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CIVIL UNIONS IN NEW ZEALAND

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ABSTRACT

Two highly controversial bills were introduced to the New Zealand Parliament in June 2004 and are currently before the Justice and Electoral Committee. The first bill is the Civil Union Bill 2004. It provides for a new legal relationship, called civil union, as an equal alternative to marriage for both heterosexual and same-sex couples. It is accompanied by the second bill, the Relationships (Statutory References) Bill 2004, which en bloc amends identified existing legislation in order to remove potential discrimination between married couples, civil union couples and de facto relationships. These bills have been introduced in response to the anti-discrimination standards set out in the Bill of Rights Act 1990 and the Human Rights Act 1993.

This paper investigates the issue of marriage and alternative relationship models in New Zealand, and scrutinises the justification of the proposed civil union legislation. After exploring the current legal situation of married or unmarried hetero- and homosexual couples in New Zealand, this paper outlines the corresponding international developments. In particular, the German Law on Life-Partnerships will be analysed, because the alternative relationship model in Germany is similar to New Zealand's civil union model. Subsequently, this paper assesses whether the proposed civil union legislation is an adequate solution to the legal discrepancies currently existing with regard to potentially discriminated against relationships.

This paper comes to the conclusion that the introduction of a legal relationship for same-sex couples, who are currently excluded from the institution of marriage, is necessary. On the whole, the proposed civil union legislation constitutes a fair solution. However, heterosexual couples should be excluded from the currently proposed legislation, in the light of the fact that they are entitled to marry. Their inclusion would only create further discrimination. In the end, this paper suggests that the establishment of one common relationship model for both heterosexual and same-sex couples is preferable to any other solution and should be the ultimate goal.

Word Length

The text of this paper (excluding abstract, table of contents, footnotes, bibliography and appendices) comprises approximately 11,972 words.

I INTRODUCTION

In New Zealand, the Human Rights Act 1993 (HRA 1993) makes it unlawful to discriminate against a person on grounds of their marital status or their sexual orientation, be it heterosexual, homosexual, or bisexual.¹ Yet, an investigation of New Zealand's legislation shows that in many cases laws still differentiate between married and unmarried couples. Although there are some provisions that apply to so-called de facto couples as well as married couples,² certain legal rights and responsibilities remain accessible to married couples only.³ A prominent example is section 42 (2) of the Burial and Cremation Act 1964, according to which only husband and wife can be buried in the same plot.⁴ In the light of the HRA 1993 these laws are potentially discriminatory, especially with regard to same-sex couples that are currently excluded from the legal institution of marriage and the corresponding legal status.⁵ In this context two highly controversial bills were introduced into Parliament on 24 June 2004 with the intent to remove the existing discrimination between married couples, heterosexual de facto couples, and same-sex couples.

The first bill is the Civil Union Bill, which provides for a new legal relationship called civil union.⁶ Civil unions provide an alternative to marriage for both homosexual and heterosexual couples, allowing them to publicly formalise and solemnise their relationships.⁷ The legal status of civil unions and marriages is meant to be equal. Therefore the Civil Union Bill is accompanied by a second bill, the Relationships (Statutory References) Bill (Omnibus Bill), which aims to remove unjustified discrimination on the basis of relationship status by amending or repealing identified discriminatory provisions.⁸ The Omnibus Bill ensures, for example, that the above mentioned Burial and Cremation Act 1964 applies equally to

¹ Human Rights Act 1993, ss 21(1)(b), 21 (1)(m).

² See for example Property (Relationships) Act 1976, s 2D.

³ See for example Burial and Cremation Act 1964 ss 15 (1) (a) (ii), 42 (2), Crimes Act 1961 s 67, Electoral Act 1993 s 109 (2) (c) (ii).

⁴ Also a parent, child, brother or sister can be buried in the same plot.

⁵ See *Quilter v Attorney General* [1998] NZLR 523 (CA).

⁶ Civil Union Bill 2004 (Civil Union Bill), no 149-1.

⁷ Helen Tunnah "Government moves to allow gay couples to legally 'tie the knot'" (16 June 2003) *The New Zealand Herald Online* <<http://www.nzherald.co.nz>> (last accessed 04 April 2004).

⁸ Relationships (Statutory References) Bill 2004 (Omnibus Bill), no 151-1; Colin James "Uncivil fight looms in Dalziel's plans for civil unions" (10 February 2004) *The New Zealand Herald Online* <<http://www.nzherald.co.nz>> (last accessed 04 April 2004).

married couples and couples in a civil union by inserting the words *civil union partner* in the relevant section.⁹

This paper investigates the justification of the introduction of civil unions into the New Zealand legal system. It argues that, if the institution of marriage is not made accessible to same-sex couples, a comparable option, such as civil union, must be established in order to eliminate unjustified discrimination. For heterosexual couples, however, this paper finds that there is no persuasive reason to provide for such an alternative, as these couples remain free to institutionalise their relationships through marriage.

This paper first gives an overview of the present legal situation of married and unmarried heterosexual or homosexual couples and explores the background of the Civil Union Bill and Omnibus Bill (Part II). Subsequently, this paper considers the corresponding situation in other countries, and outlines international trends and developments (Part III). In particular, this paper discusses the approach taken in Germany, where a law similar to the Civil Union Bill has been successfully enacted (Part IV). The analysis of the German solution is taken into consideration when, in the end, this paper assesses marriage and civil union in New Zealand (Part V).

This paper concludes that in New Zealand the establishment of a legal relationship for same-sex couples is inevitable. The civil union model proves to be a fair solution to combat unjustified discrimination on grounds of sexual orientation with regard to same-sex couples. Heterosexual couples, on the other hand, should be exclusively referred to marriage (Part VI).

Further, this paper indicates the desirability of a comprehensive redefinition of marriage, including same-sex relationships, but acknowledges that presently the political environment and social reality in New Zealand allows for civil unions at most. The implementation of the civil union legislation can be regarded as an important first step towards legal equality between hetero- and homosexual couples.

⁹ Omnibus Bill, above n 8, sch 13. The Omnibus Bill goes beyond accompanying the Civil Union Bill. It does not only remove legal discrimination between married couples and civil union partners, but also aims to remove discrimination against *de facto* couples. Supporters of the bill argue that in many cases it is not justifiable to treat *de facto* couples differently from married couples or civil union partners. Why, for example, should *de facto* partners be prohibited from being buried in the same plot? However, this interesting aspect of the Omnibus Bill and the question of potential discrimination against couples who choose not to marry or enter into a civil union lie outside the scope of this paper.

II OVERVIEW OF THE CIVIL UNION ISSUE IN NEW ZEALAND

A Addressees of Civil Union Legislation

Since the proposed legislation provides for an alternative to marriage, it is not relevant to couples who are committed to be in a de facto relationship and want to remain outside the legal scope of marriage or civil union. Civil unions are of interest for heterosexual de facto couples, who would like the certainty and stability of a legally recognised relationship but object to the concept of marriage due to its religious or traditional associations. Under the legislation it would also be possible for couples who are already married to reconsider their lifestyle choice and revert their marriage into a civil union. However, civil unions are of particular interest for same-sex couples because, as the law now stands, same-sex couples are excluded from the institution of marriage altogether. They are left without any possibility for public declaration of their commitment to each other and for that commitment to be legally and socially recognised.

B Background of and Need for Civil Union Legislation

1 Development towards legal recognition of same-sex couples

The introduction of the Civil Union Bill and the Omnibus Bill is the result of a long-term struggle by the homosexual lobby for recognition and equal rights. In New Zealand, developments towards legal recognition of homosexual relationships began in 1986 with the decriminalisation of private homosexual acts of adult males.¹⁰ Following that, same-sex relationships have slowly gained more legal recognition.

New anti-discrimination standards in favour of same-sex relationships were set out by two important acts, the HRA 1993 and the Bill of Rights Act 1990 (BORA 1990). Section 21 (1) (b) and (m) of the HRA 1993 prohibits discrimination on the grounds of marital status and sexual orientation. Article 19 (1) of the BORA 1990 gives effect to this prohibition by providing that "[e]veryone has the right to freedom from discrimination on the grounds of discrimination in the Human Rights Act". In the light of these provisions the exclusivity of the Marriage Act 1955 has been challenged several times with the aim of establishing the right for same-sex couples to have their relationship fully recognised. In *Quilter v Attorney General* three

¹⁰ Homosexual Law Reform Act 1986.

lesbian couples sought marriage licences under the Marriage Act 1955. Ultimately the Court of Appeal held in 1998 that marriage only applies to a union between a man and a woman and that the Marriage Act 1955 justifiably does not apply to same-sex relationships.¹¹ Following that, in 1999 the Law Commission published a paper on the recognition of same-sex relationships and proposed that “[t]here should be an enactment providing for the registration of same-sex partnerships, such registration to have to same effect as a marriage between opposite-sex parties.”¹²

2 *Current situation of unmarried couples and reasons for the change*

(a) Present legal status of de facto relationships

In recent years, a number of laws have been amended or reformed and as a result regulate the rights and obligations of people in hetero- or homosexual de facto relationships¹³ equivalently to those of married people.¹⁴ Arguably the most important example is the Property (Relationships) Act 1976. Until 2002 there were significant differences in the way property was shared when a relationship ended depending on the marital status. Now, under certain circumstances, the Property (Relationships) Act 1976 treats married and de facto couples identically when dealing with legal issues of relationship property. Homosexual couples are included under the definition of de facto relationships as stipulated in section 2 D of the Property (Relationships) Act 1976.¹⁵

¹¹ *Quilter v Attorney General*, above n 5.

¹² New Zealand Law Commission *Recognising Same-Sex Relationships* (NZLC SP4, Wellington, 1999) 8.

¹³ According to Property (Relationships) Act 1976, s 2D a *de facto relationship* is a relationship between two persons (whether a man and a woman, or a man and a man, or a woman and a woman) – (a) who are both aged 18 or older; and (b) who live together as couple; and (c) who are not married to one another.

¹⁴ Compare Property (Relationships) Act 1976, s 2D; Estate and Gift Duties Act 1968, s 75A(1); Family Protection Act 1955, sec 2(1); Family Proceedings Act 1980, s 60(1); Family Commissions Act 2003, s 4; Administration Act 1969 s 2(1); Income Tax Act 2004, CS 4(b); Tax Administration Act 1994, s 173M(7); Taxation (Relief, Refunds and Miscellaneous Provisions) Act 2002, s 91(7); Health Practitioners Competence Assurance Act 2003, sch 3 s 11 (1)(d).

¹⁵ Most laws treating married and de facto couples equally refer to the Property (Relationships) Act's definition of de facto relationship. Some other acts provide equal rights and obligations for unmarried different-sex or same-sex couples by including them, besides husband and wife, under the interpretation of terms like *spouse* (Parental Leave and Employment Protection Act 1987, s 2; Injury Prevention, Rehabilitation, and Compensation Act 2001, s 18; Electricity Act 1992, s 111(2)(e)), *partner* (Domestic Violence Act 1995, s 2; Harassment Act 1997, s 2 (1); Housing Reconstruction Act 1992, s 42) or *immediate family* (Sentencing Act 2002, s 4; Victims' Rights Act 2002, s 4).

(b) Remaining discrimination

Despite singular changes, there are still more than 100 pieces of potential discriminatory legislation in New Zealand that exclude unmarried, and therefore any homosexual couple, from their scope.¹⁶ For instance, minors under the age of 18 years are regarded as competent in several laws only if they are married or have been married.¹⁷ Marriage is also a privilege if someone has been deported or repatriated from New Zealand. The Immigration Act 1987 provides that the removed person, or that person's spouse, can receive assistance for the purpose of reuniting the spouse with the person, including monetary reimbursement for travelling or other related costs.¹⁸ There is no such support for partners in other committed relationships. Moreover, unmarried partners are, by convention, not regarded as next of kin. They can therefore be excluded from hospital visitation, medical decision-making or funeral arrangements, even if they have been together for decades.¹⁹ This can be extremely distressing for the partners.

The Omnibus Bill identifies these and other potentially discriminatory laws and proposes changes as to the comprehensive inclusion of civil unions and, where appropriate, *de facto* couples.²⁰ Yet, marriage is not only of advantage when it comes to legal status. There are provisions that might even be regarded as potentially discriminatory in the opposite way. Section 67 of the Crimes Act 1961, for example, specifies the crime of husband and wife conspiring. Excluding other committed relationships from this crime is not necessarily justified. Further examples can be found concerning monetary matters. For instance section 5(a) of the Disabled Persons Community Welfare Act 1975 provides power to the Director-General to regard income of disabled person and his or her spouse only. The Omnibus Bill also identifies and proposes changes for those provisions, since its objective is the removal of any discrimination on grounds of sexual orientation and marital status.²¹

¹⁶ David Young "Uncivil union" (17 to 23 April 2004) *The New Zealand Listener Online* <<http://www.listener.co.nz>> (last accessed 14 June 2004); Tunah, above n 7.

¹⁷ See for example Residential Tenancy Act 1986, s 2(1) "Adult"; Defence Act 1990, s 36(1); District Court Act 1947, s 50(2).

¹⁸ Immigration Act 1987, s 148.

¹⁹ "Reasons for change" Civilunions.org <<http://civilunions.org.nz>> (last accessed 01 August 2004).

²⁰ The purpose of the Omnibus Bill to remove discrimination against *de facto* couples that do not want to marry nor enter into a civil union is not the subject of this paper, see above n 9.

²¹ See Omnibus Bill, above n 8, sch 13: Crimes Act 1961 and Disabled Community Welfare Act 1975.

C *Core of Debate*

The Civil Union Bill and the Omnibus Bill carry with them potential for drastic improvements regarding the legal rights of individuals involved in same-sex relationships especially. Therefore it is not surprising that the bills are mostly treated as homosexual issues. In comparison, the issue of heterosexual civil unions takes a backseat in the discussion, although the number of potentially affected heterosexual de facto relationships is reportedly 30 times higher than the number of same-sex relationships.²² Hence, though civil union is an institution for both heterosexual and homosexual couples, the public debate focuses primarily on the pros and cons of granting equal rights to homosexual relationships. Opponents of the Civil Union Bill have even dubbed it *gay marriage bill*.²³ This paper consequently focuses primarily on civil unions of same-sex relationships.

III *INTERNATIONAL TRENDS AND DEVELOPMENTS*

For the examination of the proposed civil union legislation in New Zealand it is important to consider an international perspective of the issue.

A *Legal Recognition of Same-Sex Couples*

According to a report published by Amnesty International “[a]t least 70 states have entered the 21st century with laws on their statute books prohibiting same-sex relations”;²⁴ some of them are even still applying the death penalty. Fortunately, in modern societies all around the world, a movement towards legal recognition of same-sex couples is noticeable. But what does *legal recognition* actually mean? Some people might feel that legal recognition starts with the decriminalisation of homosexual conduct.²⁵ Others might think that legal recognition will only be achieved once all distinctions between hetero- and homosexuals are eliminated. In order to allow a comprehensive examination of the subject, the term legal recognition should be understood in a broad sense, commencing with the positive acceptance of homosexual couples as legal entity.

²² Nick Venter “Civil dis-union” (25 June 2004) *The Dominion Post* Wellington A1.

²³ See Kevin Taylor “United Future attacks ‘gay marriage’ bill” (12 April 2004) *The New Zealand Herald Online* <<http://www.nzherald.co.nz>> (last accessed 27 April 2004).

²⁴ Amnesty International *Crimes of hate, conspiracy of silence – Torture and ill-treatment based on sexual identity* (22 June 2001) 12 <<http://web.amnesty.org>> (last accessed 16 June 2004).

²⁵ In New Zealand criminal sanctions against consensual homosexual conduct between males have been removed by the Homosexual Law Reform Act 1986 which amended the Crimes Act 1961. Consensual homosexual conduct between females has never been criminalised in New Zealand.

The highest degree of legal recognition is achieved when a state provides same-sex couples with a legal relationship comparable or, ideally, identical to marriage. Different levels of this ideal have been reached in different states so far. A number of states have already successfully introduced new relationship models to their legal system. In other countries corresponding legislation has been introduced and is still in the legislation process. New Zealand is one of these countries. Another example is the United Kingdom, where the Civil Partnership Bill is currently before Parliament.²⁶ There are also countries, for example Austria, in which the debate about establishing a new legal relationship like civil unions has not yet reached the parliamentary level, although the issue is widely discussed in public.²⁷

1 *'Registration of relationships' models*

In 1989, the first country to enact legislation providing same-sex couples with the opportunity to register their relationship was Denmark.²⁸ Norway, Sweden, the Netherlands and Iceland followed the Danish example and granted registered same-sex couples similar rights to married couples.²⁹ Finland, France and Germany were next, and also Portugal, some regions in Spain and Argentina introduced comparable regulations.³⁰ The extent of the rights granted to same-sex couples differs in each country, especially in regard to delicate questions like adoption. The countries of Denmark, Sweden, Iceland and the Netherlands are the most progressive towards allowing registered same-sex couples to adopt children.³¹

2 *'Gay marriage' models*

It is important to distinguish the registration model from the legal approach commonly referred to as gay marriage. Gay marriage means allowing homosexuals to celebrate and formalise their relationship as *normal* marriage. The issue of gay marriage and the issue of creating a new type of legal relationship, such as civil

²⁶ Civil Partnership Bill (UK) <<http://www.publications.parliament.uk>> (last accessed 02 August 2004); "Gay couples to get joint rights" (31 March 2004) *BBC NEWS online* <<http://news.bbc.co.uk>> (last accessed 17 June 2004).

²⁷ Homosexuellen Initiative (HOSI) Wien "Ehe-Verbote für Lesben und Schwule weltweit im Wanken" (24 February 2004) <<http://www.hosiwien.at>> (last accessed 17 June 2004).

²⁸ The Danish Registered Partnership Act 1989 (Dk).

²⁹ New Zealand Law Commission, above n 12, 7; James Graff "Summer of Love" (7 June 2004) *TIME* New York 51.

³⁰ Ewa Pagacz "Same-Sex Marriage – An International Human Right" (14 April 2004) *BadSubjects* <<http://eserver.org/bs>> (last accessed 17 June 2004).

³¹ Pagacz, above n 30.

union, might be related but remain two separate issues and should not be confused. As described above, several countries have made the effort to achieve equality by establishing a legal relationship comparable to marriage, while leaving the institution of marriage untouched. Traditional marriage has religious connotations and many societies seem not yet ready to give up the perception of marriage as a union between a man and a woman. Nevertheless, the same people that are against gay marriage might still be generally in favour of equal rights for homosexuals and support a registration model.³² Compared with the attempt to redefine traditional marriage, the registration model is arguably an easier way to attain legal equality for homosexual couples.

However, some states have actually redefined marriage to make it equally accessible for homosexuals. In 2001, the Netherlands, after having successfully introduced a registration model in 1998,³³ was the first country in the world to eliminate the traditional definition of marriage as union between a man and a woman³⁴. Belgium subsequently adopted a similar model. Furthermore, some Canadian provinces have allowed same-sex couples to marry,³⁵ and following a Supreme Court's decision at the beginning of this year, same-sex marriage also became legal in the American state of Massachusetts.³⁶

Regardless of this development, it can not be said that there is a widespread trend towards redefining marriage. In Australia the Prime Minister John Howard recently asked Parliament to amend the law to stipulate that marriage must involve a man and a woman.³⁷

³² "Recognising Same Sex Relationships" (October 2003) <<http://www.superdrewby.com>> (last accessed 17 June 2004): "If the vast percentage of Australian and American citizens (over 70% in the US) believe that gays and lesbians should have equal rights, but those same people don't support Gay Marriage, this tells us we are saying or doing something wrong!"

³³ Dutch Partner Registration Act (NL) in force from 1 January 1998.

³⁴ Arjan Schippers "Wedding Bells for Dutch Gay Couples" (15 August 2001) <<http://www.rnw.nl>> (last accessed 10 May 2004).

³⁵ See Toby Sterling "The Global View Of Gay Marriage" (4 March 2004) *CBSNEWS.com* <<http://www.cbsnews.com>> (last accessed 18 June 2004).

³⁶ "Wedding dream comes true for Couple No 1" (18 May 2004) *The Dominion Post* Wellington B2; "Gays say I do as Bush calls for ban" (19 May 2004) *The Dominion Post* Wellington B1.

³⁷ "Australia to prevent gay marriage" (27 May 2004) *BBC NEWS online* <<http://news.bbc.co.uk>> (last accessed 19 June 2004); "Gay marriage ban" (05 August 2004) *The Dominion Post* Wellington B1.

B *Recognition of Same-Sex Relationships by Church*

The recognition of same-sex unions by law has to be distinguished from the recognition of such unions by the church. Traditional marriage has secular as well as religious aspects, but only the secular aspect can be subject to legislation and state interference. It is solely the church's decision who is regarded as married, or equally bound to each other, in the eyes of the church.

One of the strongest opponents of civil unions or same-sex marriages is the Vatican, but there are also other religious objectors.³⁸ They base their objection on traditional religious beliefs and their interpretation of the Bible, claiming also that other ancient faiths share their view.³⁹ Support is sought by passages from the Bible such as "[F]rom the beginning of creation, God made them male and female. For this reason a man shall leave his father and mother [and be joined to his wife] and the two shall become one flesh."⁴⁰ It has been stated that the Bible was clear in terms of homosexuality as a dysfunction, an abomination, and that a minister of religion could not compromise that position by offering ceremonies to same-sex couples without offending the Christian community.⁴¹ The Vatican declared that "[m]arriage is holy, while homosexual acts go against natural moral law".⁴² Muslim authorities are also unalterably opposed to the recognition of same-sex unions.⁴³

On the other hand there are some churches, or single priests, pastors or ministers that feel differently and welcome civil unions or same-sex marriages as part of their community.⁴⁴ Religious ceremonies are celebrated and same-sex unions are not valued less than marriages.⁴⁵

³⁸ The Anglican and Methodist Church consider formal splits over the issue of homosexuals; "Church might split over gays" (04 May 2004) *The Dominion Post* Wellington B1; Rachel Zoll "Methodists may split over gay" (7 May 2004) *Detnews.com* <<http://www.detnews.com>> (last accessed 03 August 2004).

³⁹ New Zealand Catholic Bishops' Conference *Letter to the Members of Parliament concerning the Civil Unions Bill* (April 2004) <<http://www.catholic.org.nz>> (last accessed 03 August 2004).

⁴⁰ Mark 10:6-8.

⁴¹ See Tracy Watkins "Church blessing for civil unions" (22 June 2004) *The Dominion Post* Wellington A1.

⁴² Offices of the Congregation for the Doctrine of the Faith *Considerations regarding proposals to give legal recognition to unions between homosexual persons* (3 June 2003) <<http://www.vatican.va>> (last accessed 10 August 2004).

⁴³ Graff, above n 29, 51.

⁴⁴ Watkins, above n 41.

⁴⁵ Lee Foley "Churches must engage the world to live the gospel" (March 2004) *United Church News* <<http://www.ucc.org/ucnews>> (last accessed 03 August 2004).

In the end, the question of giving same-sex union a religious blessing remains the churches' business, but the introduction of legal provisions in favour of same-sex couples might contribute to a general change of attitude towards equality and acceptance.

C Alternative to Marriage for Heterosexual Couples

On the other side of the issue of same-sex couples stands the question of whether or not different-sex couples should be offered an alternative to marriage in line with civil union. Prima facie it seems unjust to exclude heterosexual couples from the scope of a new legal relationship, since it might not only be same-sex couples who would be interested in a legally recognised relationship model other than traditional marriage.

In most of the countries that have introduced a new relationship model for same-sex couples, the issue of excluding or including different-sex couples had been discussed and was eventually dismissed.⁴⁶ Arguably, since heterosexual couples are undeniably legally allowed to get married, their exclusion from an alternative model does not constitute unfair discrimination against them. Yet, some countries offer their alternative model to both homosexual and heterosexual couples. The main examples for this are the French civil solidarity pacts and the Dutch registered partnerships.⁴⁷ According to the first reading of the Civil Union Bill the New Zealand model will also be available for all couples, regardless of sexual orientation.⁴⁸ Whether this inclusion of different-sex couples is justified with regard to the New Zealand legal system will be analysed below (Part V).

IV MARRIAGE AND SAME-SEX UNIONS UNDER GERMAN LAW

Before scrutinising the issue of civil unions in New Zealand, the situation of one country that has already implemented legislation on same-sex unions shall be analysed in more depth for purposes of comparison. Germany is the most interesting example to be analysed in this context because a legal relationship for same-sex unions has successfully been introduced despite great opposition and strict

⁴⁶ See Denmark, Sweden, Iceland, Finland, Germany, The United Kingdom.

⁴⁷ The Dutch Partner Registration Act (NL) continues to apply, although marriage has now been opened to same-sex couples in the Netherlands.

⁴⁸ Civil Union Bill, above n 6, cl 7.

constitutional requirements that protect traditional marriage. The German Constitutional Court, which possesses the power to declare laws void, was called upon to decide on the legal validity of the legislation. The Constitutional Court's rulings have highest authority in Germany. The Court found in favour of same-sex unions. The decision presents valuable arguments for the corresponding New Zealand situation.

A Background of Marriage and Same-Sex Relationships in Germany

In Germany, homosexual male conduct was partly criminalised until 1994, when the last remainders of criminalisation were finally abandoned.⁴⁹ In the 1990s a discussion on the introduction of a new legal relationship for same-sex couples arose. The main argument on this issue has always been that such an institution would violate the institution of marriage. Marriage, defined as an enduring union between a man and a woman, is a traditional value in German law and society that enjoys special protection under the German Constitution.⁵⁰ The German Constitution is superior to all other German legislation. The most important characteristic of constitutional protection is that any conflicting law is automatically void. A new law allowing same-sex couples to marry would therefore be invalid, as presently marriage must be entered into by a man and a woman. The German system is different from New Zealand, where no superior law exists with which the introduction of same-sex marriages or civil unions could conflict.

However, there is the theoretical possibility of changing the Constitution in Germany to redefine marriage, although constitutional changes are very rare as they require a special amending law which must be supported by two thirds of the Members of Parliament.⁵¹ In a matter as controversial as homosexuals and marriage such a consensus is highly unrealistic. Therefore, the foremost aim of those who support equal rights for homosexuals in Germany was not the alteration of the definition of marriage, but the introduction of an alternative model for same-sex couples. Some regard the introduction of a new legal relationship as a preliminary stage in generating a change in the society's consciousness towards the ultimate goal of the redefinition of marriage.

⁴⁹ "Geschichte des § 175 StGB" <<http://www.lindenstrasse.de>> (last accessed 04 August 2004).

⁵⁰ Grundgesetz der Bundesrepublik Deutschland (German Constitution) (D), art 6.

⁵¹ German Constitution, above n 50, art 79.

B The Law on Life-Partnerships 2001

After intensive debates, and despite a great opposition from the conservative parliamentary parties, the Law to End Discrimination Against Same-Sex Partnerships eventually came into force in Germany on 1 August 2001.⁵² In its article 1 this law provides for the Law on Life-Partnerships, which establishes and regulates the new legal relationship for same-sex couples in 19 paragraphs. Articles 2 and 3 of the Law to End Discrimination Against Same-Sex Partnerships are amendments to the German Civil Code, as well as other federal laws, in order to implement the equality of the newly created life-partnerships.

1 Scope of the Law on Life-Partnerships

According to section 1 of the Law on Life-Partnerships two persons of the same sex can declare, in front of a public authority, that they want to commit to a lifelong partnership. Excluded are people who are minors, those who are already married or in a life-partnership, and people of certain degrees of blood relationship.⁵³ By effectively declaring their commitment, the couples enter into a so-called life-partnership which has a legal status comparable to marriage in many important areas of the law.

Of high importance for most couples is the fact that life-partners are regarded as next of kin.⁵⁴ Furthermore, they can choose one of their surnames as a partnership name,⁵⁵ they owe each other a certain duty of care,⁵⁶ they can make specific declarations and arrangements about their shared assets,⁵⁷ and they are required to pay maintenance and alimony, if the need should arise.⁵⁸ Life-partners may also have a limited form of child custody with regards to their partner's children.⁵⁹ The law of succession for life-partners is regulated similarly to the law applicable to married couples.⁶⁰ Equal rights between marriage and life-partnerships also exist in other

⁵² Compare media release of the Bundesverfassungsgericht (German Constitutional Court) "Lebenspartnerschaftsgesetz kann in Kraft treten – einstweilige Anordnung abgelehnt" (18 July 2001) <<http://www.bverfg.de>> (last accessed 04 August 2004).

⁵³ Gesetz über die eingetragene Lebenspartnerschaft (German Law on Life-Partnerships) (D), s 1(2).

⁵⁴ German Law on Life-Partnerships, above n 53, s 11.

⁵⁵ German Law on Life-Partnerships, above n 53, s 3.

⁵⁶ German Law on Life-Partnerships, above n 53, s 4.

⁵⁷ German Law on Life-Partnerships, above n 53, ss 6, 7.

⁵⁸ German Law on Life-Partnerships, above n 53, ss 5, 16.

⁵⁹ German Law on Life-Partnerships, above n 53, s 9.

⁶⁰ German Law on Life-Partnerships, above n 53, s 10.

areas such as tenancy law and the right to refuse to give evidence.⁶¹ As with traditional marriage, a legally binding procedure is prescribed by which life-partners must abide if they decide to dissolve the partnership.⁶²

2 *Exclusion of Heterosexual De Facto Couples*

The legislation proposed for civil unions in New Zealand, which applies equally to different-sex and same-sex relationships differs from the German Law on Life-Partnerships which is exclusively applicable to homosexual couples. The inclusion of heterosexual couples under the life-partnership legislation had not been an important issue in the public debate surrounding the law-making process in Germany,⁶³ although de facto relationships as such enjoy no special rights or protection under German law.⁶⁴ As in New Zealand, the public controversy surrounding the legislation focused on the enhancement of homosexual rights, not relationship rights in general. Indeed, the prevalent opinion in Germany seems to be those heterosexual de facto couples who deliberately chose not to partake in rights and obligations derived from marriage would presumably not be interested in an alternative institution to marriage.⁶⁵

3 *Compatibility with the German Constitution*

After the life-partnership legislation had come into force, the conservative governments of three Federal States made a joint application to the German Constitutional Court, claiming that the legislation was conflicting with superior constitutional law and consequently had to be declared void.⁶⁶ This was the final attempt to stop the legislation, as the Constitutional Court is the court of ultimate resort. The applicants produced an argument based on aspects concerning the formalities of the law-making process and some minor legal issues, which the Court discarded rather quickly. Pursuant to the main argument put forward by the applicants, the judges principally dealt with a possible breach of article 6 and article 3 of the German Constitution.

⁶¹ The relevant sections in the corresponding laws have been amended to that effect.

⁶² German Law on Life-Partnerships, above n 53, s 15.

⁶³ Compare Jochen Duderstadt *Die nichteheliche Lebensgemeinschaft* (2 ed, Luchterhand, München, 2004) 125 to 127, who investigates the model of life-partnerships as possible alternative model for de fact heterosexual couples, but draws the conclusion that it would not be appropriate.

⁶⁴ Rainer Fischer *Nichteheliche Lebensgemeinschaft* (2 ed, Nomos, Baden-Baden, 2003) 27 to 31.

⁶⁵ Compare Duderstadt, above n 63, 6 to 11.

⁶⁶ BVerfG 1 BvF 1/01 (17 July 2002) <<http://www.bverfg.de>> (last accessed 06 August 2004).

(a) Article 6 of the German Constitution: marriage and family

Article 6 of the German Constitution states that marriage enjoys special protection under the Constitution. Neither the Constitution nor any subordinate law provides a definition of marriage, but according to the Constitutional Court's case law marriage is a lifelong union between a man and a woman.⁶⁷ Article 6 protects the institution of marriage itself, which means the guarantee of its continued existence, its basic features and structure. Furthermore article 6 protects the freedom to enter into a marriage. The question arises as to whether the establishment of life-partnerships between same-sex couples violates marriage.

The Court found that the life-partnership legislation does not affect the freedom to enter into a marriage.⁶⁸ Despite the option of the life-partnerships, heterosexual couples eligible to marry under German law can still enter into marriage without any restrictions. The Court's argumentation is plausible since the option of life-partnerships just broadens the pool of choices, but does not limit any freedoms.

As to the institutional guarantee, the opponents claimed that the life-partnership legislation is a mere copy of marriage under a different label, which violates the exclusivity of marriage with its special features.⁶⁹ They claimed that marriage between a man and a woman is protected as a vital element of society for the upbringing and education of children. Therefore not only was the opening of marriage to homosexuals prohibited, but also the establishment of any relationship with a legal status comparable to marriage. The Court responded that with respect to the special protection deriving from article 6 the state undeniably is not allowed to create a relationship model that would be privileged and superior to marriage,⁷⁰ but article 6 does not generally prohibit other legal relationships besides marriage.⁷¹ According to the Court, the state is free to regulate relationships equal to marriage, because the exclusivity and special protection of marriage in the Constitution cannot be interpreted as a ban on offering other relationships a similar legal framework.⁷² Additionally, marriage and life-partnership do not hold the same legal standing. The addressees are different, because parties of a life-partnership are usually not potential

⁶⁷ BVerfG, above n 66, para 87.

⁶⁸ BVerfG, above n 66, para 78.

⁶⁹ BVerfG, above n 66, para 20.

⁷⁰ Namely an institution with identical rights but less obligations.

⁷¹ BVerfG, above n 66, paras 86 to 103.

⁷² BVerfG, above n 66, para 98.

parties of a marriage. Moreover, certain rights are still allowed exclusively to married couples, such as adoption. The existence of life-partnerships does not limit or devalue the legal status of married couples, nor does it threaten the continued existence of marriage as an institution. Marriage is not altered at all. In view of this, the Court came to the conclusion that the life-partnership legislation does not violate marriage as protected by the Constitution.

(b) Article 3 of the German Constitution: prohibition of discrimination

Article 3 of the German Constitution provides that all humans are equal before the law. Unjustified discrimination is prohibited. The applicants claim that the exclusion of heterosexual couples from the life-partnership legislation constitutes unjustified discrimination and violates article 3. As mentioned, the issue of excluded couples has not been of great relevance during the legislation process. Therefore, by submitting the discrimination argument to the Court, the applicants apparently did not intend to advocate the rights of other couples, but only aimed to bring forward additional arguments against the legislation. It can be assumed that the inclusion of other than homosexual couples would not change the opponents' basic objection to the life-partnership legislation, the opposition would only be based on different grounds. Nonetheless, not offering the option of life-partnerships to any and all interested couples as an alternative to marriage could qualify as prohibited discrimination if there was no justification for the exclusion.

In this context the Court found that discrimination specifically based on gender is not identifiable.⁷³ Men and women are treated equally with regard to their relationship choices. Both may marry a person of the opposite, but not one of the same gender. Both sexes may enter into a life-partnership with someone of the same, but not with someone of the opposite gender.

Secondly, the Court acknowledged that the life-partnership concept, exclusively applying to persons in same-sex relationships, treated persons in a heterosexual relationship differently.⁷⁴ Yet, this different treatment can be justified. As opposed to heterosexual couples who are allowed to marry, same-sex couples have had no opportunity to be involved in a legally recognised relationship until the life-partnership legislation came into effect. Heterosexual couples have always had,

⁷³ BVerfG, above n 66, para 105.

⁷⁴ BVerfG, above n 66, paras 109 to 110.

and still have, the opportunity to marry, and life-partnerships were only designed to remove the disadvantages same-sex couples suffered from being excluded from marriage. Based on these reasons the Court concluded that it is justified to exclude heterosexual couples from life-partnerships and refer them to marriage. In so far article 3 is not violated.

Additionally, the applicants claimed that it constitutes unjustified discrimination and must be void because other committed relationships, like those between siblings or other relatives, are excluded from the legal option of life-partnerships.⁷⁵ Corresponding arguments have been made in New Zealand by opponents of the civil union legislation.⁷⁶ As to this claim the German Constitutional Court found that such relationships are already not comparable to marriage or life-partnerships.⁷⁷ The legal rights and obligations between relatives are sufficiently regulated,⁷⁸ and there is no apparent reason to compare blood relatives with committed people who are not relatives but want to establish this status by founding a life-partnership. In conclusion the Court held that the life-partnership legislation does in no way constitute unjustified discrimination according to article 3 of the Constitution.

(c) Constitutional Court's judgment and effect of decision

The Constitutional Court dismissed all arguments submitted by the applicants and decided that the life-partnership legislation does not violate the German Constitution, and thus is valid. The legislation remains in effect. The Constitutional Court's reasoning must be respected because of its authority. It must be mentioned, however, that there are two dissenting opinions. One judge interpreted article 6 differently and claimed that it in fact prohibited the establishment of a new institution comparable to marriage.⁷⁹ Another judge criticised the majority for not satisfactorily considering the special status of marriage. The judge was not convinced by the reasons given that exclusion of other couples from the legislation was justified.⁸⁰

⁷⁵ BVerfG, above n 66, paras 109 to 110.

⁷⁶ The New Zealand Maxim Institute states 10 reasons why the civil union legislation is damaging. The Institute further states that if same-sex unions are treated the same as married couples, also siblings or unions of more than two persons could demand a similar treatment, see <<http://www.maxim.org.nz>> (last accessed 21 July 2004).

⁷⁷ BVerfG, above n 66, para 110.

⁷⁸ There are specific provisions regulating rights and obligations between relatives, e.g. in the law of succession, in tax law or concerning rights to refuse to give evidence.

⁷⁹ BVerfG, above n 66, paras 125 to 127.

⁸⁰ BVerfG, above n 66, paras 128 to 147.

C Remaining Inequalities

Today, the life-partnership legislation is operating successfully in Germany. Nevertheless, when examining life-partnerships in comparison to marriage, it becomes obvious that there remains an imbalance of duties and benefits, which disadvantages individuals involved in a life-partnership. Significant differences between life-partners and married couples continue to exist. In the area of taxation life-partners are treated as singles and therefore must pay higher taxes than married couples. Life-partners are also denied equal benefits to married couples in the areas of civil service law and social welfare law.⁸¹ Further, an institution similar to engagement does not exist for same-sex relationships, although certain legal consequences are connected to this under German law, such as the right to refuse to give evidence. Another inequality, the justification of which is highly controversial, is the treatment of life-partners with regards to adoption law. Life-partners can currently neither adopt a child together nor can one partner adopt the other's child.⁸²

D Conclusion and Outlook on the Situation in Germany

Many homosexuals feel that the remaining differences existing between marriages and life-partnerships are discriminatory and must be removed. In some areas of the law life-partners have the same obligations as married couples, though in other areas they are denied benefits. This issue is yet unsolved and highly criticised. Life partners, for example, owe each other maintenance and alimony as if they were married, but they do not enjoy corresponding taxation benefits.

Some of these inequalities had already been addressed in a complementary law that Parliament passed in 2000. After passing Parliament though, this complementary law was subject to the further approval of the Chamber of the Federal Council of Germany before it could ultimately come into force, a step that the Law on Life-Partnerships did not undergo. This approval is a special feature of the German law making process. The Federal States have a final say with regards to legislation in certain areas. Taxation and social welfare are two of these areas. Since the complementary law provided regulation in these fields, the Federal Council's

⁸¹ Bündnis 90/Die Grünen Bundestagsfraktion "Eingetragene Lebenspartnerschaft wird ausgebaut" (23 July 2004) <<http://www.gruene-fraktion.de>> (last accessed 04 August 2004).

⁸² Bündnis 90/Die Grünen Bundestagsfraktion "Lebenspartnerschaft und Adoptionsrecht" (21 July 2004) <<http://www.gruene-fraktion.de>> (last accessed 04 August 2004).

approval was compulsory. In opposition to the composition of Parliament at that time, the majority in the Federal Council was politically conservative and opposed the life-partnership concept, and therefore the Council refused to consent to the complementary law. However, the issues remain on the agenda and recently became even more topical as one Member of Parliament has made his homosexuality public and has called for more equal rights.⁸³ In this context, a new bill has already been introduced to Parliament, adjusting the relationship property law and a right to adopt the partner's children.⁸⁴ Another bill, primarily addressing taxation issues, is to be introduced some time soon.⁸⁵ The success of this bill is hard to predict and depends very much on the composition of the Federal Council at the relevant time.

The disagreement between Parliament and the Federal Council in this matter is especially interesting because it reflects the sensitivity of the subject and demonstrates its dependence on slight political majorities. Following the Constitutional Court's decision, the opponents have to accept the Law on Life-Partnerships as legally valid. Still, the conservative party of the Christian Social Union (CSU) announced that they will revoke the complete life-partnership legislation in case of a change of government.⁸⁶ This threat is not realistic due to the fact that Germany, as a Member State of the European Union, must comply with superior European law. In 1994 the European Parliament issued a resolution on equal rights for gays and lesbians and called upon the European Commission, as well as the Member States, to remove existing discrimination against homosexuals.⁸⁷ In 2003 the European Parliament recommended that homosexuals should be allowed to legally marry and adopt children.⁸⁸ Although the European Parliament's resolutions are not legally binding, they greatly influence opinion formation in European legislative processes. In other European bodies, as well as in European case law, there is also clearly a tendency towards further legal equalisation of homosexuals' rights. Moreover, it should not be forgotten that the Netherlands and Belgium, as two of the few countries that allow marriage for homosexual couples, are Member States

⁸³ "Westerwelle fordert mehr Rechte für Homosexuelle" (27 July 2004) *Spiegel Online* <<http://www.spiegel.de>> (last accessed 04 August 2004).

⁸⁴ "Eingetragene Lebenspartnerschaft wird ausgebaut", above n 81.

⁸⁵ "Eingetragene Lebenspartnerschaft wird ausgebaut", above n 81.

⁸⁶ "Westerwelle fordert mehr Rechte für Homosexuelle", above n 83.

⁸⁷ Dominique Jakob "Die eingetragene Lebenspartnerschaft im Europarecht" in Dieter Schwab (ed) *Die eingetragene Lebenspartnerschaft* (Giesecking, Bielefeld, 2002) 336, 352 to 353.

⁸⁸ "Euro parliament supports gay marriage, points finger at Italy" (04 September 2004) <<http://www.eubusiness.com>> (last accessed 19 June 2004). See Sheila Swatschek "Regenbogenfamilie in Europa –gleiche Rechte für alle?" <<http://www.lsvd.de>> (last accessed 10 August 2004); Pagacz, above n 30.

of the European Union. Regarding this legal and political environment it is highly unlikely that the German Law on Life-Partnerships could effectively be revoked. It is much more likely that the rights of life-partners will successfully be adjusted and improved in order to reduce remaining discrimination.

V *MARRIAGE AND CIVIL UNIONS IN NEW ZEALAND*

The arguments that have been made in the context of the German life-partnership legislation closely resemble recent discussions in New Zealand about marriage and civil unions. This resemblance may be regarded as surprising, because the German and New Zealand legal systems are fundamentally different. Indeed, the similarities between the differing views in both countries show that the opinions are independent from the existing legal framework, but originate from a general societal change with regard to the social and legal recognition of homosexuals.

In the following the legal concepts of marriage and civil unions in New Zealand will be analysed based on the first parliamentary reading of the Civil Union Bill and the Omnibus Bill. This paper focuses on the Civil Union Bill, as the Omnibus Bill is, insofar, only its consequential companion that gives legal effect to the new relationship. The justification of the Omnibus Bill basically stands or falls with the justification of the Civil Union Bill.

A *Discussion and First Reading of the Civil Union Bill and the Omnibus Bill*

On 24 June 2004 the Civil Union Bill was read in Parliament for the first time and, after a heated debate, was passed with 66 to 50 votes.⁸⁹ Subsequently, on 29 June 2004 the Omnibus Bill was passed with 77 to 42 votes.⁹⁰ Currently both bills are before the Justice and Electoral Committee, which receives submissions and is due to report back in November.

1 *Critical overview of the discussion*

Since the first discussions about its creation, the proposed civil union legislation has been subject to controversial public statements. Already prior to the Bills' parliamentary introduction, when the actual text was not yet publicly known,

⁸⁹ (24 June 2004) NZPD no 60, 13950.

⁹⁰ (29 June 2004) NZPD no 61, 13986.

objectors of the legislation were not hesitant to express their opinions. "Join with us in opposing this silliness" was, for example, a public appeal made by New Zealand's United Future party.⁹¹ It can be observed that some opponents tend to use unreasonable, to some extent almost propagandistic, language. Yet, they often fail to support their views with objective arguments. This became even more evident in the Bills' first readings, where statements such as the following were made: "This bill will tear the social and moral fabric of New Zealand asunder".⁹² "[T]his bill is an abomination to all mankind".⁹³ "If this bill is passed, today is a day that will dawn in our history as a day that (...) is an indictment on the people who wish to lower our standards".⁹⁴ D Jones MP made the following comment, which did little to support the opposition: "Two males, or two females, will never know, but as a man living with a woman in a heterosexual relationship I am sure that my way of life is infinitely better than the others."⁹⁵ Fortunately more sound and beneficial arguments were also produced in the parliamentary debate by both opponents and proponents of the legislation.

Hon P Dunne MP emphasised that the issue was not a moral or religious one, but an issue of the best interest of society as a whole. He was in favour of the elimination of discrimination against homosexual couples through law amendments, but found that it is unnecessary to provide for a new legal relationship.⁹⁶ The possibility to enter into a civil union as such did not confer additional rights to homosexual couples.⁹⁷ It was further argued that traditional marriage needed to be protected, as it was essential for the protection of children, who are the future of New Zealand society.⁹⁸ Children needed a mother and a father and giving civil unions the status of marriage would downgrade marriage.⁹⁹ Most opponents based their arguments on personal beliefs rather than on legal or social facts.

It cannot be denied that the arguments from the legislation's supporters also stemmed mostly from personal beliefs, but while promoting that same-sex unions deserve equal treatment, they were able to refer to the existing statutory prohibition

⁹¹ Taylor, above n 23; See also advertisement published on United Future New Zealand homepage <<http://www.unitedfuture.org.nz>> (last accessed on 30 May 2004).

⁹² B Connell MP (24 June 2004) NZPD no 60, 13929.

⁹³ B Gudgeon MP (24 June 2004) NZPD no 60, 13933.

⁹⁴ B Gudgeon MP (24 June 2004) NZPD no 60, 13933.

⁹⁵ D Jones MP (24 June 2004) NZPD no 60, 13947 to 13948.

⁹⁶ Hon P Dunne MP (24 June 2004) NZPD no 60, 13938.

⁹⁷ Hon P Dunne MP (24 June 2004) NZPD no 60, 13938.

⁹⁸ P Brown MP (24 June 2004) NZPD no 60, 13933.

⁹⁹ Hon Dr N Smith MP (24 June 2004) NZPD no 60, 13952.

of discrimination on the grounds of sexual orientation.¹⁰⁰ The proponents criticised the superior role of traditional marriage in society and pointed out the difficulties same-sex couples experience due to the lack of an available legal relationship. Nevertheless, it was repeatedly emphasised that civil unions are different from marriage and that marriage would remain untouched.¹⁰¹

2 *Need for objective analysis of the situation*

Regarding the New Zealand legal framework and international developments in favour of same-sex unions, it is not surprising that Parliament is faced with the Civil Union and the Omnibus Bill. As Hon M Wilson MP stated in Parliament “[g]ay and lesbian couples have been to the courts, and the international institutions. They have been told to come to this House”.¹⁰²

Regrettably, the discussion is clouded by the expression of irreconcilable opinions of extreme lobbies. Therefore, discussion of the issue of civil unions needs to be separated from personal views and must focus on the legal perspective. The issue needs to be analysed objectively for any compromise or progress to be made.

B *Legal Standing of Marriage in New Zealand*

1 *Marriage Act 1955 and Quilter v Attorney General*

Opponents of the civil union legislation base their arguments predominantly on the protection of marriage and the fundamental role traditional marriage plays in New Zealand’s society. Therefore, the question must be answered as to what *marriage* is in legal terms. The Marriage Act 1955 does not contain a definition of marriage. As Thomas J held in *Quilter v Attorney General* marriage is, in the first place, a legal status in the nature of a partnership conferred and prescribed by the state.¹⁰³ The state has the power to determine the requirements of a valid marriage and to regulate the rights and obligations connected to marriage. As mentioned before, in the legal discussion about civil unions and marriage, it is essential to

¹⁰⁰ L Dalziel MP (24 June 2004) NZPD no 60, 13930 to 13932; T Barnett MP (24 June 2004) NZPD no 60, 13944; Hon M Robson MP (24 June 2004) NZPD no 60, 13948 to 13949.

¹⁰¹ M Mackey MP (24 June 2004) NZPD no 60, 13941.

¹⁰² Hon M Wilson MP (24 June 2004) NZPD no 60, 13949.

¹⁰³ *Quilter v Attorney General*, above n 5, 532 Thomas J.

distinguish between the state-conferred status of marriage (often referred to as civil marriage) and the religious notion of marriage.¹⁰⁴

According to the decision in *Quilter v Attorney General*, the scheme and the language of the New Zealand Marriage Act 1955 confines marriage to a union between a man and a woman.¹⁰⁵ This interpretation of the Marriage Act 1955 corresponds with the traditional common law concept of marriage.¹⁰⁶ Once two people have entered into a civil marriage, they enjoy a number of exclusive rights and benefits reserved for them by the law due to their marital status.¹⁰⁷ Why would a state create such a special legal institution for relationships? Like religions and society, the state traditionally perceives marriage as the foundation for procreation, which is essential for the continuance of the species and the state's future. The special legal status of marriage is mainly said to encourage and support people to start and maintain a family, and to produce and raise children in the state's interest.

2 *Is marriage a fixed concept?*

If civil marriage is a state-conferred status, it cannot be regarded as a fixed concept. In fact, marriage itself, as a universal institution existing in some form in all cultures, has been perceived differently throughout history. It is a fluid concept. Before colonial times, for example, there was no legal system providing for marriage in New Zealand, but there was the Maori customary marriage, which still exists today but has no legal status.¹⁰⁸ In ancient times, as in some societies today, marriage symbolised power and social status, and even same-sex marriages or cohabitations were not unknown or necessarily disapproved of.¹⁰⁹

When social reality changes, the state can adjust rights and obligations related to civil marriage, as well as the institution of marriage as such. There is nothing inherent in the concept of marriage that would prohibit the state from changing marriage or introducing legal relationships with an equivalent status, especially if other relationships come to fulfil the same or similar tasks in society. Recent

¹⁰⁴ See Part III B Recognition of Same-Sex Relationships by Church.

¹⁰⁵ *Quilter v Attorney General*, above n 5, 526 Richardson P.

¹⁰⁶ See Andrew Butler "Same-sex marriage and freedom from discrimination in New Zealand" (1998) PL Autumn 396, 396.

¹⁰⁷ For example: benefits in taxation, next of kin status, authorisation for medical decisions, and succession.

¹⁰⁸ Bill Atkin *Living Together Without Marriage* (Butterworths, Wellington, 1991) 3.

¹⁰⁹ See generally William N Eskridge "A History of Same Sex Marriage" (1993) 79 Va Law Rev 1419.

examples prove this view to be correct, as some states have successfully opened marriage to same-sex relationships or introduced alternative models with similar legal status. In these states no obvious harm has been done to marriage as an institution, or to society as a whole.

In view of this understanding of marriage, the opponents of the civil union legislation in New Zealand need to produce solid arguments and evidence to support their claim that the introduction of civil unions would violate marriage and endanger society as a whole.

C Necessity or Duty to Provide for Civil Unions as Equal Alternative

The HRA 1993 and the BORA 1990 clearly prohibit discrimination on grounds of sexual orientation and marital status. Yet, neither the HRA 1993 nor the BORA 1990 are superior law and do not override other unambiguous legislation.¹¹⁰ Furthermore, the HRA 1993 and the BORA 1990 do not impose a direct duty to change discriminatory provisions, but cause indirect pressure by providing for a complaint procedure before the Human Rights Commission.¹¹¹

Introducing civil unions in New Zealand might be merely due to a desire for political correctness, as Hon P Dunne MP argued,¹¹² or it might be necessary in order to remove unjustified discrimination against other relationships. In the following discussion, these questions will be analysed on the basis of same-sex relationships, which cause the most controversy. The situation of different-sex couples will then be assessed briefly.

1 Justification of an alternative model for same-sex couples

(a) Existing prima facie discrimination

As shown above, there are numerous areas of law in which same-sex couples are prima facie discriminated against because they are denied the right to marry each other.¹¹³ Most compelling are the facts that same-sex partners are not regarded as next of kin, and that they lack any opportunity to have their relationship legally and

¹¹⁰ See Bill of Rights Act 1990, ss 4, 5.

¹¹¹ See Human Rights Act 1993, s 75 et sqq.

¹¹² Hon P Dunne MP "Address to Political Correctness forum" (29 March 2004) United Future Speech <<http://www.unitedfuture.org.nz>> (last accessed 04 May 2004).

¹¹³ See Part II B 2 Present legal status of de facto relationships.

publicly recognised as a valuable and respected union. The question is, are the apparent legal inequalities truly discriminatory, or simply justified differentiation of two kinds of relationships?

(b) Heterosexual and same-sex relationships essentially comparable

Discrimination can be defined as treating a person or a group of persons differently who have the same characteristics or treating a person or a group of persons the same who have different characteristics.¹¹⁴ If homosexual and heterosexual relationships do not have the same or comparable characteristics, the different treatment cannot constitute unjustified discrimination.

This idea that same-sex unions are essentially different from heterosexual relationships is promoted by opponents of the civil union legislation and can be found in the Vatican's statement that "there are absolutely no grounds for considering homosexual unions to be in any way similar or even remotely analogous to (...) marriage."¹¹⁵ The core justification for denying same sex couples a status comparable or identical to marriage is the absence of the biological ability to procreate.¹¹⁶ Thus, same-sex unions are said to lack a fundamental characteristic of traditional marriage.¹¹⁷

It is true that only heterosexual couples have the biological ability to create new human life. This fact distinguishes heterosexual from homosexual couples, but not necessarily married from unmarried couples. Procreation is not unique to married couples, as an intact different-sex family is no longer the only vehicle for reproduction. There are many solo parents and de facto relationships with children, as well as married couples that remain childless. Lesbian couples can become parents through sperm donation; an option that married couples also make use of. Furthermore, modern reproductive technologies, namely assisted human reproduction and in vitro fertilisation, do not require patients to be married.

In modern societies marriage has multiple other purposes besides procreation. The Ontario Court of Appeal held that other purposes of marriage are intimacy, companionship, societal recognition, economic benefits and the blending of two

¹¹⁴ *Quilter v Attorney General*, above n 5, 573 Tipping J.

¹¹⁵ Offices of the Congregation for the Doctrine of the Faith, above n 42.

¹¹⁶ *Quilter v Attorney General*, above n 5, 534 Thomas J.

¹¹⁷ New Zealand Catholic Bishops' Conference, above n 39, 5.

families.¹¹⁸ Thomas J in *Quilter v Attorney General* also pointed out purposes such as cohabitation, commitment, financial interdependence, mutuality and devotion.¹¹⁹ None of these other purposes of marriage is exclusive to heterosexual relationships.

In the light of these observations it is false to single out the biological ability to procreate as the predominant aspect of legal marriage in order to justify the denial of a similar status to same-sex couples. Committed same-sex relationships are not only emotionally, physically and economically comparable to committed heterosexual relationships. Their unions can fulfil the same purposes marriage does. This view has very recently been affirmed in the reasoning of a House of Lords' decision granting a survivor of a same-sex relationship the same legal rights as a survivor of a marriage.¹²⁰

(c) Same-sex couples do not choose to be outside the legal scope of marriage

Some opponents of civil unions claim that a homosexuals' right to equality does not warrant special entitlements because of their sexual orientation, namely the establishment of a homosexual alternative to marriage.¹²¹ Homosexual people are free to marry under the same circumstances as everyone else. The opponents' claim that homosexuals make a deliberate choice not to fulfil the criteria for marriage by desiring to be with a person of the same gender. Therefore they must live with the consequences of that choice. This argument is unfortunate since sexual orientation is not a conscious choice. Neither do homosexuals deliberately choose not to marry. They do not have a choice as they lack the opportunity to marry the person they love.

If there laws were in place stating that only people of the same race, of the same religious belief or of the same physical health could marry each other most of society would protest. It would not support the justification of such laws to argue that a white-and-black couple, a Muslim-and-Christian couple, or a couple of a physically disabled and a physically healthy person *deliberately chose* not to marry. Without doubt the majority of New Zealanders would regard such a law as unjustifiably discriminatory. As a matter of fact, sexual orientation is a prohibited grounds of

¹¹⁸ *Halpern v Canada (Attorney General)* (10 June 2003) CA Ontario C39174, para 94.

¹¹⁹ *Quilter v Attorney General*, above n 5, 534 Thomas J.

¹²⁰ *Ghaidan v Mendoza* [2004] 3 All ER 411, para 139 Baroness Hale of Richmond (HL).

¹²¹ New Zealand's Catholic Bishops' Conference, above n 39, 5.

discrimination under the HRA 1993 on a par with those of race, religious belief and disability.¹²²

(d) The institution of marriage is not diminished by recognised same-sex unions

Different treatment might be justified if the current status of marriage was wrongfully diminished by the recognition of other forms of relationships. It is argued that it is the state's responsibility to protect marriage, as an important fundament of society, and not to weaken it by introducing an alternative institution for same-sex couples. The New Zealand Maxim Institute published a lengthy statement about the public benefits of marriage.¹²³ According to the Institute, marriage improves the country's wealth, reduces state dependency and crime, provides more stability than cohabitation and advances the physical, psychological, emotional, economic and educational wellbeing of children and adults alike. Interestingly, these public benefits have no mention of sexual orientation and there is no reason to believe that a publicly recognised civil union would not produce identical effects.

In this context it should be clarified that marriage in New Zealand does not enjoy any institutional guarantee. Differing from the situation in Germany, marriage is not protected by superior law. The New Zealand Parliament is not restricted when passing laws that may affect or alter the institution of marriage. Yet, the proposed civil union legislation leaves marriage untouched. Marriage remains available for heterosexual couples only, and there are no limitations as to the legal status, structure or validity of marriage. As Hon D Benson-Pope MP said in the Civil Union Bill's first reading, there are no victims because civil unions are only about giving some couples rights that others already have.¹²⁴

The diminishment of the value of marriage is a very weak argument against the issue of offering same-sex couples a legal relationship, especially since same-sex couples remain excluded from marriage. Certainly this argument cannot be sufficient to justify discrimination under the BORA 1990 and the HRA 1993. Even in Germany, where marriage has a superior legal standing, it was held that the exclusivity and special protection of marriage in the Constitution could not be

¹²² Human Rights Act 1993, ss 21 (1)(c), 21 (1)(f), 21 (1)(h).

¹²³ Maxim Institute "The public benefit of marriage" <<http://www.maxim.org.nz>> (last accessed 17 August 2004).

¹²⁴ Hon D Benson-Pope MP (24 June 2004) NZPD no 60, 13928.

interpreted as a ban on offering other types of relationships a similar legal frame.¹²⁵ Those who strongly believe that marriage is a superior concept should be confident enough in their belief to accept the addition of an alternative model.¹²⁶

(e) International obligations under the ICCPR: *Joslin v New Zealand*

Besides domestic responsibilities to remove unjustified discrimination against homosexuals, New Zealand is also bound to comply with certain international obligations. The international human rights angle of the New Zealand same-sex relationship issue has been dealt with in *Joslin v New Zealand*.¹²⁷

After losing their case, the unsuccessful plaintiffs in *Quilter v Attorney General* lodged a communication with the Human Rights Committee, which was established under the regime of the International Covenant on Civil and Political Rights (ICCPR), and which New Zealand is a State party to.¹²⁸ Article 23 of the ICCPR provides for the right to marry, and article 26 of the ICCPR prohibits any unjustified discrimination. The Committee found that New Zealand did not violate the rights under the ICCPR by refusing to grant a marriage licence to homosexual couples, since article 23 of the ICCPR, drafted in the 1950s, referred to marriage as a union between a man and a woman.¹²⁹ Internationally, the decision was seen as an important test for the Committee, and the outcome was disappointing for supporters of homosexuals' rights, especially because of its brief reasoning.¹³⁰

However, in an additional opinion two of the Committee's members clarified that the Committee's conclusion should not be read as a general statement that excluding same-sex couples from marriage, and its benefits, would never amount to a violation of article 26 of the ICCPR.¹³¹ In *Joslin v New Zealand* the plaintiffs simply failed to argue that they were discriminated against by the exclusion from the benefits deriving from marriage. The decision in *Joslin v New Zealand* should therefore not be mistaken as a statement that article 26 of the ICCPR does not require

¹²⁵ BVerfG, above n 66, para 98.

¹²⁶ Compare David Friar "Marriage is more than having and nurturing children" (23 June 2004) *The New Zealand Herald Online* <<http://www.nzherald.co.nz>> (last accessed 30 June 2004).

¹²⁷ *Joslin v New Zealand* (17 July 2002) Comm No 902/1999.

¹²⁸ International Covenant on Civil and Political Rights (16 December 1966) 999 UNTS 171. The Human Rights Committee is established under the Optional Protocol to the International Covenant on Civil and Political Rights (16 December 1966) 999 UNTS 302.

¹²⁹ *Joslin v New Zealand*, above n 127, paras 8.2 to 9.

¹³⁰ See Paul Rishworth "Review: Human Rights" (2003) NZ Law Rev 261, 266 to 267.

¹³¹ *Joslin v New Zealand*, above n 127, "Appendix: Individual opinion of Committee members Mr Rajsoomer Lallah and Mr Martin Scheinin (concurring)".

New Zealand to remove potential discrimination between married couples and same-sex couples that wish to achieve a similar legal status. Indeed, the contrary was indicated.

(f) New Zealand's international reputation and statement at the UNCHR

Besides the ICCPR, New Zealand is also a signatory to the Universal Declaration of Human Rights.¹³² In this context New Zealand recently presented itself internationally as a supporter of equality and freedom from discrimination on grounds of sexual orientation. A representative of New Zealand, speaking also on behalf of Canada, claimed before the United Nations Commission on Human Rights (UNCHR) that the United Nations had been silent on sexual orientation far too long and that it was time to break the silence because discrimination on these grounds took place in too many countries.¹³³ The delegate acknowledged the difficulty and complexity of the issue but clearly stated that New Zealand and Canada were "not prepared to compromise on the equality in dignity and rights of all people".¹³⁴

New Zealand's international credibility could be damaged if the proposed civil union legislation is discarded without solid reasoning and without objective criteria which prove that same-sex couples are currently not discriminated against because of their sexual orientation.

(g) Discrimination not justifiable by morality issues

All arguments based on the understanding that homosexual relationships are morally wrong and should therefore not be legally or socially recognised, are doomed to fail. By passing the BORA 1990 and the HRA 1993, and by entering into international treaties, New Zealand has made a decision that any discrimination of homosexual persons is no longer acceptable.

People who regard homosexual relationships as morally or ethically wrong will most likely harbour similar feelings towards transgender people. Although some people regard transgenderism as morally wrong, it is legal reality in New Zealand

¹³² Universal Declaration of Human Rights (10 December 1948) UN Doc A/810 at 71.

¹³³ "UN 2004 - Brazilian Resolution - Canada and New Zealand statement at the UNCHR in support of the Brazilian resolution" (26 April 2004) <<http://www.ilga.org>> (last accessed 17 August 2004).

¹³⁴ "UN 2004 - Brazilian Resolution - Canada and New Zealand statement at the UNCHR in support of the Brazilian resolution", above n 133.

that a transgender person can have their gender on their birth certificate changed in order to be fully recognised as a member of the new gender.¹³⁵ As a result a transsexual person who was born as a man can legally marry another man. This legislation has been operating successfully and is widely accepted as an important right for transgender people. In the same way homosexual rights must be fully recognised, independent from individuals' moralities.

(h) Prevalence of same-sex couples irrelevant

In his speech before Parliament Hon P Dunne MP referred to the last census in New Zealand and pointed out that there were 1.3 million married New Zealanders, just over 300,000 living together in a de facto relationship, and only 10,000 in same-sex relationships.¹³⁶ He implied that, due to the small number of same-sex relationships, an alternative to marriage is not needed to formalise and solemnise these relationship, as long as the law does not discriminate against them otherwise. Such a view can have no validity with regard to basic principles of democracy and human rights. Correspondingly, Baroness Hale of Richmond concluded in a similar context:¹³⁷

Finally it is a purpose of all human rights instruments to secure the protection of the essential rights of members of minority groups, even when they are unpopular with the majority. Democracy values everyone equally even if the majority does not.

(i) Protection of children no justification for discrimination

A popular argument among the opponents is that recognising same-sex relationships as civil unions endangers the protection of children. New Zealand's Catholic bishops refer to the United Nations Convention on the Rights of the Child, which declares the best interest of the child is paramount in every case.¹³⁸ They claim that children need a stable family with a mother and a father. According to the bishops there is evidence that homosexual parents tend to be more promiscuous, and their relationships are less stable. The bishops claim that there is no evidence that

¹³⁵ Births, Deaths and Marriages Registration Act 1995, s 28.

¹³⁶ Hon P Dunne MP (24 June 2004) NZPD no 60, 13939.

¹³⁷ *Ghaidan v Mendoza*, above n 120, para 132 Baroness Hale of Richmond.

¹³⁸ New Zealand's Catholic Bishops' Conference, above n 39, 4.

suggests that giving these relationships legal standing would change that.¹³⁹ It is especially feared that same-sex couples in a civil union might ultimately become able to legally adopt children, although this feature is currently not included in the proposed civil union legislation. The adoption issue is highly sensitive and has also been excluded from the life-partnership legislation in Germany, although the full recognition of same-sex relationships consequently involves the possibility to adopt a child. In Germany the right to adoption is therefore still on the political agenda.

There is no empirical evidence that same-sex relationships are less stable, or constitute a worse environment for children than a marriage. The arguments against same-sex parents most often stem from a general disrespect of same-sex relationships. With regard to the best interest of children, parenting abilities should be more important than the gender of the parents. In different countries and cultures there are different views on the ideal or traditional composition of a family with children.¹⁴⁰ In the New Zealand context, a gay couple made an interesting point:¹⁴¹ in early 2004 a convicted murderer was allowed to marry in prison. How can this marriage represent a better environment for children than a committed same-sex relationship?

Those who promote the best interest of the child should welcome the possible introduction of civil unions. It is not forbidden for same-sex couples to raise children. Neither it is forbidden for heterosexual de facto couples or solo parents. Same-sex couples can rear children with or without being in a civil union. The legal certainty of a marriage-like alternative would only contribute to the stability of same-sex relationships for the benefit of the children.

(j) Opportunity of private relationships contracts not sufficient

Taking the concept of freedom of contract into consideration, it is debatable whether the same-sex partners' opportunity to make contracts and write wills is sufficient to protect their relationship. Certain statutory provisions cannot be overridden by contract. Examples are the right to refuse to give evidence, taxation

¹³⁹ New Zealand's Catholic Bishops' Conference, above n 39, 5.

¹⁴⁰ See Cesnabmihilo Dorothy Aken'Ova "Which is the traditional family? Our definition, not the Vatican's" (19 April 2004) UN 2004 NGO Statement: Alternative Families <<http://www.ilga.org>> (last accessed 10 May 2004).

¹⁴¹ Nick Venter "Civil union poster boys speak out" (12 August 2004) *The Dominion Post* Wellington A4.

rules and the Burial and Cremation Act 1964, which has been identified as discriminatory at the onset of this paper. Contracts are also open to mistakes and disputes, and their preparation can be complex and expensive.¹⁴² The opportunity to enter into private relationship contracts is not sufficient to justify current discrimination against same-sex relationships.

(k) Single amendments and law reforms not adequate to remove discrimination

It has been shown that there are no convincing arguments to justify the identified discrimination against same-sex relationships. Although they acknowledge the existing discrimination, some opponents base their objection on the claim that the proposed civil union legislation goes farther than is necessary.¹⁴³ It is believed by some that the removal of discrimination does not necessarily require the introduction of a new legal relationship.

Could it be enough to continue the policy of amending and reforming individual statutes in order to bring them to anti-discrimination standards? Admittedly, this has been the method of choice during the past, for example in the case of the Property (Relationships) Act 1976. Nevertheless, such piecemeal changes to specific statutes bring little satisfaction and cause legal uncertainties. The changes are never comprehensive or consistent. Already in 1999 the Law Commission condemned this approach as a "clumsy technique that runs an unacceptable risk of oversight".¹⁴⁴

In view of this, could it be sufficient to implement the comprehensive changes proposed by the Omnibus Bill but not the Civil Union Bill? Alongside comprehensive law reforms the establishment of a legal alternative to marriage for same-sex couples could be pointless. Yet, it cannot be ignored that same-sex couples are not only discriminated against by the denial of single rights and benefits, but also by the denial to publicly institutionalise and solemnise their relationships. This has

¹⁴² See also Hon D Benson-Pope MP "Questions and Answers on Civil Union and Relationships (Statutory References) Bills" (21 June 2004) <<http://www.beehive.govt.nz>> (last accessed 30 June 2004).

¹⁴³ See Hon P Dunne MP (24 June 2004) NZPD no 60, 13938.

¹⁴⁴ New Zealand Law Commission, above n 12, 7.

been realized not only in Germany, as shown above, but in other countries as well. The Ontario Court of Appeal in Canada held:¹⁴⁵

Through this institution [marriage], society publicly recognizes expressions of love and commitment between individuals, granting them respect and legitimacy as a couple. This public recognition and sanction of marital relationships reflect society's approbation of the personal hopes, desires and aspirations that underlie loving, committed conjugal relationships.

Without compelling reasons, same-sex couples are still denied any form of public institution in which to express their commitment. The establishment of civil unions is a possible remedy for this discrimination and should not be qualified as unnecessary or too far fetched.

(1) Improvement of social acceptance and general situation of homosexuals

The introduction of life-partnerships in Germany has proved to be a great socio-political success.¹⁴⁶ The acceptance of gay and lesbian individuals and relationships has improved noticeably. The civil union legislation, if enacted, is likely to have a similar effect in New Zealand. Barriers of prejudice stand the possibility of being completely removed. Couples who commit to civil unions may also be seen as role models for young homosexuals, who presently grow up in a society that does not fully recognise their choice of partners.

New Zealand must understand and accept these realities. The existence of committed homosexual relationships cannot be denied, nor is it legitimate to continue any unjustified discrimination against them. The civil union legislation offers an opportunity to finally adjust the law to reflect this reality.

2 *Justification of an alternative model for different-sex couples*

The Civil Union Bill currently allows different-sex couples to choose civil union as an alternative to marriage. Without a doubt, the proposed civil union legislation is based on the homosexual's struggle for equal rights. Nevertheless, there

¹⁴⁵ *Halpern v Canada (Attorney General)*, above n 118, para 5.

¹⁴⁶ See "Eingetragene Lebenspartnerschaft wird ausgebaut", above n 81.

are two reasons for the proposed inclusion of different-sex couples.¹⁴⁷ First, the civil union legislation does not aim to create new discrimination by excluding heterosexuals from its scope. Secondly, heterosexual couples should also be provided with a choice in case they do not feel comfortable with the religious and traditional connotations of marriage.

The justification for same-sex civil unions originates from the fact that homosexual couples are excluded from marriage. No argument based on this fact can be produced for different-sex couples. With or without the civil union legislation they are entitled to enter into a marriage and achieve a legal status that homosexual couples are currently disallowed. If marriage were available for homosexuals, civil unions would not be needed.

It is not convincing to claim that heterosexual couples need an alternative to marriage because of its religious or traditional connotations. Homosexual couples do not seek an alternative to marriage because they want to avoid unwanted traditions, but because they want to achieve a certain legal status. Homosexuals have not been asked whether they would prefer a more traditional institution as opposed to the modern civil union model. There is no justification for taking personal preferences into consideration when it comes to heterosexual couples. Furthermore, civil marriage is a legal status conferred by the state, and as such completely secular and equal to the proposed civil unions. Any religious or traditional connotations connected with marriage can insofar not be decisive.

There is no justification to offer heterosexual couples the additional option of civil unions, as they are free to marry.¹⁴⁸ Conversely, offering heterosexual couples both options, but limiting homosexual relationships to civil unions only, would in fact carry on the discrimination against homosexuals. The impression of a second-class institution would be aggravated.¹⁴⁹ Therefore, heterosexual couples should be excluded from the civil union legislation.

¹⁴⁷ See Heide Pusch *Civil Union – Partnership of Equals* (Research Essay Gender and Women's Studies, Victoria University of Wellington, 2003), 30; "Questions and Answers on Civil Union and Relationships (Statutory References) Bills", above n 142.

¹⁴⁸ See also New Zealand Law Commission, above n 12, 9.

¹⁴⁹ Young, above n 16, made an interesting comparison in order to emphasize that this differentiation it is not justifiable: "Imagine (...) black American Rosa Parks still could not sit in the "whites only" seats at the front of the bus, but whites would have a new choice – they could ignore the signs and sit with her."

D Critique on Proposed Civil Union Legislation in its Current Version

1 Remaining discrimination

Compared with the German Law on Life-Partnerships, the Civil Union and the Omnibus Bill provide for a fairer and more comprehensive model. Whereas the New Zealand solution is all-encompassing, the German model allows a significant number of inequalities to remain.¹⁵⁰ In New Zealand the basic idea is to create total equality in one strike. In support of the proposed civil union legislation, some of the problems that are as yet unsolved in Germany are subject to specific law reforms in New Zealand, such as the adoption issue.¹⁵¹ However, the New Zealand civil union solution also is partly unsatisfactory.

The most obvious discrimination remains the ability of heterosexual couples to choose between marriage and civil union while same-sex couples are only offered one option. This has been assessed above and is one of the reasons why it is proposed in this paper that different-sex couples should be excluded from the scope of the Civil Union Bill.

Another problem is the recognition of civil unions by other jurisdictions, and vice versa, the recognition in New Zealand of similar relationships entered into in other jurisdictions. These problems seem to be inherent to alternative models, since they lack the universality and traditional nature of marriage. The majority of states do not have any institution comparable to civil unions, therefore they are not likely to recognise these relationships, and civil union partners will continue to experience discrimination as compared to married couples. Since recognition remains each individual country's choice, New Zealand cannot be held responsible for these inequalities.

Nonetheless, with regard to its human rights responsibilities, it should be New Zealand's duty to support the international recognition of civil unions as much as possible. Those countries that currently provide for civil unions or registered partnerships have an interest in recognising New Zealand civil unions, as those countries may want their relationship model to be recognised as widely as possible as well. Yet, same-sex unions entered into under another country's legislation are not

¹⁵⁰ See Part IV C Remaining Inequalities.

¹⁵¹ Current reform of the Adoption Act 1955.

going to be recognised in New Zealand, on the grounds that there is a too wide variation in the forms of civil union and registered partnerships available overseas.¹⁵² If the civil union legislation is passed, the recognition of foreign civil union models must be considered more thoroughly. Full recognition could be achieved step by step and under individual agreements. It would not be impossible, for example, for Germany and New Zealand to reach an agreement to legally recognise each others' same-sex relationship models.

2 *Preference of gay marriage model?*

The remaining problems would not exist if the solution chosen by New Zealand had been the redefinition of marriage instead of the proposal of a civil union model. Opening up marriage for same-sex couples provides ultimate legal and social equality. Consequently, among the opponents of the civil union legislation are those who regard civil unions as second-class marriages or as an unacceptable *separate but equal* solution.¹⁵³

With regard to the difficulties the proposed civil union legislation is facing in the law-making process, an alteration of the definition of marriage would have most probably been more difficult to achieve. Nevertheless, some Members of Parliament made it clear in the Civil Union Bill's first reading that they would have welcomed or preferred a debate about a way to extend the scope of marriage.¹⁵⁴ Some regard the civil union approach as simply a way to create a marriage under a different label, and call for an honest debate.¹⁵⁵

Back in 1999, the New Zealand Law Commission observed that no country had altered its definition of marriage, and concluded that the attempt to do so in New Zealand would cause unnecessary and understandable offence.¹⁵⁶ A separate model for same-sex couples was regarded as a more sensible solution. By now, the international situation has changed as some countries and national states have

¹⁵² "Questions and Answers on Civil Union and Relationships (Statutory References) Bills", above n 142.

¹⁵³ Young, above n 16; John Penny, Rochelle Forrester and Truis Ormsby-Martin "Submission On Same-Sex Couples And The Law" <<http://www.agender.org.nz>> (last accessed 21 July 2004).

¹⁵⁴ J Collins MP (24 June 2004) NZPD no 60, 13942 to 13943; Hon C Carter MP (24 June 2004) NZPD no 60, 13939 to 13941.

¹⁵⁵ S Franks MP (24 June 2004) NZPD no 60, 13936 to 13938.

¹⁵⁶ New Zealand Law Commission, above n 12, 8.

successfully introduced a new definition of marriage which include same-sex couples.¹⁵⁷

There is no legal argument that can be made in New Zealand against a redefinition of marriage as a gender-neutral institution. As opposed to the legal situation in Germany, there is no piece of legislation that would hinder a reform of the Marriage Act 1955. In addition to this, New Zealand's HRA 1993 expressly prohibits discrimination on grounds of sexual orientation, whereas in Germany there exists only a clause prohibiting discrimination in general. The HRA 1993 creates an explicit responsibility of Parliament to remove discrimination based on sexual orientation.

It can be seen from the analysis of the situation in New Zealand that there is no justification for treating same-sex couples differently from heterosexual couples. Making a distinction between marriage and civil unions can only be based on traditional values and beliefs connected with marriage. Such reasons cannot be decisive when it comes to the question of discrimination. The Ontario Court of Appeal observed that "[m]arriage is, without dispute, one of the most significant forms of personal relationships"¹⁵⁸ and:¹⁵⁹

"Denying same-sex couples the right to marry perpetuates the (...) view (...) that same-sex couples are not capable of forming loving and lasting relationships, and thus same-sex relationships are not worthy of the same respect and recognition as opposite-sex relationships."

Similarly, in *Quilter v Attorney General* Thomas J found that denying homosexuals the right to marry one another the law "can only add to the stigmatisation of their relationships and have a detrimental effect upon their sense of self-worth."¹⁶⁰

Not only most homosexuals, but also other potentially concerned groups, such as the transgender or intersexual community would generally prefer a

¹⁵⁷ See Part III A 2 'Gay marriage' model.

¹⁵⁸ *Halpern v Canada (Attorney General)*, above n 118, para 5.

¹⁵⁹ *Halpern v Canada (Attorney General)*, above n 118, para 94.

¹⁶⁰ *Quilter v Attorney General*, above n 5, 537 Thomas J.

redefinition of marriage.¹⁶¹ Currently married transgender people, who have not yet officially changed their gender, are forced to divorce if they want to have their gender change reflected on their birth certificate. The importance of their marriage conflicts with their wish to have the birth certificate changed according to their gender identification, and they are forced to make a choice between the two. This situation can be quite distressing and could be solved if marriage was defined neutrally. Similarly intersexual New Zealanders may only benefit from a neutral definition.

Although the legal redefinition of marriage is preferable, this approach was deliberately not chosen in New Zealand. The civil union model may not be ideal, but at present it seems the only politically realisable option. Moreover, in choosing this option, New Zealand is in line with most other countries that have introduced legislation for same-sex unions. The example of the Netherlands proves that an alternative relationship model can be a steppingstone for same-sex marriage, which makes the success of the proposed civil union legislation in New Zealand, despite its weak points, even more important.

VI CONCLUSION

Some have argued that Parliament should rather deal with more urgent issues other than whether or not an alternative relationship model should be introduced. It may be true that there are more pressing issues on the political agenda, but it should not be forgotten that the proposed civil union legislation is the result of what has been long term process. The HRA 1993, recognising sexual orientation and marital status as grounds of discrimination, was adopted more than 10 years ago, and five years ago, the New Zealand Law Commission recommended the introduction of a relationship registration model for same-sex couples. Though, these are not the only reasons why a parliamentary decision on the matter is needed. International legal responsibilities and corresponding developments overseas also call for a decision to be made in New Zealand.

This paper's analysis proves that there is no justification to deny same-sex couples the possibility to achieve a legal relationship status comparable to marriage.

¹⁶¹ Compare Penny, Forrester and Ormsby-Martin, above n 153. Some homosexual generally object marriage. There are schools of thought that marriage is an unjust and corrupt institution that should not be emulated by gay and lesbian people. See New Zealand Law Commission, above n 12, 4.

All in all, the proposed civil union legislation constitutes a fairly good solution with regards to the elimination of existing discrimination, although it is not ideal. The inclusion of different-sex couples as well as their ability to convert between marriage and civil union would have to be removed, as these features continue the discrimination against same-sex couples. The Civil Union Bill and the Omnibus Bill are currently before the Justice and Electoral Committee, therefore improvements may still be made.

From a legal perspective, there is no solid justification of arguments against the redefinition of the institution of marriage, in order to make it available to same-sex couples. In the light of this observation, the model provided for in the Civil Union Bill is not completely satisfactory. An alteration of marriage would remove the existing discrimination more effectively. Yet, as this paper acknowledges, at present the proposed civil union legislation is the most politically realisable option.

Nevertheless, in order to fully comply with anti-discrimination requirements, the ultimate goal must be the establishment of one common relationship model for all couples regardless of their sexual orientation, be it under the label of marriage or civil union. This may be achievable step by step, as has happened in the Netherlands. In the meantime, though not all New Zealand same-sex couples will choose to have a civil union, it should become an option for those who would like this form of relationship recognition and protection.

New Zealand has an international reputation of perpetuating high anti-discrimination standards. With regard to discrimination against women, it was the world's first country to give women the right to vote in 1892. Furthermore, New Zealand has a history of combating discrimination against Maori. The relationship between Maori and Pakeha, based on the Treaty of Waitangi, is often referred to as exemplary reconciliation between indigenous people and immigrants. With the increasing number of countries that grant same-sex couples the right to either register their union or to get married, New Zealand must now accept that full legal recognition of same-sex unions is necessary.

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