



Marriage and Legal Recognition of Same-sex Unions

A Discussion Paper

November 2002



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Message from the Minister

Marriage has been widely debated in recent years. Perhaps no single issue touches more people. Everyone — those who are married, those who have chosen not to marry or remarry and those who have not had the opportunity to choose — has an opinion. Their opinions are based on their own experiences and on the experiences of their parents, their children and families, friends and neighbours, as well as on their values and beliefs.

Public debate on marriage began long before the recent legal challenges to the constitutionality of requiring marriage to be between “one man and one woman”. Not just in Canada but around the world, individuals and their governments have debated whether marriage has a continuing value to society, and if so whether and how the state should recognize married relationships in law. The Canadian public, like those in many other countries, are divided on this question. Some feel strongly that governments should continue to support marriage as an opposite-sex institution, since married couples and their children are the principal social unit on which our society is based. Others believe that, for reasons of equality, governments should treat all conjugal relationships — opposite-sex and same-sex — identically. Still others believe that in a modern society, governments should cease to recognize any one form of relationship over another and that marriage should be removed from the law and left to individuals and their religious institutions.

As part of this debate, recent Charter challenges to the legal requirement that marriage be between “one man and one woman” are now before the courts in three provinces — British Columbia, Ontario and Quebec, with conflicting results at the trial level. These three decisions are now under appeal. The government hopes to benefit from the guidance of the appeal courts on the legal issues.

But marriage is not just about law. Challenges to the opposite-sex meaning of marriage bring a new focus to the continuing debate about the future of marriage in Canada. The court challenges show that marriage has a continuing value to both those seeking to

maintain the opposite-sex requirement and those in the gay and lesbian community who are seeking to marry. People in Canada and their representatives must now decide whether marriage should remain an opposite-sex institution, perhaps along with the creation of a new registry for civil unions that would be deemed equivalent to marriage for the purposes of federal law and programs, or be changed to include same-sex couples or cease to be reflected in law at all.

The Government of Canada believes that Parliament is the best place to debate how we as a society should address this question. Some of those who disagree with the trial court decisions in Ontario and Quebec have expressed concern that the courts, rather than elected members of Parliament, are making decisions to change fundamental social institutions. In my view, the roles of Parliament and the courts do not conflict, but complement each other. When the *Canadian Charter of Rights and Freedoms* was added to our Constitution in 1982, Parliament and the legislatures decided to make explicit the right of Canadians to go to court and challenge laws. At the same time, our Constitution makes it clear that Parliament has an essential role to play in deciding important social questions. Recent court decisions acknowledged the importance of this role, and we intend to responsibly play our part.

The question we are discussing is complex. Every viewpoint on how best to reconcile the traditional meaning of marriage and the recognition of committed gay and lesbian relationships within our constitutional framework and equality guarantees deserves to be heard. I know that people living in Canada will find a way to resolve this issue that is consistent with our values as a society and that respects the Constitution and the roles of Parliament and the courts. The Parliamentary Committee will open this discussion. I look forward to hearing the views of Canadians and the recommendations of the Committee.

Martin Cauchon
Minister of Justice and Attorney General of Canada

Seeking people's views

Under Canadian law, the legal concept of marriage as the “union of one man and one woman to the exclusion of all others” has existed since before Confederation. This was thought to be so clear that the opposite-sex requirement for marriage was not specifically included in a federal law, with the exception of recent legislation regarding Quebec. Rather, judges included this requirement as part of the common law that has been consistently applied by the courts in Canada (except in Quebec). In Quebec, the same concept of marriage existed in the pre-Confederation *Civil Code*, and was recently confirmed in federal law (section 5 of the *Federal Law–Civil Law Harmonization Act, No. 1*).¹

Marriage has many aspects — social, religious, emotional and financial, among others. It also has legal consequences, including a range of benefits and obligations under federal law and under provincial and territorial law. Governments legislate legal consequences for marriage to protect a vulnerable partner and any children — mostly to ensure that they are adequately cared for on the death of one partner or if the relationship breaks down.

Many of the legal consequences of marriage, including this range of benefits and obligations under federal, provincial and territorial law, may also be applicable to other committed partners, such as common-law couples. At the federal level, Parliament began extending some of these legal consequences to common-law couples in the 1960s, about 20 years before the Charter came into force. One example is the survivor benefit in the *Canada Pension Plan*, which is available to the survivor in a common-law relationship of at least one year. Since the Charter came into force, a series of court decisions has held that most benefits and obligations available to married couples should be extended equally to other couples in a conjugal or marriage-like relationship, including same-sex couples.

¹ Section 5 reads “Marriage requires the free and enlightened consent of a man and a woman to be the spouse of the other.” This section was recently declared unconstitutional by the Quebec Superior Court.

In 2000, Parliament enacted the *Modernization of Benefits and Obligations Act*, extending benefits and obligations under 68 federal statutes to common-law opposite-sex and same-sex couples. As a result, the majority of the legal consequences of marriage in federal law now also apply to all couples in committed common-law relationships. Many of the benefits and obligations granted to married couples under provincial and territorial laws and programs are granted equally to common-law couples of the same sex and the opposite sex in the majority of provinces and territories.

There is some debate about whether it is appropriate to grant the same benefits and impose the same obligations on common-law partners as on married couples. Some ask whether common-law partners should be included only in what is called public laws, (or the laws that apply between governments and individuals, such as the *Canada Pension Plan*), and not in private laws, (or laws governing the obligations between two people, such as family law). If two individuals have chosen not to marry, some think that choice should be respected and they should not be required by law to have the same obligations between each other, including on the breakdown of the relationship.

The provinces and territories take different approaches to this issue, which reflect the diversity of views. The law seeks a balance between individual autonomy and the protection of vulnerable partners and children. In the federal law, common-law relationships are included in all benefits and obligations after one year of cohabitation (known as an “ascription model”), in order to evenly protect vulnerable partners. There are two reasons for this. First, if married couples or common-law partners must go to a lawyer to legally opt out of certain benefits or obligations, then laws can more readily ensure that the choice is based on legal advice about the implications, and is made evenly by both partners. Second, if couples were asked instead to choose whether to opt in, they might choose based on their current circumstances, for example, that they will not need a

survivor benefit because they both have their own pension entitlement, but they would then be left unprotected if there was an unforeseen change in their circumstances.²

If there is equal treatment in terms of benefits and obligations, some wonder why gay and lesbian couples still want to marry. The applicants in the current court challenges cite three reasons. First, some gay and lesbian couples consider that there is a qualitative difference between common-law relationships and marriage. Marriage is a ceremony where the couple formally announces to their families, friends and the state their commitment to one another and their intention to make the relationship last. A legally sanctioned equivalent to marriage, even one that is closely akin to marriage, is not acceptable to gay and lesbian couples because they believe that it does not give full and equal recognition to their relationship. Second, the current federal law requires gay and lesbian couples to wait the one-year qualifying period that is required for all common-law couples before becoming eligible for benefits and subject to obligations under federal law, while married couples are recognized immediately after the registration of their marriage. Under some provincial and territorial laws, the waiting period is longer, for example three or five years. Some gay and lesbian couples say that they should not have to wait when they are no less committed to one another than are the partners in a marriage. Finally, some gay and lesbian couples feel strongly that access to marriage is necessary to give the full protection of the law to their families and children, as they are concerned that their children may be stigmatized by the lack of legal recognition for their relationships.

The information that follows is meant to inform the House of Commons Standing Committee on Justice and Human Rights, which will table its recommendations after holding hearings later this year.

² Other arguments have also been put forward. Some have suggested that if one partner does not want to marry in order to avoid the legal consequences, then they are unlikely to agree to opt in as common-law partners. Some have also suggested that laws should not recognize the “free choice” of couples with children who do not marry, as where the relationship breaks down, this may affect the lives of the children who did not choose. Finally, some argue it is inappropriate to allow couples to choose to take on obligations, as where private law obligations do not apply on the breakdown of a relationship, public programs must usually fill the gap, such as the Guaranteed Income Supplement under the *Old Age Security Act*.

A spectrum of viewpoints

A survey of media coverage and public debate over the last decade reveals that people in Canada hold many different views on marriage. The findings of public opinion polls, which have routinely included questions on marriage, gay and lesbian couples and discrimination for at least the last decade, reflect the ongoing debate and public interest relating to these topics.

In a poll summarized in the *Angus Reid Report* (May/June 1998), 75 percent of respondents agreed that human rights legislation in Canada should protect gay and lesbian individuals from discrimination based on their sexual orientation. In a November 1999 Angus Reid poll commissioned by Justice Canada, close to two-thirds of respondents (63 percent) said that partners of gay or lesbian employees should be entitled to the same spousal benefits as the opposite-sex partners of employees.

Public opinion research suggests that public support for recognition of marriage between two persons of the same sex is rising. Thirty-seven percent of respondents in 1993 were in favour of same-sex couples being able to marry, and this figure rose to 49 percent in 1996. More recent research conducted in February 2002 by Environics for the Centre for Research and Information on Canada found that 53 percent of respondents were in favour of gay and lesbian couples marrying; 40 percent were opposed.

People in Canada may not agree on how to address this issue — there are many strongly held views. Many people in Canada believe that marriage is fundamental to our society, and that its primary function is to create a stable and supportive foundation for procreation and raising children. They believe that the opposite-sex requirement of marriage is not only essential, but that it is recognized precisely because of its link to procreation. To them, marriage is a sociological and religious institution built on the biological fact that children are born to couples of the opposite sex and that the couples who produce most of these children also raise and nurture them, even though they may do

so in blended families. Although marriage is not *only* about procreation, the potential for having and raising children is central to the institution, as illustrated by the fact that the common law provided that a marriage could be invalidated because of impotence.³ Given that the majority of Canadian children are both born to, and raised by, married couples, some people believe that the state logically has a role in promoting marriage and reserving it exclusively for partners of the opposite sex, to help ensure stability and support for children. This view of marriage is reflected in religious teachings in most major world religions.

Other people in Canada see this issue as a fundamental question of equality and the right to fully participate in our society. They believe the choice to marry should be open to same-sex couples as it is to opposite-sex couples. These people point to the fundamental importance in Canadian law of equality guarantees that protect individuals and groups of individuals from discrimination. Some same-sex partners seek access to marriage because it is a public recognition of, and expression of support for, their commitment, as well as a confirmation that their relationship has as much value to society as that of married couples. There are also some practical benefits to marriage; for example, it may create a clearer relationship without the requirement for adoption between a parent's partner and the children they may be raising together.

Some people in Canada think that the purpose of marriage has evolved. They point to growing numbers of divorces and common-law relationships as proof that marriage no longer promotes social stability, although it still has a role in enabling couples to publicly express their commitment to one another. People who see marriage as an expression of commitment rather than an instrument of social stability argue that people in committed same-sex relationships should be just as entitled to formally register their unions as those who marry. Others point out that the sociological and historical origins of marriage were not religious, but rather proprietary. Specifically, the institution of marriage was created to govern the transfer of ownership of property, including women and children, between

³ This is not the case in the Civil Law (see *Gibeault c. Campeau*, (1977) C.S. 717, page 718; *P.G. Québec c. K.*, (1947) B.R. 566, page 571; *Burnett c. Worthington*, (1951) C.S. 50; *Beaulne c. Thessereault*, (1947)

wealthy families. Only later did this contract become sanctified by religion. Thus, some people consider that the very origin of the institution of marriage should divest it of any continuing validity, and some even believe that marriage can never be a truly equal partnership precisely because of these origins. They share the view that the state should cease to play a role in regulating marriage, and that marriage should be left to individuals and their beliefs.

Finally, some people have suggested that marriage, and the stability it provides to families and communities, is currently being weakened by the growing number of informal or common-law relationships. According to this view, marriage can be strengthened only if it is socially encouraged over less formal relationships, even if this means encouraging both committed opposite-sex couples and committed same-sex couples to marry. They argue that if governments recognize parallel forms of relationships outside of marriage, thus offering couples more choices, there is a risk that an important social institution will be further eroded, resulting in less stability for society.

This overview of the range of perspectives on same-sex marriage is by no means exhaustive, and the Committee hearings will provide an opportunity to hear an even broader spectrum of views.

The Law Commission of Canada also briefly discussed the issue of marriage in its report *Beyond Conjuality: Recognizing and Supporting Close Personal Adult Relationships*, tabled in Parliament in February 2002.⁴ The Law Commission made several suggestions about how marriage and same-sex relationships could be addressed, and these are included in the section called “*What choices are open to Parliament?*” later in this paper.

C.S. 24; C. c. J., (1947) C.S. 298, page 299).

⁴ The Law Commission’s report focused mostly on people in non-conjugal relationships, such as an adult child living with an elderly parent, two elderly siblings, or an individual with disabilities and his or her caregiver. The Commission suggested that these couples should also be eligible for the benefits and obligations of spouses and common-law partners under federal law. Federal law currently includes family and other adult non-conjugal relationships only in some circumstances. But further study would be needed before Parliament can decide whether it is appropriate to treat non-conjugal relationships in the same way as spouses or common-law partners in all federal laws, and so these suggestions are beyond the scope of this paper.

The current legal framework

Canada is a constitutional democracy. Our Constitution contains all of the powers of the state now and for the future. It both divides the power to make laws between the federal Parliament and the provincial and territorial legislatures, and sets out the basic rights and freedoms of each individual in the *Canadian Charter of Rights and Freedoms*. The Charter places limits on government action affecting individuals to ensure that governments act in a way that respects individual rights and freedoms. The Constitution grants a right to individuals to challenge a law they believe is inconsistent with the Charter. This involves asking the courts to rule on the validity of an existing law.

In dividing the power to make laws, the Constitution divides the power over marriage between the federal Parliament and the provincial and territorial legislatures. The federal Parliament has authority over the legal capacity to marry (i.e., who can marry whom).⁵ The provincial and territorial legislatures have the authority over solemnization, which includes requirements for such things as licences, determining who can conduct the ceremony and how, and registration.

When marriages break down, the Constitution gives authority to the federal Parliament to regulate the legal consequences through divorce. The *Divorce Act* sets out a legal framework applied across Canada, which includes grounds for divorce and allows for spousal support, child support, and custody and access orders.

With regard to relationships between unmarried couples, such as common-law partners and registrations (for example, civil unions or domestic partners), legal authority is also divided. Because of our constitutional division of powers, neither the federal Parliament nor a provincial or territorial legislature acting alone has the jurisdiction to create a new

⁵ Legal capacity has several branches, including the opposite-sex requirement (identity of gender), prohibitions on marriages between individuals who are too closely related (prohibited degrees of consanguinity), prohibitions on marriages where one or both are already married to someone else (bigamy and polygamy), and other requirements for minimum age, voluntary consent and impotence.

form of legal relationship beyond marriage (such as a civil union or a domestic partnership) that will have predictable legal consequences under both federal law and provincial or territorial law, although each has the authority to legislate concerning relationships beyond marriage for the purposes of their own laws and programs. The provincial and territorial legislatures have authority to regulate unmarried relationships for provincial and territorial laws and programs, including how they are defined, and what the legal consequences will be, for example in the law of wills and estates. The federal Parliament also has the power to define and regulate the legal consequences of these relationships for its own laws and programs, such as the *Canada Pension Plan*.

The legal consequences in the event of the breakdown of relationships between unmarried couples (for example, common-law partners, civil unions or domestic partners), as well as the division of marital property when a marriage breaks down, are ordinarily regulated by the provincial and territorial legislatures under their authority over property and civil rights. However, there are a few federal laws that set out legal consequences for the breakdown of relationships, whether between married or unmarried couples, for the purposes of a specific federal law or program, such as the *Canada Pension Plan*.

Religious and civil marriage

The Constitution includes a guarantee of freedom of religion, which is entrenched in the Charter. And while there are some legitimate limits on freedom of religion, as, for example, where some other Charter right or freedom is involved, governments must be careful to allow as much as possible for the diversity of religious beliefs.

Some people have expressed concern that, if the concept of marriage is changed, religious officials could be forced to marry gay and lesbian couples even when it is against their beliefs. None of the recent court decisions directly addressed this issue, but both the Ontario decision and the Quebec decision noted that such a result was very unlikely. This issue is addressed further in the section called *Possible approaches*.

In Canada, the legal requirements for a valid marriage are not always the same as the religious requirements. Most religions have their own requirements for entering into a valid marriage. The Roman Catholic Church, for example, will not marry first cousins or divorced persons who have not received an annulment. Some branches of Judaism will not marry a previously married woman unless she has undergone a religious divorce by receiving a “get.” Some religious officials will not marry two individuals unless at least one is a member of their congregation.

When individuals marry in a religious ceremony, the legal and religious requirements operate together. Religions may impose additional requirements on the prospective marriage partners, but they may not perform a marriage that is legally valid unless the two people seeking to be married meet all the basic requirements set out in federal law and provincial or territorial law. For example, people who do not meet the minimum age requirement set out in the law cannot validly be married through a religious ceremony.

Concern over the possible impact of differences in religious requirements for marriage was debated at the time of Confederation, and led to the federal government being given the power over the legal capacity to marry, to ensure consistency across the country. These differences in requirements for religious marriages have also over time led most countries, including Canada, to create a legal mechanism for civil or “city hall” marriages. In this way, a couple may legally marry in a civil ceremony as an alternative to a religious ceremony.

The distinction between a religious and a civil marriage may be nearly invisible to many couples getting married in Canada. In some provinces and territories, if a couple is married religiously, they may not need to get a marriage licence, provided they meet the legal requirements.⁶ Ordinarily, it is the religious official conducting the wedding

⁶ Some provinces allow religions, where it is part of their tradition, to publicly read “the banns” instead of a marriage licence. In this instance, the religious official would publicly announce during the service on three occasions that the wedding was going to happen, and that any member of the congregation who knew of an impediment should let the official know. In other instances, the religious official may make the

ceremony who will take care of the registration, which then gives the marriage legal recognition. In all cases in Canada, the religion has the right to perform whatever rites of marriage it chooses, but the ceremony by itself has no legal consequences unless the marriage also meets the requirements of federal law and provincial or territorial law. That is why religious officials must be authorized under provincial or territorial law to perform ceremonies that are recognized in law.

In other countries, such as France, the distinction between religious and civil marriage is more readily apparent. There, a couple must go through a civil ceremony, whether or not there will also be a religious one, if they want their marriage to be legally recognized.

Recent court decisions

There are now conflicting court decisions in British Columbia, Ontario and Quebec on the opposite-sex requirement of marriage. Last fall, the British Columbia Supreme Court upheld the opposite-sex requirement of marriage. The court held that although the opposite-sex requirement of marriage violated the equality guarantees of gay and lesbian individuals under the Charter, it was justified in a free and democratic society. In the court's view, the concept of marriage results in inequality for gay and lesbian couples, even though the concept did not arise because of a "discriminatory belief that same-sex couples are not worthy of being married." However, the inequality was justified as the Charter does not require marriage to be made "something it was not" in order to embrace other relationships. The Court also found that the federal Parliament did not have the constitutional authority to alter the opposite-sex meaning of marriage, although the Quebec and Ontario courts disagree on this point. The British Columbia Supreme Court decision is under appeal, and expected to be heard by the British Columbia Court of Appeal in February 2003.

arrangements to obtain the marriage licence, so that the couple may be unaware of this part of the process. After the wedding ceremony is conducted, the couple will sign the register, with their witnesses, and in the case of many religious ceremonies, the official conducting the ceremony will mail the register to the

In Ontario, a decision of the Ontario Divisional Court in 1993 also upheld the opposite-sex requirement of marriage. The Court held that unions of persons of the same sex are not marriages because of the definition of marriage, and that the Charter does not have the effect of bringing about a change in the definition of marriage.

In July 2002, however, a different panel of the Ontario Divisional Court found that the opposite-sex requirement of marriage was a breach of the constitutional equality guarantees for gay and lesbian Canadians and gave Parliament two years to address this issue. If Parliament fails to do so, the court said, the common law in Ontario will automatically be changed to allow unions of “two persons.” In the view of the Ontario Divisional Court, the purposes of marriage in our modern society can be equally valid for same-sex as for opposite-sex couples — commitment, companionship, mutual care and support, shared workload, shared shelter, emotional and financial interdependence, and child-rearing. The only remaining distinction in the court’s view was that same-sex couples could not procreate, at least not without the intervention of a third party. But as not all married couples have children, and many children are born outside of marriage, the three judges held that having the potential to procreate was insufficient to be the sole legal basis for continuing the opposite-sex requirement of marriage.

In September, the Quebec Superior Court made a similar finding to that of the Ontario Divisional Court. The opposite-sex requirement of marriage was found to be a breach of the constitutional equality guarantees, and the court ruled that such a breach was not justified in a free and democratic society. It also gave Parliament two years to address the issue. The Court also declared specific sections of three laws that had set out the opposite-sex meaning of marriage⁷ unconstitutional and inoperative.

provincial authority, who will send out the marriage certificate. Again, the couple may often not be aware of the registration requirement.

⁷ Section 5 of the *Federal Law — Civil Law Harmonization Act, No. 1*; section 1.1 of the *Modernization of Benefits and Obligations Act*; and that portion of article 365 of the *Quebec Civil Code* that had referred to the opposite-sex meaning of marriage.

If the law changes in Ontario and Quebec only, this would mean that the law of marriage would apply across Canada in different ways. This outcome is exactly what the drafters of the original Constitution hoped to avoid — having some provinces and territories recognize a marriage that others do not.

The role of Parliament and the courts

In the last few years, Parliament has discussed the meaning of marriage on three occasions, as well as during debate on a series of bills introduced in Parliament by individual Members of Parliament or Senators:

- in 1999, Parliament passed by a wide margin an Opposition motion stating that Parliament will take all reasonable steps to maintain the opposite-sex meaning of marriage in Canada;
- in 2000, section 1.1 was added to the *Modernization of Benefits and Obligations Act* as an interpretive clause, stating that nothing in the Act altered the existing meaning of marriage as the “lawful union of one man and one woman to the exclusion of all others”; and
- in 2001, section 5 of the *Federal Law–Civil Law Harmonization Act, No. 1* confirmed the opposite-sex meaning of marriage in Quebec.

The recent decisions of the Ontario Divisional Court and the Quebec Superior Court are inconsistent with these earlier statements of Parliament. Indeed, the Quebec Superior Court decision declared the last two unconstitutional. This has caused concern among some people in Canada that the courts may be “over-stepping” their constitutional role by overruling the expressed will of Parliament. However, under the Constitution, Parliament and the courts have complementary roles. In reviewing the law on marriage, two courts

have set out new interpretations on the scope of the Charter equality guarantees. It is now up to Parliament to review its approach to marriage in light of these new decisions.

What are others doing?

Canada is not the first country in the world to address whether and how to legally recognize same-sex unions. Indeed, Canada is coming to the debate later than many countries. Several countries have debated this issue for many years and have come up with a variety of approaches, ranging from same-sex marriage in the Netherlands to the legal recognition of domestic partners, registered partnerships and civil unions in Scandinavia, parts of Europe and parts of the United States. Although some of these approaches appear to be similar, each is quite different, as it has been created to fit the particular society and to comply with the specific constitutional and legal structures in each country. Most countries have decided to retain marriage as an opposite-sex institution, and none has decided to leave marriage exclusively to religion and stop recognizing it in law. In Canada, three provinces —Quebec, Nova Scotia and Manitoba — have passed legislation on the subject, and Alberta has begun public discussions.

In each instance, there has been widespread debate on the approach chosen, and no two approaches have been exactly alike. Moreover, in each instance, the legal effect of the registration is ordinarily restricted to that country, as there is currently no means to ensure recognition of same-sex relationships by other countries.

The wide variety of approaches shows that the issue is complex. A brief summary of some of these models follows:

Within Canada

Four provinces have enacted or are considering laws relating to same-sex unions. Quebec, Nova Scotia and Manitoba have enacted legislation that allows gay and lesbian couples as well as opposite-sex couples to record their relationships in a civil registry. Alberta has set out in its *Marriage Act* a definition of marriage that requires partners to be

of opposite sex for the purposes of solemnization. Alberta, in a bill before their legislature, has also raised the possibility of legal recognition for unmarried couples. Some details are set out below. In addition to these laws, most provinces and territories have now also legislated to provide some or all of the benefits and obligations of married couples to common-law gay and lesbian couples under provincial and territorial laws.

Quebec

Bill 84 — *An Act instituting civil unions and establishing new rules of filiation* — was passed by the National Assembly in June 2002. The Act amends the *Civil Code* and a number of other provincial laws to create a new status of civil union partners (open to both unmarried opposite-sex and same-sex conjugal partners). Civil union partners have almost all of the same benefits and obligations under provincial law as married couples do, including the legal relationship between the partner and any children. A civil union can be dissolved by a court judgment, a notarized joint declaration (under some circumstances) or upon the death of one of the partners. A partner to a civil union cannot marry without first dissolving the civil union.

While ensuring equal treatment, the Act makes it clear that civil unions are not marriages, and retains some legal distinctions between the two. For example, some provisions of the *Civil Code* that relate to legal separation continue to apply only to married couples.

Nova Scotia

Nova Scotia has recently legislated domestic partnership registration for unmarried opposite-sex or same-sex conjugal couples. On registration, the partners have most of the same benefits and obligations as married couples under provincial law, with some exceptions such as adoption. A domestic partnership is automatically dissolved if one of the partners marries another person; it can also be dissolved by a separation agreement, an executed statement of termination by both parties, or by a separation of more than one year, if one or both partners intend not to continue the relationship.

Manitoba

Bill 53, the *Common-Law Partners' Property and Related Amendments Act*, was passed by the Legislature in August 2002 but has not yet been brought into force. The Bill provides for the registration of two unmarried opposite- or same-sex adults as common-law partners. Where common-law partners choose not to register, they are deemed to be included after they have cohabited for the period of time specified in each statute. This is similar in many ways to the law in Nova Scotia, although the registered relationship is not automatically dissolved where one partner marries another person, and can only be dissolved after at least one year of separation.

Alberta

In 2000, Alberta amended the provincial *Marriage Act* to add a specific reference to the opposite-sex meaning of marriage and a notwithstanding clause, as follows:

“s. 1 In this Act, ...

(c) “marriage” means a marriage between a man and a woman ...

s. 2 This Act operates notwithstanding

(a) the provisions of sections 2 and 7 to 15 of the *Canadian Charter of Rights and Freedoms* ...”

In May 2002, the Alberta Minister of Justice tabled Bill 30 — the *Adult Interdependent Relationships Act* — in the Legislative Assembly. The Bill would provide for the legal recognition of partnership contracts between two unmarried adults, whether or not they are in a conjugal relationship, with the same benefits and obligations under provincial law as married couples. As with common-law partners, adults in relationships of dependency would be deemed adult interdependent partners after three years of cohabitation, even in the absence of a contract.

Other countries

European laws demonstrate a variety of approaches to the legal recognition of same-sex couples. From time to time, there is some confusion in the descriptions of some of these systems, and registered partnerships may be improperly described as marriages.

Same-sex marriage — Only one country in the world, the Netherlands, currently allows for same-sex marriage. The legislation setting up same-sex marriage is separate from that for traditional marriage, and there are some differences in how same-sex and opposite-sex couples are treated under law. For example, the law specifies that same-sex marriage is valid only within that country. The Netherlands first legislated a registered partnership model for same-sex couples and then, several years later, enacted same-sex marriage. Belgium, which has a registered partnership model, is currently debating legislation similar to that of the Netherlands.

Registered partnership models — Many countries in Scandinavia and Europe, and two states in the United States (Vermont and Hawaii), have recently reformed their laws to extend benefits and obligations to same-sex couples by creating a new legal relationship called a registered partnership or a civil union. There are two basic models.

Denmark and Vermont have created registered partnerships open to gay and lesbian couples. Registering a partnership gives a gay or lesbian couple many of the same benefits and obligations as married couples have, usually with the exception of access to adoption and religious marriage. Dissolving the partnership requires “de-registration” through a process provided for in the jurisdiction’s divorce legislation.

Finally, France, Belgium and Hawaii have systems that extend beyond conjugal couples to include other relationships between unmarried adults, although they take different approaches because of concerns expressed during the legislative process about preserving the institution of marriage. France recently created a PACS system (pacte civil de solidarité) that allows the registration of private contracts between two unmarried and

unrelated individuals, granting access to some benefits and obligations similar to those for married couples. The original proposal had included the possibility of two relatives registering, but there were objections, as some saw this as a possible erosion of the restrictions on marriages between persons who are too closely related (“prohibited degrees of consanguinity”). Belgium and Hawaii have adopted a different approach, allowing any two unmarried adults, including relatives (for example, two elderly siblings living together or an adult child living with an elderly parent) to register. However, in Hawaii, common-law opposite-sex couples may not register, so that there can be no officially recognized alternative to marriage.

Defence of Marriage Acts — In the United States, the federal government and a significant number of state legislatures have passed “Defence of Marriage Acts” to confirm the opposite-sex meaning of marriage. The federal Act allows a state to decide not to recognize unions of same-sex couples as marriages, even in cases where a couple’s union has been recognized as a marriage in another state. In some states, such as Alaska and Hawaii, debate on this question and court decisions have prompted state legislatures to make amendments to their constitutions to preserve the opposite-sex meaning of marriage.

What questions need to be decided in Canada?

The current public debate and recent court challenges to the constitutionality of the opposite-sex requirement for marriage have lent new focus to the question “What is the role of the state in defining the legal requirements for marriage?” As part of this important debate, the people of Canada will be asked to reflect on several fundamental, philosophical questions about the importance of marriage in our society, about how the state can best support marriage, and about the meaning and importance of equality in our society:

- Does marriage have a continuing role in our modern society and, if so, should this be reflected in our laws?

- If marriage has a continuing role in our society and in our laws (beyond its significance for the couple), how can Parliament best act to support marriage?
- If marriage does not have a broader continuing societal role, should governments stop regulating relationships and leave the question of marriage to individuals and their religious institutions? If this happened, what would be the result for individuals on the breakdown of a relationship? Should Parliament continue to have a role in protecting a vulnerable partner and any children, or should there be no legal consequences for those who enter into or leave relationships? If governments do have a continuing role in regulating legal consequences for relationships, how can Parliament best accomplish it?
- Do committed conjugal relationships other than marriage have a role in our modern society? If so, is that role different from the one played by marriage? If so, what is the difference? How should other committed conjugal relationships be treated in our laws?
- Now that federal laws and laws in most provinces and territories grant almost all of the same benefits and obligations of marriage to unmarried couples and their children, is there still a need for governments to regulate marriage as distinct from other conjugal relationships, or should the state regulate all such relationships under the same statute?
- If we want society and the law to support and respect both marriage and other committed conjugal relationships equally, how can this best be achieved? Does equality mean that social institutions, like marriage, are open to same-sex committed conjugal partners?

How we answer these questions will help narrow down the range of choices as we examine the following possible approaches.

Possible approaches

What should marriage look like in Canadian law? The spectrum of possible approaches, outlined below, would have an array of different consequences.

Marriage could remain an opposite-sex institution, either by:

- legislating the opposite-sex requirement for marriage; or by
- restating the opposite-sex meaning of marriage in the preamble of a new piece of legislation that would create an equivalent to marriage for federal purposes (either civil union or domestic partnership) for other conjugal relationships; or

Marriage could be changed to also include same-sex couples by:

- legislating to give same-sex couples the legal capacity to marry; or

With the cooperation of the provinces and territories, Parliament could leave marriage to the religions by:

- removing all federal references to marriage, and replacing them by a neutral registration system for all conjugal relationships, leaving marriage exclusively to individuals and their religious institutions.

Each approach would have to be undertaken in a way that complied with the constitutional division of powers and the Charter. Each approach is examined in greater detail below.

Marriage could remain an opposite-sex institution

What would this look like?

If Parliament chooses to keep marriage as it is, that is the “union of one man and one woman,” this opposite-sex meaning could be set out explicitly in a new federal law. In that case, this could be a clear expression of what Parliament believes marriage is, but would not address the equality concerns of same-sex couples.

If Parliament wished to also address some of the equality concerns, it could enact a new federal statute creating a new registry that would be deemed equivalent to marriage for the purposes of federal laws and programs. This new civil union or domestic partner registry could either be open only to same-sex couples (in the way that marriage would be open only to opposite-sex couples), or it could be open both to same-sex couples and to opposite-sex couples who choose not to marry. The federal statute creating this new registry could include a provision stating that marriage is an opposite-sex institution.

What would this do?

- Keeping the opposite-sex meaning of marriage would be consistent with what has been done by the majority of countries that have addressed this question. It would satisfy those who do not believe that the meaning of marriage can or should be changed to address equality concerns.
- It would not be viewed by all as fully addressing equality concerns under s. 15 of the Charter, and so it would likely be challenged under the Charter as discriminatory. Although this question has not been decided by the courts, both the Québec and Ontario decisions suggest that a civil registry may not be enough to meet equality concerns. If the new registry is open to both same-sex and opposite-sex couples, then opposite-sex couples would still have an additional choice that is not open to same-sex couples (i.e., the choice to marry). If the new registry is open to same-sex couples

only, then some may see the creation of the new registry as having a discriminatory purpose of keeping same-sex couples out of the institution of marriage by creating a parallel institution.

- If the opposite-sex meaning of marriage ultimately withstands the current constitutional challenges, this legislation would too.
- If the courts ultimately rule that preserving marriage as an opposite-sex institution is a violation of the Charter, but Parliament wished to maintain the opposite-sex requirement for marriage, legislation to do so would require Parliament to use section 33 of the *Canadian Charter of Rights and Freedoms*, the “notwithstanding” clause. This clause has never been used by Parliament. The Charter provides that when Parliament uses the notwithstanding clause to enact a piece of legislation, the legislation must be reviewed by Parliament every five years. Invoking the “notwithstanding” clause in legislation reaffirming the opposite-sex meaning of marriage would guarantee that the issue would be debated again in five years’ time.
- Or Parliament could choose to combine the statement of the opposite-sex meaning of marriage with the creation of a new registry that is equivalent to marriage. However, the federal Parliament acting alone does not have the authority to make the registry apply for all purposes.⁸ All of the provinces and territories would have to agree to pass complementary legislation for the new civil union or domestic partnership to apply evenly throughout Canada. Otherwise, the registration would be limited to federal statutes and programs. The fact that the registry would not apply evenly across Canada may result in claims of discrimination as gay and lesbian couples would not be treated in law as equivalent to married in all jurisdictions.⁹

⁸ The federal legislation could provide that where a couple has registered their civil union (or domestic partnership) with the province in which they live, that registration would also apply for federal statutes and programs. Only Nova Scotia, Quebec and Manitoba now allow for such registrations, and so the legislation would also have to create a federal registry for couples who live in provinces without such registries, for federal purposes only.

⁹ Without complementary provincial legislation, if a couple lived in a province that did not register civil unions or domestic partners, they would only be recognized for provincial purposes if they qualified as a

- If the relationship between partners to a civil union or registered domestic partnership breaks down, federal legislation could only set out how a couple could “de-register” for federal purposes.¹⁰ If there were no complementary legislation by the provinces and territories, matters of support, division of property and parental responsibility could be resolved only if the couple qualified as common-law partners under provincial or territorial law.

Marriage could be changed to also include same-sex couples

What would this look like?

Parliament could choose to legislate to change marriage to give same-sex couples the legal capacity to marry. Current federal, provincial and territorial laws, regulations and programs that refer to married couples would not need to be amended but would simply apply to marriages between two persons of the same sex. However, the new legislation would also have to indicate how some of the other common law rules of legal capacity to marry that are currently set out in opposite-sex terms would apply.¹¹ Also, some statutes, such as the *Divorce Act*, that use language based on the opposite-sex meaning of marriage, would need adjustment.

What would this do?

- This would fully address equality concerns.¹²

common-law couple. This might also cause some difficulties for the couple if they move to a different province.

¹⁰ The federal Parliament has the constitutional authority over divorce, but as this is not a divorce, the authority would be under “property and civil rights”, which is within the mandate of the provincial and territorial legislatures.

¹¹ For example, some of the other rules on legal capacity for marriage set out their requirements in opposite-sex terms, such as laws which prohibit marriages where two individuals are too closely related (prohibited degrees of consanguinity) and would have to be adjusted.

¹² In provinces and territories that legislate against the solemnization of same-sex marriage, such as Alberta, there would likely be further Charter challenges.

- These marriages would likely be valid only within Canada, as there is currently no legal mechanism for recognition of same-sex marriages outside our borders.
- There might be concern by some that religious officials might be forced to perform same-sex marriages. Both the Ontario and Quebec decisions suggest that the Charter would not require religious officials to conduct marriage ceremonies that were contrary to their religious beliefs. However, the federal, provincial and territorial governments could agree to look at whether some additional changes to the law are necessary (likely primarily to provincial and territorial laws¹³).
- Another way of ensuring that religious officials are not required to marry couples against their beliefs would be to remove all legal effect from religious marriage. This would mean couples would have to have a civil marriage, even where they also had a religious marriage, before it would be recognized in law. If Parliament chose this approach, the equality concerns could be fully addressed in civil marriage, without parallel changes to religious marriage. However, the only way to remove all legal effect from religious marriage would be for the provinces and territories to make changes in their solemnization laws.¹⁴
- Completing the separation of religious and secular marriage may be objectionable to many religions, which may want legal recognition for the marriages they perform, and whose members may feel marginalized by no longer receiving legal recognition for their religious marriages.

¹³ Some provinces and territories already have provisions in their human rights codes that allow exceptions for religious organizations for some purposes, or state in solemnization rules that religious organizations can refuse to marry a couple. Federal, provincial and territorial human rights laws may need to be reviewed.

¹⁴ Again, federal, provincial and territorial human rights laws may need to be reviewed to allow full assurance to the religions that they could continue to set additional requirements for religious marriage that are consistent with their beliefs.

With the cooperation of the provinces and territories, Parliament could leave marriage to the religions

Parliament could choose to underscore the division of church and state in Canada by making a clearer distinction between the role of Parliament and that of the religions in the area of marriage. To accomplish this goal, all legal effect could be removed from marriage, leaving marriage exclusively to the religions. This would require the full cooperation of all provinces and territories.

What would this look like?

Parliament could repeal all federal law on marriage and all references in federal law and programs to marriage. These would be replaced with a new registry for opposite-sex and same-sex couples using neutral language, for example, registered partner. Existing marriages could be deemed to be included, but all new relationships would be required to be registered under the new system in order to be recognized in law. Federal divorce laws would apply only to existing marriages, and the breakdown of registered relationships would be governed by provincial and territorial law. A couple could choose to be married by a religious official, but that marriage would have no effect in law unless the couple also registered in the new system. Each religion would decide whether to perform marriage only for opposite-sex couples or also for same-sex couples.

What would this do?

- This approach would work only with the full cooperation of all provinces and territories as the new registry would replace provincial and territorial marriage registries and civil union and domestic partner registries.
- If provinces and territories decided instead to continue to exercise their constitutional jurisdiction to solemnize marriages, this approach would not work for two reasons. First, there would be no federal law setting out who can get married, meaning that

either the Charter equality concerns would continue regarding the opposite-sex meaning of marriage (since the federal common law on this legal issue would still exist and so be open to challenge), or court decisions on the equality issue would have to fill the gap created in the federal law. Second, if provinces and territories continued to elect to solemnize marriages, there would no longer be any law on divorce that applied to these new marriages. Parliament could be criticized for not exercising its authority over divorce to protect vulnerable partners and children.

- If there were full cooperation by all provinces and territories, a uniform registry system could allow for legal recognition of committed conjugal relationships (either opposite sex or same sex) and full and equal treatment. There would no longer be any references to marriage in any federal law, but existing marriages and new registrations would be eligible for the full range of benefits and obligations under law.
- As marriage would no longer exist in law, laws regarding the legal consequences of the breakdown of marriages on divorce would apply only to existing marriages. Provincial and territorial law would apply to the breakdown of any relationships in the new registry, including those where a religious marriage had taken place.
- This new registry would be difficult to challenge before the courts, because all couples would be treated the same way. However, it would likely concern those who believe that marriage should be legally recognized and may make them feel that their beliefs have been marginalized. It could also create difficulties if a couple moved to another country. First, the other country would have to determine if the marriage was legally valid there, and second, a couple moving to Canada who had been married elsewhere might have difficulties getting a divorce.

How can you join the debate?

While the government has the responsibility to make laws and policies, individuals have a fundamental role to play in making their views known to their elected representatives on difficult questions that will shape our future. This paper reflects one way of viewing this question. You may have another way.

The House of Commons Standing Committee on Justice and Human Rights will soon announce a process for hearing from Canadians on how to reconcile the traditional definition of marriage and the recognition of gay and lesbian unions within the framework of the Canadian Constitution and its equality guarantees. In the meantime, you can also write directly to your Member of Parliament or Senator, or send your views to the Minister of Justice at Room 100, 284 Wellington Street, Ottawa, Ontario K1A 0H8, or by e-mail at marriage@justice.gc.ca.