the issue as they saw it, and weighed up the potential options. Basing its support for recognising same-sex relationships upon a personal autonomy argument, [7] it recommended the implementation of a registration scheme believing that it was far more "sensible" to devise a separate code for same-sex relationships. The reasoning they provided for this was that toleration of diversity is a two-way street, and "...gays and lesbians should be prepared to acknowledge that they are not harmed by a legal code designed to avoid giving what may be seen as gratuitous offence to those for whom matrimony is a holy estate."[8] It proposed that registered partnerships should be limited to same-sex couples, seeing no justification for allowing heterosexual couples this additional alternative to marriage.[9]

At the time of both the Ministry of Justice and the Law Commissions reports, same-sex marriage was not permitted anywhere in the World, whilst a number of European countries had adopted registration models.[10] This probably explains the New Zealand movement towards a form of registered partnerships as a less radical alternative to same-sex marriage. A private members civil union bill sponsored by Russell Fairbrother in 2001 was drafted but never balloted, so it was not until 2004 that a Government bill came before the House. It was

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[7] New Zealand Law Commission *Recognising Same-Sex Relationships* (NZLC SP4, Wellington, 1999) 2.

[8] New Zealand Law Commission *Recognising Same-Sex Relationships* (NZLC SP4, Wellington, 1999)
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[9] New Zealand Law Commission *Recognising Same-Sex Relationships* (NZLC SP4, Wellington, 1999) 9.

[10] Sweden, Denmark, Norway, Iceland, Greenland, the Netherlands, and Belgium all had registration models at the time.

introduced into the house on 21 June 2004 by the Hon David Benson-Pope along with its companion measure, the Relationships (Statutory References) Bill.

The controversy surrounding the bill is evidenced by the amount of interest shown during the Select Committee process. The Select Committee received 6419 submissions and heard all 352 who requested oral hearings. Of the submissions, 2794 were opposed to the bill and 459 were in support. On their face these numbers suggest strong broad opposition to the bill. However, it appeared to the Select Committee that most of the submissions in opposition to the bill were deliberately orchestrated through religious groups. Therefore, it came to the conclusion that the people sending these submissions represented a small minority of people in New Zealand who hold a particular set of religious beliefs.[11] This is supported by the fact that at the time of the Select Committee process a recent Herald poll has indicated that 56% of New Zealander's were in favour of the bill and 39% were opposed.[12]

After a few minor amendments recommended by the Select Committee, the Civil Union Bill proceeded through the legislative process and was passed on 13 December 2004. The eventual passage of the CUA was considered by many to be a victory for the gay and lesbian community in that they had finally won the ability to gain the rights and responsibilities to which heterosexual couples have long been entitled, and were free from the shackles of long-lived

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[11] Justice and Electoral Select Committee "Civil Union Bill" (29 November 2004) <http://www.clerk.parliament.govt.nz> (last accessed 28 September 2005) 9-10.
[12] Justice and Electoral Select Committee "Civil Union Bill" (29 November 2004) <http://www.clerk.parliament.govt.nz> (last accessed 28 September 2005)10.

discrimination.[13] Conversely, others viewed the CUA as a threat to the institution of marriage, and a sorry reflection of the slippery slope of moral decline in New Zealand society.

B Relevant Policy Background to Civil Unions

According to Labour's policy on rainbow issues, every person including gay, lesbian, transgender and bisexual New Zealanders, is entitled to fairness and equal rights under the law. The party claims to be committed to a human rights framework that upholds and protects the rights of all people, and promises to amend all remaining laws that cause unfair discrimination on the grounds of sexual orientation.[14] The creation of civil unions was an attempt to bring these aims into fruition. A stated policy objective behind providing a mechanism for same-sex couples to formally solemnise their relationship was to create a positive human rights culture, with an acknowledgment that a failure to provide such could be seen as not entirely consistent with human rights obligations.[15]

The CUA provides for legal registration of same-sex relationships, and by way of the companion measure, the RSRA (which is an omnibus piece of legislation amending more than 160 pieces of legislation), civil union couples are generally put on the same terms as married couples. The intended effect of the RSRA was to remove all unjustifiable discrimination on the basis of relationship

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[14] Labour New Zealand <http://www.labour.org.nz> (last accessed 14 July 2005).
[15] The Knowledge Basket <http://www.knowledge-basket.co.nz> (last accessed 20 July); Cabinet Policy Committee "Government Civil Union Bill" (13 May 2003) POL (03) 117 <http://www.justice.govt.nz> (last accessed 20 September 2005); Hon David Benson Pope (Associate Minister of Justice) (9 December 2004) 622 NZPD 17639-17640.

status.[16] It was recognised that this discrimination was unduly harsh on same-sex relationships as they are unable to make the choice to marry.[17] Thus, the Government acknowledged that the exclusion of same-sex couples from the institution of marriage caused discrimination in that it completely denied them many of the concomitant rights and responsibilities. However, it seemed to consider that providing access to these benefits and obligations of marriage would be adequate protection from that discrimination.

Indeed, it was thought by the Cabinet Policy Committee that a process for registering same-sex relationships would largely remove the Crown from exposure to legal action brought under human rights legislation.[18] It is assumed that by this it meant that the interpretation of the MA was no longer open to judicial challenge, as well as all the legislation dealing with the incidents of marriage. The Bill of Rights vet on the CUA did not reveal any concern regarding discrimination on the basis of sexual orientation.[19] Furthermore, an additional opinion was requested to consider the effect of clause 17 and 18 of the bill which allows for those who would otherwise be entitled to marry (i.e. *heterosexual* civil union partners) to have their civil union converted into a marriage. The Crown Law Office concluded that this section was not

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[16] Cabinet Policy Committee "Legal Recognition of Adult Relationships" (12 May 2006) POL (03) 116 <http://www.justice.govt.nz> (last accessed 20 September 2005). The RSRA was also intended to confer equal rights and obligations on de facto couples as well as civil union partners however this paper is only concerned with its effect on same-sex relationships.

[17] Cabinet Policy Committee "Legal Recognition of Adult Relationships" (12 May 2006) POL (03) 116 <http://www.justice.govt.nz> (last accessed 20 September 2005).

[18] Cabinet Policy Committee "Government Civil Union Bill" (13 May 2003) POL (03) 117 <http://www.justice.govt.nz> (last accessed 20 September 2005).

[19] Crown Law Office "Civil Union Bill: Legal Advice Consistency with the New Zealand Bill of Rights Act 1990" (29 April 2004) <http://www.justice.govt.nz> (last accessed 17 June 2005).

discriminatory because any differential treatment arises under the MA not the CUA.[20]

Another important part of the policy was to protect the traditional concept of marriage as understood at common law; the CUA was not intended to be an attack on marriage.[21] Although many of the submitters on the bill conflated the two institutions, civil unions are not marriage. Indeed, a stand alone Act was intended to reinforce the intention that marriage is limited to a union between one man and one woman. The CUA does not alter the MA at all, and following the Select Committee recommendations on the RSRA, specific amendments were made to the legislation to ensure that marriage is referred to differently to civil unions and de facto relationships.[22]

C Conclusion

The Government recognised that both the absence of a mechanism through which same-sex couples could register their relationship and of access to the rights and obligations that flowed from that could be viewed as inconsistent with its obligation to prevent discrimination. The CUA and the RSRA were intended to remedy this situation. Indeed, it is now considered by many that the

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[20] Justice and Electoral Select Committee "Civil Union Bill" (29 November 2004) 5 <http://www.clerk.parliament.govt.nz> (last accessed 28 September 2005).

[21] See Cabinet Policy Committee "Government Civil Union Bill" (13 May 2003) POL (03) 117 <http://www.justice.govt.nz> (last accessed 20 September 2005); Justice and Electoral Select Committee "Civil Union Bill" (29 November 2004) 2 <http://www.clerk.parliament.govt.nz> (last accessed 28 September 2005); <http://www.clerk.parliament.govt.nz> (last accessed 29 July 2005); Civil Union Campaign <http://www.civilunions.org.nz> (last accessed 2 August 2005); See also Hon David Benson Pope (Associate Minister of Justice) (9 December 2004) 622 NZPD 17639.

[22] Justice and Electoral Select Committee "Relationships (Statutory References) Bill" (1 March 2005) 3-4 <http://www.clerk.parliament.govt.nz> (last accessed 28 September 2005).

Government has succeeded in removing discrimination on the ground of sexual orientation from New Zealand legislation. This is the belief held by Tim Barnett, the chairperson of the Select Committee, who claims that civil unions deliver on the decade old commitment in the Human Rights Act 1993 that the law will not discriminate on the ground of sexual orientation, marital status, or family status.[23]

III WHAT IS DISCRIMINATION?

This part of the paper will canvass both New Zealand's domestic and international obligations in relation to the right to freedom from discrimination, and the corresponding right to equality. It will then go on to consider how one determines whether or not the discrimination exists under the law. It will be argued that because New Zealand's discrimination jurisprudence is still in its infancy and is lacking in consensus, guidance should be drawn from the overseas developments, particularly Canada. Due to the numerous similarities between the two jurisdictions, it is finally submitted that a New Zealand Court would find it difficult to ignore the Canadian test.

A New Zealand's Domestic Obligations

Section 19 of the NZBORA provides that "[e]veryone has the right to freedom from discrimination on the grounds of discrimination in the Human Rights Act 1993." The NZBORA is rather unique as it does not specifically

[23] Tim Barnett "Civil Union Bill Hits the Ground Running" (29 November 2004) Press Release <http://www.labour.org.nz> (last accessed 14 July 1005).

mention equality, let alone protect a right to it. The exclusion of a right to equality was a deliberate omission from the document in favour of the more simple protection from discrimination.[24] The concern expressed in the White Paper is that the meaning of 'equality before the law' is not only elusive and difficult to accurately define, but is also a dangerous concept as it enables courts to get involved in areas of substantive policy.[25]

The right to freedom from discrimination differs from the right to equality in the sense that it does not leave the law books open to challenge in any respect that they perpetuate an inequality inequalities. This is to say, legislation can only be challenged in the context of the prohibited grounds of discrimination.[26] As stated in section 19, the prohibited grounds are set out in section 21 of HRA 1993. Sexual orientation is one of these enumerated grounds on which discrimination is prohibited.

However, despite the intention of the drafters, discrimination cannot be understood without some reference to equality because to prohibit discrimination is to prohibit distinctions that perpetuate inequality in respect of those prohibited grounds.[27] After all, the right to freedom from discrimination derives from the fundamental idea that everyone is equal before the law.[28] Therefore in the context of sexual orientation, the right to freedom from discrimination under the NZBORA essentially provides an equality guarantee and imposes upon the state

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[24] A Bill of Rights for New Zealand: A White Paper (1985) AJHR A6 para 10.81-10.82.
[25] A Bill of Rights for New Zealand: A White Paper (1985) AJHR A6 para 10.81-10.82.
[26] Grant Huscroft "Freedom from Discrimination" in Paul Rishworth and others *The New Zealand Bill of Rights* (Oxford University Press, Auckland, 2003) 325, 368.
[27] Grant Huscroft "Freedom from Discrimination" in Paul Rishworth and others *The New Zealand Bill of Rights* (Oxford University Press, Auckland, 2003) 325, 380-381.
[28] See *Quilter v Attorney-General* [1998] 1 NZLR 523, 531 (CA) Thomas J.

an obligation to uphold that equality unless any unequal treatment can be justified.[29] Consequently, consideration of anti-discrimination law in New Zealand can profit considerably from reference to the advanced equality law emanating from overseas jurisdictions.

B New Zealand's International Obligations

New Zealand is also a party to and has ratified the International Covenant on Civil and Political Rights 1966 (ICCPR)[30], the document that the NZBORA was enacted to give effect to. Article 26 of the ICCPR provides that:

> All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

Although Article 26 does not specifically enumerate sexual orientation as a ground of discrimination, the Human Rights Committee has expressed the view that the ground of 'sex' includes sexual orientation.[31] Although none of the principles of international documents are binding on New Zealand, they "...paint a backdrop against which New Zealand's obligations and compliance can be placed."[32] Thus the right to equality and freedom from discrimination are basic

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[29] New Zealand Bill of Rights Act 1990, s 5.
[30] International Covenant on Civil and Political Rights (23 March 1976) <http://wwwunhrc.org> (last accessed 20 June 2004).
[31] *Toonen v Australia* (1995) 69 ALJ 602.
[32] *Northern Regional Health Authority v Human Rights Commission* (1997) HRNZ 37, 58.

human rights values of international law that New Zealand must observe in the creation of law and policy.

C Quilter v Attorney-General

In *Quilter*, the New Zealand Court of Appeal was required to consider whether the MA allowed for marriages between people of the same sex. It was argued by the claimants that section 19 of the NZBORA gave a clear indication that discrimination was not to be sanctioned by the courts, and thus required the Court to put a modern interpretation on the MA and the concept of marriage in light of section 6.[33] However it was contended that no question of discrimination arose pursuant to section 19. Thus the question of whether the refusal to issue marriage licences to same-sex couples constituted discrimination was placed in issue.

A full bench of the Court unanimously held that in any case the wording and scheme of the MA rendered it incapable of more than one meaning regardless of whether or not there was discrimination.[34] Therefore, the discussion and comments made in relation to discrimination may be seen as merely *obiter dictum*. Nonetheless, as all five judges felt compelled to consider the discrimination point, the case remains New Zealand's most comprehensive consideration of the concept.

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[33] Section 6 of the NZBORA provides that "[w]herever an enactment can be given a meaning that is consistent with the rights and freedoms contained in this Bill of Rights, that meaning shall be preferred to any other meaning."

[34] The reasons the Court gave for this decision will be further discussed below in Part V: *Discrimination Against Same-Sex Couples and the Same-Sex Marriage Debate.*

There was very little consistency between the judges in the approach taken to determining what constitutes discrimination, and the role played by section 5 of the BORA. The various judgments in the case are a perfect illustration of the complexity, uncertainty and difference of opinion in relation to the actual meaning of discrimination. Although at times seemingly confused, Tipping J concluded that discrimination constitutes any distinction that imposes a disadvantage; any justification should only be considered in relation to section 5.[35] Thomas J takes a more restrictive approach, advocating the view that discrimination will only be invidious distinctions. Once this is established, section 5 has no role at all.[36] Both these minority judgments are to an extent consistent with Canadian law of the time, however there was a divergence in opinion in relation to where prospective justifications were relevant.

With the exception of Gault J, the majority judgments gave little credence to the Canadian developments of the time. Keith J makes no attempt to provide a definition of discrimination, preferring to base his argument around the proposition that section 19 'does not reach' the matter of same-sex marriage.[37] The reasons that he presents for this are that overseas jurisprudence does not support the view that a prohibition on same-sex marriage is discriminatory;[38] it would not have been parliament's intent to use the broad language of the BORA to effect such a dramatic change on such a basic social, religious, public and legal institution;[39] and the huge number of incidents of marriage emphasises the point that it is unlikely the BORA was intended to alter the basic elements of

[35] *Quilter v Attorney-General* [1998] 1 NZLR 523, 576 (CA) Tipping J.
[36] *Quilter v Attorney-General* [1998] 1 NZLR 523, 540 (CA) Thomas J.
[37] *Quilter v Attorney-General* [1998] 1 NZLR 523, 527 (CA) Gault J.
[38] *Quilter v Attorney-General* [1998] 1 NZLR 523, 567 (CA) Keith J.
[39] *Quilter v Attorney-General* [1998] 1 NZLR 523, 567 (CA) Keith J.

marriage in such an indirect way.[40] Parliament's approach in the past, he argues, is to address the legal recognition of homosexuality in a particularistic way.[41] In his opinion, discrimination is an area that should be approached in a pragmatic and functional way because it is a complex principle that cannot always be applied automatically and comprehensively.[42]

Gault J proffered a purposive approach to the right, limiting the protection to impermissible differentiation under the law, a similar approach to Thomas J. However, under his analysis there would still be the opportunity for justifying the distinction under section 5.[43] Furthermore, in his application he employs a similarly situated test in concluding that no distinction is being drawn on the basis of sexual orientation as two same-sex heterosexuals wanting to marry would be treated in exactly the same way.[44] Additionally, he concurred with the opinion of Keith J. Richardson P did not try and define the right, but agreed with both Keith J and Gault J that the right does not require the legislative recognition of same-sex marriages.

The lack of consensus amongst the judges renders *Quilter* largely unhelpful in determining exactly what the concept of discrimination entails, and demonstrates that jurisprudence is still very much in its infancy in New Zealand. All that is possible to discern for certain is that discrimination requires a

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[40] *Quilter v Attorney-General* [1998] 1 NZLR 523, 571 (CA) Keith J.
[41] *Quilter v Attorney-General* [1998] 1 NZLR 523, 564-565 (CA) Keith J.
[42] *Quilter v Attorney-General* [1998] 1 NZLR 523, 567 (CA) Keith J.
[43] *Quilter v Attorney-General* [1998] 1 NZLR 523, 527 (CA) Gault J.
[44] *Quilter v Attorney-General* [1998] 1 NZLR 523, 527 (CA) Gault J. As will be illustrated below, the similarly situated test has been rejected as an adequate manner in which to determine discrimination.

distinction based on a personal characteristic. Consequently, it becomes necessary to look beyond New Zealand law in order to glean useful guidance.

D Formal versus Substantive Equality

1 Differential treatment based on personal characteristics

The history of the concept of equality reveals two primary models; formal equality and substantive equality. The idea formal equality model can be traced back to Aristotle who said that "justice considers that persons who are equal should have assigned to them equal things" and "there is no inequality when unequals are treated in proportion to the inequality existing between them."[45] Under this model, law is regarded as satisfying equality guarantees when there is identical treatment of 'alike' persons. As equality jurisprudence has developed there has been a shift in judicial thinking that formal equality is not the satisfactory determinant to the question of discrimination. Consequently, the doctrine of substantive equality has emerged as the preferable model.

The formal equality model is concerned with equal treatment under the law. This means that as long as alike individuals are treated identically, there is no distinction being drawn and thus no discrimination. Although it does allow for proportionate differential treatment between persons who are not alike, it provides no criteria to determine whether one person is 'like' another or who

[45] See Peter W Hogg *Constitutional Law of Canada* (Thomson Canada Limited, Scarborough, 2004)1087-1088; Anne F Bayefsky and Mary Eberts *Equality Rights and the Canadian Charter of Rights and Freedoms* (Carswell, Vancouver, 1985) 2.

should be compared to whom.[46] Formal equality is not concerned with the fairness of the outcome, but merely with the equality of the process itself. The similarly situated test is a restatement of formal equality, deeming a denial of equality to be made out if it could be shown that the law accorded the complainant worse treatment than others who were similarly situated.[47] The focus remains on process and not outcome.

The primary problem with formal equality that different groups in society have different characteristics, and as a result may still suffer an infringement of their equality rights if they are treated equally in a formal sense under the law. True equality does not necessarily result from identical treatment. This was the reasoning adopted by the Supreme Court of Canada in *Andrews v Law Society of Canada (Andrews)*[48] when it rejected formal equality as the appropriate test for the determination of true equality under section 15 of the Canadian Charter of Rights and Freedoms (Canadian Charter). This section provides that "…[e]very individual is equal before and under the law and has the right to equal protection and equal benefit of the law without discrimination…". According to McIntyre J, sometimes formal distinctions will be necessary in order to accommodate the differences between individuals and produce equal treatment in a substantive sense.[49] The overriding consideration must be the *impact* of the law on the individual or group concerned:[50]

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[46] Peter W Hogg *Constitutional Law of Canada* (Thomson Canada Limited, Scarborough, 2004)1088.
[47] *Andrews v Law Society of British Columbia* [1989] 1 SCR 143, 166 (SCC) McIntyre J.
[48] *Andrews v Law Society of British Columbia* [1989] 1 SCR 143 (SCC).
[49] *Andrews v Law Society of British Columbia* [1989]1 SCR 143, 165-169 (SCC) McIntyre J.
[50] *Andrews v Law Society of British Columbia* [1989] 1 SCR 143, 165 (SCC) McIntyre J.

> Recognizing that there will always be an infinite variety of personal characteristics, capacities, entitlements and merits among those subject to a law, there must be accorded, as nearly as may be possible, an equality of benefit and protection and no more of the restrictions, penalties or burdens imposed upon one than another.

Therefore, bad law will not be saved merely because it treats all individuals identically, and a law that makes distinctions will not necessarily be a bad law simply because it makes that distinction.[51] His Honour then went on to say that in the consideration of whether there is true equality or not one must consider the content of the law, its purpose, and its impact upon those to whom it applies as well as upon those to whom it does not apply.[52] Essentially, an equality violation can be brought about either by a formal legal distinction on the basis of a personal characteristic or identical treatment that represents a failure to take into account underlying distinctions between groups within society.[53] The substantive equality model advocated in *Andrews* has since been affirmed and employed by the Supreme Court of Canada.[54]

2 *Does the differential treatment need to be invidious?*

This leads to the question of whether the differential treatment on the basis of a personal characteristic must be invidious in order to constitute discrimination. Discrimination is a relative concept and cannot be understood without comparative reference. Beyond that there is little certainty as to its meaning.

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[51] *Andrews v Law Society of British Columbia* [1989]1 SCR 143, 167 (SCC) McIntyre J.
[52] *Andrews v Law Society of British Columbia* [1989]1 SCR 143, 168 (SCC) McIntyre J.
[53] *Andrews v Law Society of British Columbia* [1989]1 SCR 143, 167 (SCC) McIntyre J.
[54] See for example *Miron v Trundel* [1995] 2 SCR 418 (SCC); *Egan v Canada* [1995] 2 SCR 513 (SCC); and was more recently consolidated in *Law v Canada* (Minster of Employment and Immigration) [1999] 1 SCR 497 (SCC).

Legislation inevitably draws distinctions between groups in society and often those distinctions may be trifling, and equally often there exist differences in treatment that are much more contentious, causing a divergence of opinion as to whether or not they are discriminatory.

The White Paper provides no aid in definition, as it assumes that the meaning of discrimination is not important:[55]

> The word 'discrimination' in this Article [section 19] can be understood in two senses- an entirely neutral sense, synonymous with 'distinction', or in an invidious sense with the implication of something unjustified, unreasonable, or irrelevant. However, the result would seem to be much the same on either interpretation, because of the application of Article 3 [now section 5] which authorises reasonable limitations prescribed by law on the rights guaranteed by the Bill.

However, the distinction between rights and justification for the limitations upon rights is at the centre of the operation of the Bill of Rights. Before you can conclude whether a right has been infringed it is necessary to know what that right requires. It is not until we know whether that right has been infringed that the question of justification comes into play.[56] The problem with the 'neutral sense' approach is that it presumes that any difference in treatment based on a prohibited ground infringes the right. This would mean that legislation would frequently be in violation because, as stated above, legislation often draws

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[55] A Bill of Rights for New Zealand: A White Paper (1985) AJHR A6 para 10.78.
[56] Grant Huscroft "Freedom from Discrimination" in Paul Rishworth and others *The New Zealand Bill of Rights* (Oxford University Press, Auckland, 2003) 325, 375.

distinctions between groups. Therefore, this approach is unrealistic as it would mean that trivial distinctions constitute discrimination.

The Ministry of Justice advocates an approach that narrows the realm of prima facie discrimination, in taking the position that section 19 is infringed when there is differential treatment that confers a disadvantage.[57] Although this approach is more attractive than the 'neutral sense' approach because it limits the scope of the prima facie right to an extent, in reality the limit is of little significance because where there has been a distinction drawn on the basis of one of the prohibited grounds it is likely that it will cause some sort of disadvantage in every case.[58] As a result, the interpretation and application of section 5 is left to determine the meaning of the right.

The essence of discrimination, and its common understanding, suggests wrongful distinctions under the law, and the idea of requiring *freedom* from discrimination only makes sense if discrimination is negative in some way.[59] The problem with both the above interpretations is that, if either of them were to be adopted, *prima facie* discrimination would not necessarily be only those distinctions that were negative and may end up trivialising the protection. A more appropriate way of defining discrimination is to limit it to distinctions that involve invidious treatment.

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[57] Ministry of Justice *The Non-Discrimination Standards of the Government and the Public Sector: Guidelines on How to Apply these Standards and Who is Covered* (Wellington, 2002) 18-19 <http://www.justice.govt.nz> (last accessed 25 September 2005).

[58] Grant Huscroft "Freedom from Discrimination" in Paul Rishworth and others *The New Zealand Bill of Rights* (Oxford University Press, Auckland, 2003) 325, 376.

[59] Grant Huscroft "Freedom from Discrimination" in Paul Rishworth and others *The New Zealand Bill of Rights* (Oxford University Press, Auckland, 2003) 325, 376.

Moreover, this approach is consistent with the substantive equality model that has emerged out of Canada. Substantive equality is concerned with the result of the law and the impact that it has on the people to whom it applies as well as the people to whom it does not apply. It has evolved to a point where it assesses the impact of differential treatment (whether that be a formal distinction or a failure to take into account a personal characteristic), with reference to the preservation of human dignity rather than the mere existence of a disadvantage. This approach was preferred in light of the purpose behind equality provisions. In the seminal case of *Law v Canada (Law)*, Iacobucci J pronounced that the equality analysis under the Canadian Charter must be purposive and contextual.[60] In his opinion, the purpose of the section 15 protection is as follows:[61]

> To prevent the violation of essential human dignity and freedom though 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.

Consideration of this stated purpose immediately reveals the idea that the concept of discrimination or inequality is entangled with the notion that the differential treatment must be of such a nature that it is an affront to human dignity. As later stated by Iacobucci J, the protection and promotion of human dignity is the overriding concern of equality, and it infuses all elements of the

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[60] *Law v Canada* (Minster of Employment and Immigration) [1999] 1 SCR 497, para 6 (SCC) Iacobucci J for the Court.
[61] *Law v Canada* (Minster of Employment and Immigration) [1999] 1 SCR 497, para 51 (SCC) Iacobucci J for the Court.

discrimination analysis.[62] Therefore, the definition of "substantive equality" is discrimination that brings into play the claimant's human dignity; the requirement of invidious discrimination is merely a restatement of the requirement that there must be substantive as opposed to formal inequality.[63] Thus, the differential treatment must impose and obligation or withhold a benefit in a manner that denigrates the complainant group.

3 *The* Law *test*

Consolidating all the earlier Supreme Court discrimination cases,[64] his Honour then proposed a broad set of guidelines that can be used to help determine whether there is discrimination is any particular instance. It involves three broad inquiries. The first is whether there has been differential treatment involving either a formal distinction on the basis of a personal characteristic, or a failure to take into account an existing disadvantage resulting in substantially different treatment on the basis of one of more personal characteristics. Secondly, the differential treatment must be based on an enumerated or analogous ground. Finally, the discrimination must be in a substantive sense bringing into play the purpose of section 15 in remedying such ills as prejudice, stereotyping and historical disadvantage.[65]

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[62] *Law v Canada* (Minster of Employment and Immigration) [1999] 1 SCR 497, para 51 (SCC) Iacobucci J for the Court.
[63] *Law v Canada* (Minster of Employment and Immigration) [1999] 1 SCR 497, para 84 (SCC) Iacobucci J for the Court.
[64] The cases that had the most significant effect on the creation of this test were *Andrews v Law Society of British Columbi*a [1989] 1 SCR 143 (SCC); *Egan v Canada* [1995] 2 SCR 513 (SCC); *Miron v Trundel* [1995] 2 SCR 418 (SCC).
[65] *Law v Canada* (Minster of Employment and Immigration) [1999] 1 SCR 497, para 39 (SCC) Iacobucci J for the Court.

Iacobucci J proffered four contextual factors that should be used at the touchstone of the final inquiry- pre-existing disadvantage, stereotype or vulnerability of the claimant; correspondence between the grounds and the claimants actual needs, capacities and circumstances; ameliorative purpose or effects on more disadvantaged individuals; and the nature of the interest affected.[66]

E Justifications for Discrimination

In both New Zealand and Canada there is provision in our respective human rights instruments that allow for limitations to be put on rights provided they are demonstrably justifiable in a free and democratic society. The provisions are section 5 of the NZBORA and section 1 of the Canadian Charter. Despite the fact that the Canadian test for discrimination requires the differential treatment to discriminate in a substantive sense, the Supreme Court still deems the section 1 analysis to be imperative.[67] The legal test applied in a New Zealand section 5 analysis derives from the test formulated in the Canadian case *R v Oakes*,[68] the requirements and application of which will be assessed in Part VII of this paper.

F Conclusion

New Zealand is yet to develop its own test for discrimination. On the other hand, Canada has developed a comprehensive test as a result of extensive

[66] *Law v Canada* (Minster of Employment and Immigration) [1999] 1 SCR 497, para 62-75 (SCC) Iacobucci J for the Court.
[67] See *Andrews v Law Society of British Columbia* [1989]1 SCR 143, 167 (SCC).
[68] *R v Oakes* [1986] 1 SCR 103, 138-139 (SCC) Dickson CJ.

opportunity to consider what the concept means over the last decade. The *Law* test, created with the purpose of equality provisions in mind, encapsulates both the intent to assure equality in a substantive sense and only to only prohibit discrimination that is invidious. Given the fact that the NZBORA was based on the Canadian Charter; the subsequent similarities between the two documents in the sense that both have a justification provision; and the common law basis of the two jurisdictions, it would be difficult and nonsensical for a New Zealand Court to ignore and refuse to apply this sophisticated Canadian test.

IV THE IMPORTANCE OF EQUALITY AND ANTI-DISCRIMINATION LAW

This part of the paper will briefly outline why the preservation of equality is pertinent, both from a human rights and a social policy point of view. These perspectives will be considered both generally and in the context of the same-sex marriage relationships.

A Protection of Fundamental Human Rights

In general terms, equality is the constant thread underlying human rights discourse and is therefore a human rights guarantee that should be fervently defended in the creation of both policy and legislation. As propounded by Huscroft, equality is the backbone to a bill of rights.[69] It ensures that all individuals retain a sense of self-worth and feel worthy of concern and respect allowing them to participate in and contribute fully to society. Applying this to

[69] A Bill of Rights for New Zealand: A White Paper (1985) AJHR A6 para 10.81-10.82.

the issue at hand, the provision of equality for same-sex couples is essential to redress the historical discrimination that they have long been subjected to. Only then will the dignity of same-sex couples be respected.

In its 1999 report, the Law Commission asserted that the same-sex marriage debate was not advanced by rights talk because our human rights legislation is not supreme.[70] It is submitted that this contention undermines human rights completely and the state's obligation to uphold them, effectively rendering the NZBORA redundant. Despite the fact that the NZBORA does not have the status of supreme law, this does not detract from the human rights standard that it sets and to which the state should comply. Given the fundamental nature of the right to be free from discrimination, human rights legislation provides a compelling foundation upon which a claim for same-sex marriage can be brought. Although the decision of *Quilter* may suggest otherwise, an assessment of the developments in both Canada and the United States indicates that it is the social position of same-sex couples has advanced significantly in more recent years and it is time for a fresh look at the discrimination question in the context of same-sex relationships.[71]

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[70] New Zealand Law Commission *Recognising Same-Sex Relationships* (NZLC SP4, Wellington, 1999) 2.

[71] The developments in Canada and the United States will be discussed further in Part V.

B How Can Equality be seen as Promoting Social Policy Goals?

1 Generally

From a social policy perspective, the smooth running of society is undoubtedly dependant to an extent on the even-handedness of the law. Unless the law reflects that everyone is equally deserving of concern, respect and consideration then society will be perpetually plagued by feelings of unrest and injustice. When the ultimate goal is social cohesion and harmony, such a state of affairs is undesirable. Although societal attitudes and acceptance may take time to adjust to contemporary human rights goals, the perpetuation of prejudice in the law only hinders this process.

2 The same-sex relationship context

Formal registration strengthens committed relationships by providing a vehicle for couples to publicly declare their love and commitment.[72] Equal recognition would provide same-sex couples with a mechanism to express their commitment to each other, receive public recognition and support, and then voluntarily assume a number of legal rights and obligations.[73] Providing this opportunity for same-sex couples reinforces the commitment they make to each other and, and has the concomitant advantage of enhancing the overall stability of society.

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[72] Civil Union Campaign <http://www.civilunions.org.nz> (last accessed 2 Aug 2005).
[73] Law Commission of Canada *Beyond Conjugality: Recognising and Supporting Close Personal Adult Relationships* (Ottawa, 2001) 117.

Marriage itself is seen by many as a core foundational unit of society that enhances the welfare of the community at large because it has proven itself to be a durable institution for the organisation of society.[74] If marriage is the foundation stone of society because it provides for social cohesion, it surely must follow that providing same-sex relationships with equal recognition rights would advance this important social policy objective by encouraging stable and committed same-sex relationships over transient ones.

There are people that argue that equal recognition of same-sex couples devalues marriage and discourages the formation of stable relationships.[75] Yet, marriage and commitment have already lost popularity in recent decades and marriage today often does not result in life-long commitment.[76] In this case, surely there is a strong argument that creating equal legal recognition of opposite and same-sex couples encourages a trend back towards stable relationships as the norm by promoting committed relationships for all couples. Therefore, it is submitted that if same-sex marriage were permitted it would serve to strengthen marriage as an institution, not devalue it.

Equal recognition would provide the additional benefit of providing a supportive and stable environment for children simply because it encourages stability. Children are going to benefit from this stability whether or not they are

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[74] See *Halpern v Canada* (AG) (2003) 225 DLR (4th) 529, para 116 (Ont CA).
[75] See for example Alison Laurie *Report on the Written Submissions to the Justice and Electoral Select Committee on the Civil Union Bill and Relationships (Statutory References) Bill* (Wellington, November 2004) 6.
[76] Civil Union Campaign <http://www.civilunions.org.nz> (last accessed 2 Aug 2005).

biologically related to both the parents or not.[77] There is something more that is invested in a legally recognised relationship which means that it is less likely to end.[78] As with marital children, this measure of family support and stability comes both in an emotional and financial form. Furthermore, equal recognition of relationships would likely accord the family with greater social approval that would enhance the sense of self-worth within children.

Furthermore, equal treatment of same-sex couples advances the social policy goal of recognising the diversity of society and choices people make regarding relationships in 21st century New Zealand. Rather than denying their existence, legal recognition accepts and supports that diversity which in turn leads to a more stable society. This is a policy objective expressly stated in section 10 of the Family Commission Act 2003 under which the Commission must have regard to the diversity of families. Additionally, legally recognising relationship diversity is economically advantageous as registered couples become financially dependant on each other as opposed to the state.

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[77] Mark Strasser "The Logical Case for Same-Sex Marriage: A Response to Professor John Witte Jr" in Lynne D Wardle and others (eds) *Marriage and Same-Sex Unions: A Debate* (Praeger Publishers, Westport, 2003) 60,61.

[78] Civil Union Campaign <http://www.civilunions.org.nz> (last accessed 2 Aug 2005).

V DISCRIMINATION ON THE BASIS OF SEXUAL ORIENTATION AND THE SAME-SEX MARRIAGE DEBATE

A The Marriage Act 1955

There is no definition of marriage in the New Zealand MA, and thus no explicit statement that marriage is restricted to a union between one man and one woman. In fact, the Act adopts largely gender-neutral language throughout. However, at the time that the MA was enacted, it was accepted in *Quilter* that common understanding was that marriage was the union of one man and one woman to the exclusion of all others.[79] Furthermore, the MA does contain certain provisions which reflect the traditional understanding of the concept, most particularly section 15 and the Second Schedule.

Section 15 states that subject to the provisions of the section, a marriage is void if it is prohibited by the provisions of the Second Schedule which states persons who are within the degrees of consanguinity. The Second Schedule is divided into two parts. The first part of the Schedule lists the people that a man may not marry, and the list only contains people of the female gender. The second part lists the people that a woman may not marry, containing only people of the male gender. Certainly it would amount to a large anomaly within the Act if a man was not able to marry his sister but was able to marry his brother. Thus, the Second Schedule strongly supports the view that marriage is restricted to unions between a man and a woman to the exclusion of all others. As these

[79] See *Quilter v Attorney-General* [1998] 1 NZLR 523, 577 (CA) Tipping J.

provisions reinforced the traditional understanding on marriage, the Court in *Quilter* felt compelled to interpret the Act as such.

B The New Zealand Approach to Same-Sex Marriage

In light of this interpretation, the essential thrust of the majority opinion regarding discrimination towards same-sex couples was that because marriage is by definition heterosexual it is therefore not discrimination to prohibit same-sex marriage; to allow it would be a contradiction in terms. However, this approach leaves the essential question begging- is the traditional definition discriminatory? In their opinion recognition of same-sex relationships was an area of social policy best left to Parliament, no doubt feeling tightly restrained by section 4 of the NZBORA which protects parliamentary sovereignty,[80] and reluctant to make such a bold move given the failure of other countries to deem the restriction on marriage discriminatory.

However, the following sections will reveal that since this decision, overseas Courts have been progressively diverging from the approach of the *Quilter* majority which employs the traditional concept of marriage to justify the prohibition on same-sex marriage. It is therefore tenuous to continue to rely on this decision as authority for the assertion that the prohibition on same-sex marriage does not constitute discrimination.

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[80] Section 4 of the NZBORA provides that "[n]o Court shall, in relation to any other enactment…(a) Hold any other provision of the enactment to be impliedly repealed or revoked, or to be in any way invalid or ineffective; or (b) Decline to apply any provision of the enactment-by reason only that the provision is inconsistent with any provision of this Bill of Rights."

C *Developments in Canada*

1 *Early decisions*

As in New Zealand, the legal definition of marriage in Canada was for a long time based on the 1866 English case of *Hyde v Hyde* in which Lord Penzance defines it as- "[m]arriage…may be defined as…the voluntary union…of one man and one woman to the exclusion of all others."[81] Despite and increasing acceptance of homosexuality and limited recognition of same-sex relationships in the law for family purposes,[82] Canadian courts still refused to accord same-sex couples the same status as heterosexual couples because this was simply a definitional matter and therefore not discriminatory.[83] The rationale behind the restriction on marriage related to what was considered to be the primary purpose of marriage- procreation. Same-sex couples lacked the biological ability to fulfil this purpose and it is merely this reality that is reflected in the restriction on marriage.[84]

2 *The movement begins*

Affirmative development for same-sex couples began in *Egan v Canada* when the Canadian Supreme Court held that sexual orientation would be

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[81] *Hyde v Hyde and Woodmanse* (1866) LR 1 PD 130, 133.
[82] Nicholas Bala "Redefining Marriage in Canada and the United States: Moving in the Same Direction, But at Different Speeds" (12th World Conference of the International Society of Family Law, Salt Lake City, 19-23 July 2005) 5.
[83] *Layland v Ontario (Minister of Consumer and Commercial relations)* (1993) 14 OR (3d) 658 (Div Ct).
[84] See for example *Layland v Ontario (Minister of Consumer and Commercial relations)* (1993) 14 OR (3d) 658, 666 (Div Ct).

analogous ground under section 15 of the Canadian Charter.[85] The Court, however, once again denied the claim on the basis that the *raison d'etre* of marriage is anchored in the biological and social realities that only heterosexual couples can procreate.[86] Nonetheless, positive ground was soon made in the case of *M v H* in which the Canadian Supreme Court had to decide whether it was discrimination to restrict the obligation to pay spousal support to heterosexual couples.[87] Using the *Law* test, the Court found that this amounted to discrimination. The Court also acknowledged that same-sex relationships can share many conjugal characteristics and that no relationship need fit into the traditional marital model to demonstrate that it is conjugal.[88] This decision prompted some provinces to enact legislation that gave same sex couples the same rights based on a period of conjugal cohabitation,[89] while others actually provided registered partnership laws.[90]

3 Same-Sex marriage

This movement eventually led to challenges being made to the traditional definition of marriage that had been relied on to define capacity to marry, and soon decisions in the Court of Appeal in both Ontario and British Columbia held

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[85] *Egan v Canada* [1995] 2 SCR 513 (SCC).
[86] *Egan v Canada* [1995] 2 SCR 513, paras 21 and 25 (SCC) La Forest J.
[87] *M v H* [1999] 2 SCR 3 (SCC).
[88] *M v H* [1999] 2 SCR 3, para 58-59 (SCC) Cory J. Characteristics of a conjugal relationship (of or relating to marriage or the relationship of spouses are shared shelter, sexual and personal behaviour, services, social activities, economic support and children as well as the societal perception of a couple. These may be present in varying degrees and need not be present at all; *Molodowich v Pettinen* (1980) 17 RFL (2d) 376 (Ont Dist Ct).
[89] Nicholas Bala "Redefining Marriage in Canada and the United States: Moving in the Same Direction, But at Different Speeds" (12th World Conference of the International Society of Family Law, Salt Lake City, 19-23 July 2005) 7.
[90] These states that enacted registered partnerships laws were Nova Scotia, Manitoba and Quebec.

that the prohibition on same-sex marriage was discriminatory.[91] The starting point of both these cases was to decide whether there was a common law bar on same-sex marriage. After concluding that there was, the Courts then went on to consider whether or not that common law bar constituted discrimination by applying the *Law* test. This approach represented a marked divergence from previous cases that refused to proceed with a discrimination analysis after deciding that the common law definition limited marriage to heterosexuals.

The Ontario Court of Appeal decision in *Halpern v Canada* is the most commonly cited judgment relating to the Canadian constitutional right to marry.[92] When considering the four contextual factors of the *Law* test, the Court placed emphasis on the historical disadvantage and prejudice suffered by homosexuals,[93] and the importance of the interest affected. The Court concluded that same-sex couples were excluded from an important fundamental societal institution that had significant corresponding benefits. Because the exclusion was not based on the need of the claimants and had no ameliorative purpose, it was held to perpetuate the view that same-sex relationships are less worthy of recognition and thereby demeans their dignity.[94] Under the section 1 analysis the Court refused to accept that the objectives of uniting the opposite sexes; encouraging the birth and raising of children of the marriage; and companionship were valid justifications for the restriction on marriage. As a result, the Court

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[91] *Halpern v Canada (AG)* (2003) 225 DLR (4th) 529 (Ont CA); *EGALE Canada Inc v Canada* (AG) (2003) 13 BCLR (4th) 1 (CA).
[92] Nicholas Bala "Redefining Marriage in Canada and the United States: Moving in the Same Direction, But at Different Speeds" (12th World Conference of the International Society of Family Law, Salt Lake City, 19-23 July 2005) 9.
[93] *Halpern v Canada (AG)* (2003) 225 DLR (4th) 529, paras 82-87 (Ont CA).
[94] *Halpern v Canada (AG)* (2003) 225 DLR (4th) 529, para 107 (Ont CA).

reformulated the common law definition of marriage as "the voluntary union for life of two persons to the exclusion of all others".[95]

The federal cabinet decided not to appeal this decision and within a week a reference case was bought before the Supreme Court of Canada to determine the constitutionality of allowing for same-sex marriage. The Court concluded that the federal government could enact this legislation and no religious celebrant would be required to perform a same-sex marriage. The Civil Marriage Act received assent on 19 July 2005. Canada is now the fourth country in the World to permit same-sex marriage.[96]

D Developments in the United States

Same-sex couples in the United States have found it more difficult to attain legal recognition for their relationships. However the last decade has witnessed some significant developments. Challenges were first made to the traditional definition of marriage in the 1970's, but the first success did not come until 1996 in a Hawaii trial Court decision which ruled that there was no compelling reason to justify the ban.[97] Before this decision could be appealed, the state voters passed a state constitutional amendment that allowed the state government to limit marriage to heterosexual couples. A similar course of events was played out in Alaska.[98] Challenges to the traditional concept of marriage prompted a campaign that resulted in the passage of the Defence of Marriage Act 1996 at

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[95] *Halpern v Canada (AG)* (2003) 225 DLR (4th) 529, para 154 (Ont CA).
[96] Canada joins Belgium (2003), the Netherlands (2001), and Spain (June 29 2005) in permitting same-sex marriage.
[97] *Baker v Miike* (1996) WL 694235 (Haw Cir Ct).
[98] See *Brause v Bureau of Vital Statistics* (1998) WL 88743 (Alaska Super Ct).

federal level. This statute provides that for the purposes of all federal law marriage is the union between a man and a woman. This immediately reduces the effect of any state recognition of same-sex marriage as those marriages will remain excluded from the federal benefits of marriage. Furthermore, it provides that no state is required to give legal effect to same-sex marriage.

Although the courts of many states continue to uphold the traditional concept of marriage largely on the basis of the procreation argument, others have taken a more activist approach. For example, in 1999 the Vermont Supreme Court held that they restriction on same-sex marriage violated the common benefits clause of the State Constitution.[99] The Court instructed the state legislature to remedy the breach but allowed them to decide whether to provide for same-sex marriage or create an equivalent institution. The legislature opted to allow same-sex couples to enter into civil unions under which they would be entitled to all the state benefits to which married couples were entitled.

More significantly, the Supreme Judicial Court of Massachusetts ruled that civil unions were not adequate to remedy the constitutional infirmity it had found to exist under the traditional definition of marriage.[100] It held that civil unions would not provide full equality, but would instead foster a "stigma of exclusion that the Constitution prohibits".[101] The state of Massachusetts began

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[99] *Baker v State* (1999) 744 A 2d 864 (Vt).
[100] See *In re Opinion of the Justices: SJC-09163* [2003] 440 Mass 1201 (Supreme Judicial Court of Massachusetts); *Goodridge v Department of Public Health* [2003] Mass 309 (Supreme Judicial Court of Massachusetts).
[101] See *In re Opinion of the Justices: SJC-09163* [2003] 440 Mass 1201, 1208 (Supreme Judicial Court of Massachusetts).

issuing licences on May 17, 2004, however these marriages do not receive recognition under federal law.

Similar legal challenges are working there way through the courts in other states,[102] and other states have enacted domestic partnership laws that allow same-sex couples to register their relationships.[103] These statutes have been instigated by political advocacy rather than litigation, and vary in the extent to which they confer rights to the participants. However, there remain 43 states that have passed legislation defining marriage between a man and a woman which make constitutional challenges to this traditional definition more difficult.[104] Nonetheless, there has also been a significant shift of attitude in the United States regarding the equality of prohibiting same-sex marriage. It is uncertain whether this will eventually lead same-sex marriage being a norm, but the events in Massachusetts indicate that this is possible.

E Significance for New Zealand

Quilter remains good law in New Zealand, and whether or not you consider the discrimination point to be *obiter dictum* or not, the majority opinion has generally been accepted as the current state of the law. Thus, to assert that civil unions do not remedy the discrimination under the MA would seem an illogical argument if there were no rights infringement in the first place. However this section has illustrated that since *Quilter,* both Canadian and United States Courts

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[102] California, Connecticut, Maryland, Florida, New Jersey, New York and Washington.
[103] California, New Jersey, Maine, Hawaii, Connecticut, Illinois, Iowa, New York, Washington, Oregon, New Mexico, and Rhode Island.
[104] See Lambda Legal <http://www.lambdalegal.com> (last accessed 28 Sept 2005).

have been increasingly willing to move beyond shielding constitutional challenges using the traditional concept of marriage, and actually determine whether that definition is constitutional. More and more the traditional understanding is becoming the *start* rather than the *end* of the inquiry. In Canada and Massachusetts, legal challenges have already resulted in same-sex marriage.

Therefore, it is submitted that if a *Quilter* situation were to come before the New Zealand court again these overseas decisions would warrant a fresh look at the discrimination question. In *Quilter* Keith J placed significant emphasis on the fact that no other countries had recognised same-sex marriage,[105] indicating a reluctance to make a ruling that was inconsistent with overseas trends. Now that the trend has shifted, the logical conclusion for the Court would be to follow that lead and find that the prohibition on marriage *per se* constitutes discrimination. This therefore leads us to the question of what effect civil unions have on that discrimination, complicating the issue significantly.

In its advisory opinion, the Supreme Court of Canada was to consider whether the common law understanding of marriage (that prohibited same-sex marriage) was constitutional, but refused to address this question, not wanting to force the issue given that the federal government had stated its intention to provide for same-sex marriage regardless of the opinion.[106] On the other hand, the Massachusetts Supreme Court insisted that same-sex marriage was imperative and civil unions were inadequate. However, the constitutional set-up of the United States is very different to New Zealand. Therefore, neither of these

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[105] *Quilter v Attorney-General* [1998] 1 NZLR 523, 567 (CA) Keith J.
[106] *Reference Re Same-Sex Marriage* (2004) SCR 79, paras 61-71 (SCC).

two decisions would be of themselves entirely authoritative on the issue in New Zealand. Thus, this issue will be assessed in depth in the following part.

Further underlying this issue is whether the Court would have the mandate to reconsider the actual outcome of *Quilter* and to redefine the common law definition of marriage in light of section 6 of the NZBORA, notwithstanding the enactment of the CUA and the RSRA.[107] On the one hand there is the argument that by turning their mind to the issue Parliament has eschewed same-sex marriage, a point reinforced by the alterations to terminology in the RSRA to make the spouse-partner distinction clear.[108] This situation would prohibit the Court backtracking from *Quilter*. On the other hand there is the argument that since *Quilter* the legal recognition of all kinds of relationships has been constantly evolving and the CUA and RSRA was merely a part of that evolution. Given that the creation of civil unions in other overseas countries has not been the end of the evolution, it is submitted that this argument is more compelling, thus opening a window for the Court to reconsider the result of *Quilter*.[109]

F Conclusion

Although *Quilter* is still good law in New Zealand, overseas developments render it a tenuous authority for the assertion that the restriction on same-sex

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[107] See footnote 33 for the text of section 6.

[108] Justice and Electoral Select Committee "Relationships (Statutory References) Bill" (1 March 2005) 3-4 <www.clerk.parliament.govt.nz> (last accessed 28 September 2005).

[109] The Netherlands, for example, are illustrative of this continued evolutionary pattern. The country repealed sodomy laws in 1810, equalised the age of sexual consent between same and opposite-sex couples in 1971, enacted anti-discrimination legislation protecting gays and lesbians in 1983, established same-sex registered partnerships in 1998, and legalised same-sex marriage in 2001.

marriage does not constitute discrimination. It is submitted that a New Zealand court would feel compelled to conclude that the prohibition on same-sex marriage was discrimination *per se*, and would thus be required to consider the significance that civil unions have on that discrimination. The purpose of the following section is to carry out this analysis and determine whether or not the creation of civil unions remedies this state of discrimination under the MA.

VI THE SIGNIFICANCE OF CIVIL UNIONS ON THIS DISCRIMINATION

This section of the paper proceeds on the basis that the prohibition on same-sex marriage *per se* constitutes discrimination and goes on to assess the significance of civil unions in alleviating that discrimination. The discrimination jurisprudence that has emerged out of Canada will be used in the analysis. It will be argued that the restriction of access to a fundamental institution puts same-sex couples at a disadvantage despite the availability of civil unions, and does so in a manner that denigrates same-sex couples. It is not denied that there are positive aspects to civil unions, but it is submitted that it is incorrect to claim they fulfil human rights imperatives.

A Is there differential Treatment Based on Sexual Orientation?

The enactment of the CUA does not change the fact that there is a formal distinction drawn under the MA on the basis of sexual orientation; the creation of civil unions in no way altered the current understanding of marriage under the

Act as interpreted by the Court in *Quilter*. Therefore, the focus here will be whether that distinction still amounts to substantive discrimination.

B Does the Distinction Discriminate in a Substantive Sense in that it is Demeaning to the Dignity of Same-Sex Couples?

As has been discussed in Part III, the existence of a distinction in the law is not enough to constitute discrimination. According to *Law*, a formal distinction drawn under the law will not necessarily be discriminatory unless the distinction discriminates in a substantive sense by imposing a disadvantage in a manner that perpetuates a prejudice or stereotype. Iacobucci J provides a helpful explanation of how on is to determine whether or not the distinction is demeaning to dignity:[110]

> Human dignity means that an individual or group feels self-respect and self-worth. It is concerned with physical and psychological integrity and empowerment. Human dignity is harmed by the unfair treatment premised upon personal traits or circumstances which do not relate to individual needs, capacities, or merits. It is enhanced by laws which are sensitive to the needs, capacities, and merits of different individuals, taking into account the context underlying their differences. Human dignity is harmed when individuals and groups are marginalized, ignored or devalued, and is enhanced when laws recognize the full place of all individuals and groups within…society.

Therefore, the issue that remains to be determined is whether civil unions are adequate to recognise the full place of same-sex couples within society by

[110] *Law v Canada* (Minster of Employment and Immigration) [1999] 1 SCR 497, para 53 (SCC) Iacobucci J for the Court.

according them concern, respect and consideration notwithstanding the prohibition on marriage. Overarching this analysis will be the four contextual factors outlined in *Law*,[111] which must be assessed from the point of view of a reasonable person in the position of the affected group.[112] It is important to point out at this stage that intention is not crucial to a successful discrimination claim.[113]

1 Differences between marriage and civil unions

The CUA is based on the provisions of the MA, but has been modernised to reflect the current law, policy and practice.[114] Thus, in form and process civil unions operate in largely the same way as marriages with only a few differences. They are essentially parallel institutions,[115] and it is generally considered that the differences between them are immaterial to the nature of the final product:

- Minors will not have a legal civil union without their parents consent, whereas minors who marry without their parents consent will have a legal marriage;[116]

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[111] As outlined on page these four factors are pre-existing disadvantage, stereotype or vulnerability of the claimant; correspondence between the grounds and the claimants actual needs, capacities and circumstances; ameliorative purpose or effects on more disadvantaged individuals; and the nature of the interest affected.

[112] *Law v Canada* (Minster of Employment and Immigration) [1999] 1 SCR 497, para 59-61 (SCC) Iacobucci J for the Court.

[113] See *Andrews v Law Society of British Columbi*a [1989] 1 SCR 143, 174 (SCC); *Law v Canada* (Minster of Employment and Immigration) [1999] 1 SCR 497, para 80 (SCC) Iacobucci J for the Court.

[114] Ministry of Justice Ministry of Justice <http://www.justice.govt.nz> (last accessed July 16).

[115] See Justice and Electoral Select Committee "Civil Union Bill" (29 November 2004) <http://www.clerk.parliament.govt.nz> (last accessed 28 September 2005) 3.

[116] Compare Civil Union Act 2004, s 23(2)(b) with Marriage Act 1955, s 17.

- The terminology is different. Marriage partners are termed spouses, whereas after a civil union you are termed civil union partners;
- Both civil unions and marriages require a celebrant. However there are separate application processes for becoming marriage and civil union celebrants and clergy are in a privileged position under the MA;[117]
- Whereas you can arrange for a New Zealand marriage overseas, you cannot arrange a New Zealand civil union overseas.[118] However, you can have your foreign marriage and civil union recognised as such in New Zealand, if your country is listed in the regulations in the case of civil unions.[119]

In terms of the legal benefits that flow from the respective forms registration, it is necessary to consider the role of the RSRA. The CUA and the RSRA are interdependent and inextricably linked, as it is through the RSRA that civil union couples get the same rights as married couples. The RSRA amends over 160 pieces of legislation in order to provide civil union partners the same rights and obligations that are attendant to marriage. It was considered that am omnibus bill would be the most effective and efficient way to amend all this legislation.

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[117] Civil Union Act 2004, s 26 and Marriage Act 1955, ss 7-14.
[118] Marriage Act 1955, ss 41-43.
[119] Civil Union Act 2004, s 25.

2 Pre-existing disadvantage and stereotype

The first contextual factor introduced in *Law* is whether or not there exists a pre-existing disadvantage, stereotype or vulnerability of the affected group. It cannot be denied that gays and lesbians are a group that has been historically subjected to considerable stigmatisation and prejudice. This fact was reinforced by the exclusion of same-sex couples from marriage in the absence of an alternative form of registration. However, the CUA now provides for an equivalent institution, arguably remedying that historical disadvantage. It is understood that a group's interests are more adversely affected in situations involving complete non-recognition or exclusion of that group.[120] Therefore it must follow that affirmative action has been taken to protect and recognise what was an essentially ignored and marginalised group of society weakens a claim based on discrimination.

3 The nature of the interest in question

Although this argument may be initially compelling, in *Law* Iacobucci J cautioned that the mere fact that legislation takes into account the claimant's actual situation will not necessarily defeat a discrimination claim. This is because the focus of the inquiry must always remain upon the central question of the differential treatment imposed by the legislation has the effect of violating

[120] *Egan v Canada* [1995] 2 SCR 513, 556 (SCC) L'heureux-Dubé J dissenting as cited in *Law v Canada* (Minster of Employment and Immigration) [1999] 1 SCR 497, para 74 (SCC) Iacobucci J for the Court.

human dignity.[121] The question that needs to be addressed is do civil unions go far enough? The guarantee of equality is not limited to the protection of economic rights, but an assessment of the discriminatory quality of a particular distinction in the law must also evaluate the societal significance of the interest affected. This will include consideration of whether the distinction restricts access to a fundamental institution of society or affects a basic aspect of full membership in society.[122] Do civil unions recognise the full place of same-sex couples in society?

(a) To what extent are civil unions a step down from marriage?

Marriage and civil unions are conceptually the same and were intended to be identical in nature. Both institutions provide for formal registration of relationships after which they have a legal status that acts a vehicle for concomitant rights; both recognise expressions of love and commitment between individuals, granting them respect and legitimacy as a couple. Therefore, it could be argued that the CUA removes any special status that was once accorded to marriage. If there is no added value in marriage, the interest in issue (i.e. the ability to marry) becomes insignificant. Indeed, in the opinion of Tim Barnett, the CUA prevents the treatment of gay and lesbians as second-class citizens.[123] Furthermore, given that there is no right to marriage in the NZBORA, there is no requirement that the state go any further and provide for same-sex marriage.

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[121] *Law v Canada* (Minster of Employment and Immigration) [1999] 1 SCR 497, para 70 (SCC) Iacobucci J for the Court.

[122] *Egan v Canada* [1995] 2 SCR 513, 556 (SCC) L'heureux-Dubé J dissenting as cited in *Law v Canada* (Minster of Employment and Immigration) [1999] 1 SCR 497, para 74 (SCC) Iacobucci J for the Court.

[123] Tim Barnett (2 December 2004) 622 NZPD 17406-17408.

This argument is closely related to the argument posed by the Law Commission in its 1999 report. In relation to its proposal for the creation of a new system of relationships registration, the New Zealand Law Commission claimed that it would possible for even the most cynical to observe that, as stated in *Street v Mountford* "…[t]he manufacture of a four-pronged implement for manual digging results in a fork even if the manufacturer, unfamiliar with the English language, insists that he intended to make and has made a spade."[124] The essence of this argument is that with the enactment of civil unions the debate is reduced down to one of semantics. Because marriage and civil unions are essentially the same in all but name, why therefore quibble over the word 'marriage' when the two institutions fulfil the same social and legal purpose. Are civil unions not just a rose by another name?[125]

As an alternative argument, proponents of civil unions argue that in any event the status of marriage as society's highest representation of self-worth is merely an historical perspective that will change over time; civil unions are an entirely new institution with vast potential for developing its own culture that could come to be as equally accepted as marriage. Whereas marriage is accompanied by an overhanging cloud of historical prejudice, civil unions will

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[124] *Street v Mountford* [1985] AC 809, 819 as cited in New Zealand Law Commission *Recognising Same-Sex Relationships* (NZLC SP4, Wellington, 1999) 8.

[125] *In re Opinion of the Justices: SJC-09163* [2003] 440 Mass 1201, 1220 (Supreme Judicial Court of Massachusetts) Justice Sosman dissenting. Justice Sosman claimed that the matter was a squabble over the name to be used and who gets to use the 'm' word. She also made reference to Shakespeare's famous phrase about a rose by any other name swelling as sweet.

develop their own unique characteristics and sense of purpose over time.[126] In the opinion of Tim Barnett, the enactment of the CUA has provided something that is one step better than marriage- "By the end I felt we had gone one stage better- creating a 21st Century institution, open to all, with its own culture and tradition still to develop. What a Rainbow-moulded gift to the whole community."[127] This feeling is reinforced by the fact that civil unions are intended to be an inclusive institution that treats both same-sex couples and heterosexuals as equals. They surpass religious, spiritual or conservative prejudice by according all relationships equal value and worth and this is an extremely positive development.

Moreover, because marriage as an institution carries with it both religious and cultural connotations there is a proportion of the gay and lesbian community that would never have any desire to opt into the institution at all, and would strongly advocate for a new institution free from the baggage that goes with marriage. In fact some members of the gay community consider marriage itself to be demeaning because of these connotations as well as the fact that marriage has a history of being used as an expression of dominant prejudices of the society and the time.[128] On a similar theme, there are some that would not want to be a party to a marriage because same-sex marriage is properly a form of protective

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[126] Tim Barnett "Civil Union Bill Hits the Ground Running" (29 November 2004) Press Release <http://www.labour.org.nz> (last accessed 14 July 1005).
[127] Tim Barnett "Same-Sex Marriage the Kiwi Way" (7 June 2005) Press Release <http://www.labour.org.nz> (last accessed 14 July 1005).
[128] Tim Barnett (2 December 2005) 622 NZPD 17406.

assimilation. It is gays and lesbians complying with the heterosexual (or *their*) system.[129]

(b) The symbolic value of marriage

Despite these arguments, it remains the necessary corollary of creating a new institution that it will not immediately have the equivalent symbolic value that accompanies an institution that has alone held a particular status in society for centuries. It is impossible to deny that marriage is an institution that has a history of symbolising the ultimate manifestation of love, commitment and stability. Although in Western society the institution may have originated in the Church, marriage is an institution that exists in the majority of cultures around the world. In this sense it is a union that transcends notions of culture and spirituality. When stripped down to its bare bones marriage represents the ultimate commitment of two people for the rest of their lives. Consequently, it cannot be viewed "...merely as a bundle of rights, divisible by measures into checklists of benefits and responsibilities. Marriage is a privileged status, with an impact greater than the sum of its parts."[130] Indeed it is described by many as the cornerstone of society; the glue that prevents it from crumbling.[131]

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[129] New Zealand Law Commission *Recognising Same-Sex Relationships* (NZLC SP4, Wellington, 1999) 4.

[130] David Buckel "Government fixes a label of inferiority on Same-Sex Couples When It Imposes Civil Unions and Denies Access to Marriage" (2005)16 Stan L & Pol'y Rev 73, 79.

[131] This was a frequently expressed view in submissions made to the Select Committee in regard to the CUA and the RSRA. See Alison Laurie *Report on the Written Submissions to the Justice and Electoral Select Committee on the Civil Union Bill and Relationships (Statutory References) Bill* (Wellington, November 2004) 6.

Although it is true that with the benefit of time civil unions may be able to develop its only symbolic meaning, at present their symbolic value is incomparable with marriage. Indeed, to people who enter into them and to society there is a significant difference between marriage and civil unions from a symbolic and emotional perspective.[132] The significance of the institution of marriage can be evidenced by the fact that the right to marry is a right that is protected by Article 23(2) of the ICCPR. Furthermore, the United States case of *Zablocki v Redhail* held that marriage was a fundamental civil right and the most important relation in life.[133] Although the New Zealand courts have not taken such a strong stance in relation to the right to marry, and there is no equivalent right to marry in the NZBORA, these factors illustrate the fundamental significance of marriage in Western society.

(c) Access to civil unions and the availability of choice

This point is reinforced by the availability of civil unions. Civil unions are available to both heterosexual and same-sex couples.[134] It was thought that allowing heterosexuals access to civil unions would eliminate any feeling of inferiority because the institution would be inclusive rather than entirely separate.[135] It was acknowledged that this could lead to the perception that there was a hierarchy of relationships, but the Cabinet Policy Committee considered

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[132] Nicholas Bala "Redefining Marriage in Canada and the United States: Moving in the Same Direction, But at Different Speeds" (12th World Conference of the International Society of Family Law, Salt Lake City, 19-23 July 2005) 21.
[133] *Zablocki v Redhail* (1978) 434 US 374, 383-384.
[134] Civil Union Act 2004, s 4.
[135] Cabinet Policy Committee "Government Civil Union Bill" (13 May 2003) POL (03) 117 <http://www.justice.govt.nz> (last accessed 20 September 2005).

that this could be remedied by creating parallel institutions.[136] However, in its 1999 report the Law Commission was of the view that any system of registered partnership that was an alternative to same-sex marriage should only be available to same-sex couples as there is no reason why heterosexuals should be entitled to both. It is submitted that this latter argument prevails. Regardless of the form and process, the existence of one exclusive and one inclusive institution unavoidably suggests a hierarchy. The implication is that the nature of those two institutions is not identical, but that the exclusive institution has some sort of 'special' status. Indeed it suggests that it is the very exclusion of the other group that gives it that special status.

An interrelated issue is that same-sex couples are not entitled to make the same choices as heterosexual couples. It is certainly positive that civil unions are an inclusive institution, but this should not restrict the choice of same-sex couples. The inability to make the choice that heterosexuals are entitled to make implies that same-sex couples are not of equal worth. Although some members of the gay and lesbian community may find marriage demeaning, this in itself does not justify a restriction of choice. This is not necessarily to suggest that civil unions would be acceptable if they were only open to same-sex couples, but merely to illustrate that the disparity in choice between heterosexual and same-sex couples underscores the disadvantage suffered by same-sex couples by being denied the ability to marry.

[136] Cabinet Policy Committee "Government Civil Union Bill" (13 May 2003) POL (03) 117 <http://www.justice.govt.nz> (last accessed 20 September 2005).

Thus, same-sex couples are still denied the opportunity to participate in a fundamental institution of society that has a firmly established position in society as the contemporary relationship of highest worth. In this respect, it is difficult to dispute that a restriction from entering into a fundamental institution of society does not confer a significant disadvantage. Of course, the more severe and localised the effect of the law on the affected group, the more likely it is that discrimination exists.[137] If mere denial of access to the institution is sufficient to persuade, the severity of this exclusion is enhanced by the consequences that stem from that exclusion. These consequences in turn increase the value of the interest affected.

(d) The true equivalence of rights accorded by civil unions

Although it is true that civil unions accord more or less the same rights as marriage, such an absolute assertion is problematic and incorrect. A number of incidents can be identified where they do not in fact have exactly the same rights as heterosexual couples. Despite the passing of the RSRA there remain in the law some discriminatory provisions. It is claimed that these provisions are justified because those areas of law will soon be under review or are already part of the reform process.[138] These areas of law are adoption; citizenship; guardianship; evidence; friendly societies; insolvency; law practitioners; property; wills; and status of children.

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[137] *Egan v Canada* [1995] 2 SCR 513, 556 (SCC) L'heureux-Dubé J dissenting as cited in *Law v Canada* (Minster of Employment and Immigration) [1999] 1 SCR 497, para 74 (SCC) Iacobucci J for the Court.

[138] Civil Union Campaign <http://www.civilunions.org.nz> (last accessed 2 Aug 2005).

Some of these areas of law are not merely incidental to life. Adoption is the prime example. Same-sex couples lack the biological ability to have their own children, and the inability to adopt severs one of the few options that they have to raise children. Although some may argue that it is unhealthy to raise children in same-sex relationships, there is evidence to suggest that this is an unfounded assertion.[139] It also creates an absurd anomaly in the law in the sense that a gay, lesbian or heterosexual individual can adopt a child, but they are unable to do that within a committed relationship.

It is claimed that these distinctions are justifiable because they are under review and it may only be a matter of time before they are amended and accord civil union partners exactly the same rights as same-sex couples. However this outcome is not certain and there is no guarantee that this is going to happen. Furthermore, in the meantime same-sex couples are burdened by the exclusion from these provisions. If there is an honest intention to accord same-sex couples equality with regard to the incidents of marriage, it would have been much more convincing to amend the legislation despite it being under review. These outstanding provisions highlight the fact that the continued prohibition on same-sex marriage means that same-sex couples who civilly unite are not automatically accorded identical rights as a heterosexual married couple and are therefore disadvantaged.

[139] This subject will be discussed in more detail in Part VII: *Is the Discrimination Justified?*

(e) International recognition

Furthermore, it is common knowledge that same-sex relationships are not recognised in any form in the majority of countries around the world. Therefore, it is uncertain how different countries will recognise and what status they will accord civil unions in their law. By denying same-sex couples admission to marriage status, the government is thereby increasing the potential for differential and disadvantageous treatment in foreign countries. This has certainly been a major concern with the creation of civil unions in the United States. Whereas some states have passed legislation to recognise same-sex unions,[140] many continue to refuse. Thus, when same-sex couples move states they may no longer be entitled to the rights they had in their own state and at no stage do they obtain the benefits at federal level. This will no doubt be a major concern to both same-sex and heterosexual couples who wish to live overseas. However, the impact is obviously greater on same-sex couples who are denied the choice to marry.

4 Correspondence with actual needs, capacities and circumstances?

It is true that under the substantive equality model, distinctions drawn under the law will not necessarily result in discrimination. Therefore, the creation of a separate institution for same-sex couples whilst maintaining the distinction under the MA does not automatically give rise to discrimination. For instance, a distinction that takes into account the actual differences in

[140] For example New York recognises same-sex marriages from other states, but does not allow same-sex marriage or registration of same-sex relationships in any other form.

characteristics between individuals in a manner which respects and values their dignity and difference will not be discrimination if there is equality as a result of the law.[141] It is here that the separate but equal institution in this context encounters a logical difficulty. The substantive discrimination model allows for distinctions that take into account *differences* between groups; distinctions essentially taking into account the actual needs, capacities or circumstances of the claimant group. Thus restricting access to marriage while providing a separate institution as an alternative will only be logical and therefore fair and dignified if there is a reason that justifies that separate treatment based on a difference between heterosexual and same-sex couples.

(a) The contemporary rationale for having a relationship legally recognised

Throughout history there have been particular reasons it was important to register relationships as a marriage. The passing of property and legitimising children are but two examples. However these concerns have now been eliminated because most of the law affecting persons and children now applies to married and non-married couples. As a result it can be assumed that the primary reason for having a relationship legally recognised is about security "tangible" validation of their emotional commitment to one another. It is submitted that although the individuals in same-sex couples have a different sexual orientation to heterosexual couples, the relationship itself is no different and heterosexual couples and the purpose of having that relationship formally recognised is no different either. As accepted by courts both in the United Kingdom and Canada,

[141] *Law v Canada* (Minster of Employment and Immigration) [1999] 1 SCR 497, para 28 (SCC) Iacobucci J for the Court.

same-sex relationships are capable of being 'conjugal' in nature.[142] Therefore, validation of emotional commitment is the common purpose of both same-sex and heterosexual couples for having a relationship registered.

Similar conclusions are reached when the state's interest in the regulation of marriage is assessed. The purpose underlying the contemporary state regulation of marriage is to provide a structured framework under which couples can publicly express their commitment and love to each other and voluntarily assume an array of rights and obligations. When that relationship breaks down, the law then provides the machinery for an orderly resolution of that situation. The public benefits of providing this framework have been outlined in Part IV. There is no evidence to suggest that since the state has had the responsibility of regulating marriage, there has been any interest in the promotion or encouragement of any particular conception of gender roles.[143] Therefore, there is nothing separating the interest the state has in regulating marriage and civil unions. Thus the creation of a separate institution cannot be defended on the grounds of protecting a state interest.

Procreation remains the most oft argued justification for restricting access to marriage. The basis of the argument is that the differential treatment is not based on a pre-existing prejudice but rather the biological reality that same-sex couples are unable to naturally have their own children. However, as was

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[142] *Ghaidan v Mendoza* [2004] 3 All ER 411 Lord Millet dissenting; *M v H* [1999] 2 SCR 3, para 58-59 (SCC) Cory J.

[143] Law Commission of Canada *Beyond Conjugality: Recognising and Supporting Close Personal Adult Relationships* (Ottawa, 2001) 129; Nicholas Bala "Redefining Marriage in Canada and the United States: Moving in the Same Direction, But at Different Speeds" (12th World Conference of the International Society of Family Law, Salt Lake City, 19-23 July 2005) 4.

mentioned in Part V of this paper, procreation has been widely rejected by courts as the contemporary purpose of marriage.[144] The reason behind this is that law does not require an intention or capability to have children before you may marry, and there is no restriction on using contraception within marriage. Furthermore, many unmarried couples choose to have children because longer a stigma attached to having children outside of marriage. In contemporary society marriage means many different things to different people, but in the secular nation of New Zealand, the rationale behind marriage is companionate as opposed to being based on the prescription of reproduction.

Other than procreation, perhaps the most significant reason it was deemed necessary to have separate treatment is to avoid offending those people that consider the traditional concept of marriage to be sacrosanct.[145] The objections are asserted on both religious and secular grounds. As outlined in Part II of this paper, it was a stated policy objective of the legislation to protect the traditional concept of marriage, an objective that was emphasised purposefully by the civil union campaign.[146] What is more, at the Select Committee stage there were amendments made to the omnibus bill to clarify the different terminology that was to be used for marriage and civil unions.[147] Indeed Tim Barnett views the creation of civil unions as a win-win situation because they allow for the preservation of the traditional concept of marriage as a union between a man and

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[144] See for example *Quilter v Attorney-General* [1998] 1 NZLR 523, 572 (CA) Tipping J; *Quilter v Attorney-General* [1998] 1 NZLR 523, 534 (CA) Thomas J; *Halpern v Canada* (AG) (2003) 225 DLR (4th) 529, para 90 (Ont CA) Blair J; *EGALE Canada Inc v Canada (Attorney General)* (2003) 13 BCLR (4th) 1, para 88 (CA) Prowse JA.

[145] See for example New Zealand Law Commission *Recognising Same-Sex Relationships* (NZLC SP4, Wellington, 1999) 6.

[146] Civil Union Campaign <http://www.civilunions.org.nz> (last accessed 2 Aug 2005).

[147] Justice and Electoral Select Committee "Relationships (Statutory References) Bill" (1 March 2005) 3-4 <www.clerk.parliament.govt.nz> (last accessed 28 September 2005).

a woman, while at the same time giving recognition that same-sex couples can share a love and commitment that is worth protecting.[148]

(b) Religious Objections

There are many that oppose same-sex marriage on religious grounds, asserting that the natural order of families is based on the union between a man and a woman and that this union is the cornerstone of society. It is not possible to generalise in regard to views held by Christians as there are some that believe homosexuality is fundamentally wrong, others that do not condemn homosexuality entirely but do consider that the traditional concept of marriage should be preserved, and others that would support same-sex marriage. Nonetheless, religious opposition to same-sex marriage is represented strongly in the submissions to the CUA and RSRA, seeing civil unions as no more than same-sex marriage.[149]

However, marriage is a secular institution in New Zealand, legally detached from the Church (except for the privileged position of clergy as marriage celebrants) and clearly regulated by the state alone. A valid marriage only necessitates civil requirements to be met, there being no requirement that couples getting married partake in any sort of religious ceremony. Therefore, the institution of marriage is no longer entangled with ideas of morality associated with the Church. It is therefore unfair to restrict access to a fundamental

[148] Tim Barnett (9 December 2004) 622 NZPD 17643-17644.
[149] See Alison Laurie *Report on the Written Submissions to the Justice and Electoral Select Committee on the Civil Union Bill and Relationships (Statutory References) Bill* (Wellington, November 2004) 4-5.

institution of society founded on an objection that is redundant under the contemporary status of the institution. In a secular society, legislation based on religious law is unacceptable.[150] It only encourages religious intolerance, condemning an integral and essential aspect of the lives of gays and lesbians.

More compelling is the argument that same-sex marriage infringes the right to freedom of religion protected by section 15 of the NZBORA. This argument could be advanced on three grounds- that same-sex marriage imposes a dominant social ethos that will limit the freedom to hold conflicting religious beliefs; that it may require religious officials to perform same-sex marriages; and that it will create a rights conflict in areas other than the solemnisation of marriage.[151] The first ground is essentially an assertion that the conferral of a right on one group infringes the right of another, essentially amounting to an equality argument. Such an argument cannot succeed as legislation permitting same-sex marriage would not impose a burden on any differential basis.[152] Although this may be the core of religious opposition, provision of same-sex marriage would not disallow individuals to manifest their beliefs personally.

The final ground of opposition is a matter that must be determined on the facts of actual conflict. Where a conflict has not been made out, then no conflict can be said to exist. Therefore, until legislation has been implemented alleged

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[150] Alison Laurie *Report on the Written Submissions to the Justice and Electoral Select Committee on the Civil Union Bill and Relationships (Statutory References) Bill* (Wellington, November 2004) 2; Mark Strasser "The Logical Case for Same-Sex Marriage: A Response to Professor John Witte Jr" in Lynne D Wardle and others (eds) *Marriage and Same-Sex Unions: A Debate* (Praeger Publishers, Westport, 2003) 60, 62.

[151] For examples of where this might occur see Anthony R Picarello "Other Rights at Stake in the Debate over Same-Sex Marriage" (2004) New Jersey Law Journal.

[152] See *Reference Re Same-Sex Marriage* (2004) SCR 79, paras 45 and 48 (SCC).

conflicts of rights are only in the abstract, and it is thus improper to assess if there would be an unacceptable conflict of rights in undefined spheres.[153]

However, in relation to the second complaint there is an identifiable conflict. If religious officials were compelled to solemnise same-sex marriages against their wishes, it would be in breach of their right to manifest their religion. The Supreme Court of Canada found that if legislation compelled religious officials to perform same-sex unions, this would certainly be in breach of the Charter protection of religious freedom. However, there was no compulsion in the law and the Court found that the Charter protection was broad enough to prevent religious officials from being forced to perform civil or religious marriages contrary to their beliefs.[154] It is submitted that the NZBORA protection would equally prevent religious officials from compulsion, and in any case the potential conflict could easily be addressed with the inclusion of a conscience clause in any marriage amendment that did not require religious officials to solemnise unions against their beliefs.

(c) Secular Objections

In addition to religious objections, secular arguments are advanced in opposition to same-sex marriage. The greatest secular objection to same-sex marriage is that it poses a threat to family and the moral state of society.[155] Implicit in this argument is the suggestion that marriage loses its value to society if it is

[153] See *Reference Re Same-Sex Marriage* (2004) SCR 79, para 51 (SCC).
[154] See *Reference Re Same-Sex Marriage* (2004) SCR 79, para 60 (SCC).
[155] Nicholas Bala "Redefining Marriage in Canada and the United States: Moving in the Same Direction, But at Different Speeds" (12th World Conference of the International Society of Family Law, Salt Lake City, 19-23 July 2005) 9.

something to which same-sex couples have access, as if the only thing that gives marriage its value is that a certain group of society has been precluded from enjoying it.[156] As has been illustrated above, formally registered same-sex relationships offer precisely the same benefits to family units and society. Therefore, this argument only serves to illustrate that conservative objections such as these are largely rooted in the stereotypical assumption that same-sex relationships do not deserving equal concern and respect because homosexuality is inherently morally wrong.

Finally and most fundamentally, in any event arguments based on need, capacity or circumstances must be made from the perspective of the claimant.[157] In any case, the fact that legislation may achieve a valid social purpose for one group cannot be used to deny an equality claim where the effect of that legislation conflicts with the purpose of the equality guarantee.[158] Thus, aside from the freedom of religion tension which it would be possible to remedy, all the above arguments would fail because they are not based on the need, capacity or circumstances of the *complainant* group. This contextual factor therefore provides a strong indication that civil unions do not remedy the affront to dignity under the MA.

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[156] Mark Strasser "The Logical Case for Same-Sex Marriage: A Response to Professor John Witte Jr" in Lynne D Wardle and others (eds) *Marriage and Same-Sex Unions: A Debate* (Praeger Publishers, Westport, 2003) 60, 62.
[157] *Halpern v Canada* (AG) (2003) 225 DLR (4th) 529, para 186 (Ont CA).
[158] *Law v Canada* (Minster of Employment and Immigration) [1999] 1 SCR 497, para 70 (SCC) Iacobucci J for the Court.

5 Ameliorative purpose

This contextual factor involves an inquiry as to whether the impugned legislation has an ameliorative purpose or effect on a more disadvantaged group in society. Iacobucci J stressed that this factor will only be relevant where the person or group that is excluded from the scope of the ameliorative legislation are more advantaged in a relative sense.[159] It is submitted that there is no evidence that the restriction on marriage serves any ameliorative purpose for heterosexual couples, particularly in light of the fact that same-sex couples are the historically disadvantaged group in this context.[160]

6 The nature and extent of the burden

As illustrated above, it cannot be denied that the effect of the CUA is to "fence off" same-sex couples purely on the basis of their sexual orientation and in the absence of need.[161] The seminal case of *Brown v Board of Education*[162] in the Supreme Court of the United States provides an analogous example of the effects of equal but separate treatment that is based purely on personal characteristics. The Court in *Brown* overruled *Plessy v Ferguson*[163], a case that established the separate but equal doctrine under which equality of treatment is accorded when

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[159] *Law v Canada* (Minster of Employment and Immigration) [1999] 1 SCR 497, para 72 (SCC) Iacobucci J for the Court.
[160] *Law v Canada* (Minster of Employment and Immigration) [1999] 1 SCR 497, para 72 (SCC) Iacobucci J for the Court.
[161] David Buckel "Government fixes a label of inferiority on Same-Sex Couples When It Imposes Civil Unions and Denies Access to Marriage" (2005) 16 Stan L & Pol'y Rev 73, 74.
[162] *Brown v Board of Education* (1954) 347 US 483.
[163] *Plessy v Ferguson* (1896) 163 US 537.

substantially equal facilities are provided to the two groups in question, even though these facilities are separate.[164]

In *Brown* Warren CJ renounced the separate but equal doctrine in the field of public education. At the root of his decision was a consideration of the effect of segregation itself on public education. His Honour emphasised the importance of education to democratic society, deeming it the very foundation of good citizenship. It was concluded that separation of educational facilities solely because of race generated "...a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone".[165] In relation to the effect on their educational facilities it was said that a sense of inferiority affects the motivation of the child to learn and thus may have detrimental affects on the educational and mental development of black children.[166]

A number of similarities can be drawn between these two situations. The fundamental importance of education to society is analogous to the fundamental private and public importance of official relationship recognition that encourages stable and committed relationships. *Brown* supports the proposition that separate treatment of same-sex couples, even if it accords the equivalent rights, is unfair and denigrates their relationships if there is no legitimate need for the separate treatment. If there is no need for the separation of resources in these circumstances, it must necessarily follow that the motivation behind the separation is founded on prejudice and therefore perpetuates a sense of inferiority.

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[164] *Brown v Board of Education* (1954) 347 US 483, 488.
[165] *Brown v Board of Education* (1954) 347 US 483, 494.
[166] *Brown v Board of Education* (1954) 347 US 483, 494.

Notwithstanding the obvious benefits that same-sex couples receive as a result of civil unions, it is possible to go so far as to argue that the deliberate fencing off of same-sex couples actually exacerbates the original affront to dignity. The passage of legislation by the government that not only allows, but expressly legitimises the separate treatment of same-sex couples compounds the feeling that their relationships are not equally valued by society. That is to say, the considered choice of language reflects the assigning of same-sex couples to a second-class status.[167] Moreover, when this inferior status has the sanction of the law, the consequences are even greater as it sends a message to society inviting further bias and discrimination.[168]

D Conclusion

Gays and lesbians have been subjected to historical disadvantage, this being a strong though not determinative indicator of discrimination.[169] The interest in question is a time tested institution that has a status incomparable to any other, access to which allows individuals and couples complete participation in society. Maintained restriction on access to that institution means that same-sex couples suffer additional disadvantaged because civil unions do not automatically confer precisely identical benefits to marriage. Furthermore, the creation of civil unions in the context of a continued restriction on marriage is not at all related to the

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[167] *In re Opinion of the Justices: SJC-09163* [2003] 440 Mass 1201, 1207 (Supreme Judicial Court of Massachusetts) Marshall J.
[168] David Buckel "Government fixes a label of inferiority on Same-Sex Couples When It Imposes Civil Unions and Denies Access to Marriage" (2005) 16 Stan L & Pol'y Rev 73, 75.
[169] *Law v Canada* (Minster of Employment and Immigration) [1999] 1 SCR 497, para 88 (SCC) Iacobucci J for the Court.

needs and capacities of same-sex couples, nor does it serve any ameliorative purpose. Rather, it is based purely on a pre-existing prejudice which is ultimately rooted in an adversity to homosexuality. It has been illustrated that on consideration of the contextual factors from *Law* the provision of a separate but equal institution therefore does not remedy the affront to dignity caused by the distinction under the MA. In fact, it may even be seen as exacerbating the discrimination given that the CUA represents a conscious decision on the part of the government to "fence off" same-sex couples. Therefore, there remains *prima facie* discrimination under the MA.

VII IS THE DISCRIMINATION JUSTIFIED?

A Section 5 of the NZBORA

Section 5 of the NZBORA provides that:

> Subject to section 4 of this Bill of Rights, the rights and freedoms contained in this Bill of Rights may be subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

This means that when it has been determined that there has been a *prima facie* breach of a right that is protected it must then be considered whether it can be justified. The justification for a piece of legislation may be established by the practical, moral economic or social underpinnings of the legislation in question.[170] This part of the paper considers and discusses the possibility of

[170] *Halpern v Canada* (AG) (2003) 225 DLR (4th) 529, para 186 (Ont CA).

advancing an argument that the social underpinning of the MA is the protection of children, justifying the continued prohibition on same-sex marriage.

In terms of the requirements under section 5 of the NZBORA, the limit in the MA is prescribed by law as it is created by a distinction that is drawn under legislation. However, whether or not the limitation is demonstrably justified in a free and democratic society entails more in depth consideration. The case of *Moonen v Film & Literature Board of Review*[171] established the test that is applied in New Zealand to determine whether or not a particular limitation can be justified in a free and democratic society. The *Moonen* test was derived from the Canadian test applied in relation to section 1 of the Charter which is the equivalent of the NZBORA's section 5. Thus, for the purpose of consistency, the Canadian test formulated in the case of *Oakes*[172] will be used as the reference point in the section 5 analysis.

Under the *Oakes* test,[173] the party seeking to uphold the impugned law has the burden of proving on the balance of probabilities that:

(a) The objective of the law is pressing and substantial;

(b) The means chosen to achieve the objective are reasonable and demonstrably justified in a free and democratic society. This requires:

a. The rights violation to be rationally connected to the objective of the law;

b. The impugned law to minimally impair the Charter guarantee; and

[171] *Moonen v Film & Literature Board of Review* [2000] 2 NZLR 9 (CA).
[172] *R v Oakes* [1986] 1 SCR 103 (SCC).
[173] *R v Oakes* [1986] 1 SCR 103, 138-13 (SCC) 9 Dickson CJ.

c. Proportionality between the effect of the law and its objective so that the attainment of the objective is not outweighed by the abridgement of the right.

According to the Ministry of Justice, the assertion that the limitation is demonstrably justified requires justifying the law with evidence such as research, empirical data, findings from consultations, reports or results from inquiries or reviews. That is to say, it must be based on high quality analysis and research that firmly establishes why a particular course of action is necessary. [174]

B Pressing and Substantial Objective

1 What is the objective?

The first step in this analysis is to identify the objective of the law, and then determine whether that objective is pressing and substantive enough to justify the limitation on the right. The existence of two institutions that essentially perform the same legal function opens the door to the argument that the MA must have some other primary objective other than formal registration of relationships accompanied by both the social and legal benefits. Although procreation has been rejected as the objective of marriage, there is potential to argue that the protection of children is the objective behind the MA and is an objective that justifies maintaining marriage as an exclusively heterosexual union. It is submitted that this is the only possible objective that warrants thorough discussion.

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[174] Ministry of Justice *The Non-Discrimination Standards of the Government and the Public Sector: Guidelines on How to Apply these Standards and Who is Covered* (Wellington, 2002) 22 <http://www.justice.govt.nz> (last accessed 25 September 2005).

The argument is that conventional marriage has served us well as the principal framework for relationships and for the nurture of children so the state should not encourage people to raise children outside of this context. Although there are some heterosexual and same-sex couples who chose to raise children outside of the marriage institution, these situations are exceptional. [175] Heterosexual marriage is the most natural and likely place for children to be conceived and raised and provides the best environment for raising children.[176] Moreover, as marriage is seen by many as essentially a licence to raise a family,[177] maintaining the restriction on same-sex marriage, in spite of civil unions, serves to reinforce the message that same-sex relationships are not a desirable.

Proponents of this view look to social science research for support arguing that research affirms that conventional marriage is good for society because it provides children with the care, nurturing and moral education necessary to become good citizens, ultimately helping them to become good citizens.[178] It is said that the reason that conventional marriage is the ideal situation for familial relationships is because the union of two persons of the opposite sex creates something unique, a special relationship of vast potential

[175] *Egan v Canada* [1995] 2 SCR 513, para 26 (SCC) La Forest J.
[176] Lynne D Wardle "Conference on Marriage, Families and Democracy: The Bonds of Matrimony and the Bonds of Constitutional Democracy" (2003) 32 Hofstra L Rev 349, 369.
[177] EJ Graff *What is Marriage for?* (Beacon Press, Boston, 1999) 117.
[178] Lynne D Wardle "Conference on Marriage, Families and Democracy: The Bonds of Matrimony and the Bonds of Constitutional Democracy" (2003) 32 Hofstra L Rev 349, 386.

value to society.[179] Furthermore, it provides the profound benefits of dual-gender parenting- a model for inter-gender relations;[180] the ability to show children how to relate to members of the same and opposite sex; [181] the complementarity of both male and female parenting styles; [182] the unique contribution of the father; [183] male and female contributions to linguistic development;[184] and so on.

There were many submitters that actually advanced this argument in opposition to the CUA. 1344 of the submissions supported the view that children needed to be raised by their biological parents and this was not optional.[185] The vehement opposition expressed in relation to civil unions on this matter can probably be explained by the fact that many submitters conflated the institutions, referring to same-sex civil unions as same-sex marriage. It is assumed that this vehement opposition to the CUA was similarly motivated by the belief that civil unions, being equivalent in nature, would themselves undermine the preference for raising children within conventional heterosexual marriage.

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[179] Lynne D Wardle "Conference on Marriage, Families and Democracy: The Bonds of Matrimony and the Bonds of Constitutional Democracy" (2003) 32 Hofstra L Rev 349, 373.
[180] Lynne D Wardle "Conference on Marriage, Families and Democracy: The Bonds of Matrimony and the Bonds of Constitutional Democracy" (2003) 32 Hofstra L Rev 349, 375.
[181] Lynne D Wardle "Conference on Marriage, Families and Democracy: The Bonds of Matrimony and the Bonds of Constitutional Democracy" (2003) 32 Hofstra L Rev 349, 373.
[182] Dean A Byrd and Kristen M Byrd "Dual Gender Parenting: A Social Science Perspective for Optimal Child Rearing" (12th World Conference of the International Society of Family Law, Salt Lake City, 19-23 July 2005) 5.
[183] Dean A Byrd and Kristen M Byrd "Dual Gender Parenting: A Social Science Perspective for Optimal Child Rearing" (12th World Conference of the International Society of Family Law, Salt Lake City, 19-23 July 2005) 69-13.
[184] Dean A Byrd and Kristen M Byrd "Dual Gender Parenting: A Social Science Perspective for Optimal Child Rearing" (12th World Conference of the International Society of Family Law, Salt Lake City, 19-23 July 2005) 7.
[185] Alison Laurie *Report on the Written Submissions to the Justice and Electoral Select Committee on the Civil Union Bill and Relationships (Statutory References) Bill* (Wellington, November 2004) 6.

As required by the Ministry of Justice, there must be high quality evidence produced to establish why a particular path is necessary.[186] Many studies have been conducted but they are not always conclusive because of theoretical or methodological deficiencies. Samples are frequently limited or not chosen at random.[187] However, there is a growing consensus in social sciences is that same-sex couples are just as fit and able to raise children as heterosexual couples. Moreover, there is no evidence to show that children suffer behavioural or developmental disturbances due to the sexual orientation of their parents.[188] Same-sex couples may raise children differently, but different does not necessarily mean worse.[189] The greatest concern is that children raised in same-sex relationships may be stigmatised.[190] However, this stigmatisation would arise from the fact that children are being raised in a same-sex relationship full stop. If those same-sex relationships were offered and accepted the option to marry, it is likely that this equal treatment under the law would in turn alleviate the social prejudice to which these children were subjected.

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[186] Ministry of Justice *The Non-Discrimination Standards of the Government and the Public Sector: Guidelines on How to Apply these Standards and Who is Covered* (Wellington, 2002) 22 <http://www.justice.govt.nz> (last accessed 25 September 2005).

[187] Nina Dethloff "Same-sex Couples as Parents" (12th World Conference of the International Society of Family Law, Salt Lake City, 19-23 July 2005) 5.

[188] Nina Dethloff "Same-sex Couples as Parents" (12th World Conference of the International Society of Family Law, Salt Lake City, 19-23 July 2005) 5; Nicholas Bala "Redefining Marriage in Canada and the United States: Moving in the Same Direction, But at Different Speeds" (12th World Conference of the International Society of Family Law, Salt Lake City, 19-23 July 2005) 10; See also the report issued by the Committee on Psychological Aspects of Child and Family Health, Ellen C Perrin and others *Technical Report: Coparent or Second-Parent Adoption by Same-Sex Parents* 109 PEDIATRICS 341 (2002).

[189] For example Carlos Ball argues that any perceived problems with same-sex parenting truly lie not with the parenting of lesbians and gay men but with normative positions, based on the stereotypical understandings of gender roles that are used to evaluate and assess the effects of that parenting; Carlos A Ball "Lesbian and Gay Families: Gender Nonconformity and the Implications of Difference" (2003) 31 Cap U L Rev 691.

[190] Nina Dethloff "Same-sex Couples as Parents" (12th World Conference of the International Society of Family Law, Salt Lake City, 19-23 July 2005) 5.

C Conclusion

Therefore, in the absence of cogent evidence that conventional heterosexual marriage is the most ideal environment in which to raise children, the protection of children cannot be seen as the pressing and substantial objective for continuing the restriction on marriage. In any case, in light of the increasing percentage of children being conceived and raised in same-sex relationships,[191] it is submitted that there is not rational connection between the limitation on the right and the objective. There is no indication that the restriction on marriage will effectively alter the ever increasing trend of children being raised by same-sex couples. One of the motivations behind civil unions was to provide a stable environment in which to raise children, and it is likely that the CUA (as argued by many opponents to the bill) will in fact encourage same-sex parentage.

VIII CONCLUSION

With the enactment of the CUA and the RSRA, the New Zealand government purported to be satisfying its human rights obligations under section 19 of the NZBORA. It was not alone in this view, with many of the country's constituents supporting the legislation on the basis that it finally accorded same-sex couples with the equality they deserved. However it has been illustrated that in light of overseas developments, *Quilter* no longer provides a satisfactory backdrop for the formulation of separate but equal legislation. The issue requires a full analysis which does not rely on *Quilter* as a starting point in order to truly

[191] *M v H* [1999] 2 SCR 3, para 75 (SCC) Iacobucci J.

determine whether or not the law is adequately protecting the self-worth of same-sex couples.

It is submitted that under a full analysis, civil unions do not remedy the discrimination suffered by same-sex couples by virtue of the distinction under the MA, and therefore fail to meet the policy objective of fulfilling human rights imperatives. The primary reason for this is that they remain excluded from a fundamental institution of society that symbolises the highest representation of self-worth, in the absence of a valid reason for doing so. Same-sex couples have been historically subject to unfair treatment in society due to their sexual orientation, and further differential treatment only serves to reinforce the stigma of inferiority imposed on their relationships. As stated by McIntyre J in *Andrews*, discrimination that is reinforced by the law is particularly repugnant as it contributes to the perpetuation or promotion of their unfair social characterisation.[192]

The necessary implication of this conclusion is that civil unions are an inadequate alternative to same-sex marriage because they do not ensure the preservation of the dignity of same-sex couples. Therefore, the MA should be amended and provision made for same-sex couples to marry. This would finally accord same-sex relationships with the concern and respect and would provide concomitant benefits for society by advancing important social policy objectives.

[192] *Andrews v Law Society of British Columbia* [1989] 1 SCR 143, 172 (SCC) McIntyre J.

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