Celebrant Will you strive for justice and peace among all people, and respect the dignity of every human being?

People I will, with God's help.

- The Baptismal Covenant, Book of Alternative Services, page 159

Having been a member of the General Synod throughout the period from 1986 to 2010 I was privy to many discussions, both formal and informal, about how the Church should relate to persons in same sex relationships.

During the committee of the whole debate at the 2007 General Synod about blessing such relationships I made this intervention:

> I speak as one who, chronologically, is a very senior member of this synod.[1] Because I enjoy that seniority I am old enough to remember.
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> I am old enough to remember when acts of sexual intimacy between persons of the same sex, even between consenting adults, were criminal offences punishable by prison terms. I have lived long enough to see those laws repealed.
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> I am old enough to remember when most 'straight' people considered all gay men and lesbian women to be sexual perverts and social outcasts. I have lived long enough to see the majority of Canadians accept that homosexual orientation is neither a perversion nor a matter of choice, but rather a matter of one's humanity, a matter of God's creation.
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> I am old enough to remember when the stigmatization of homosexual men and women led many to addiction to alcohol or drugs or both and, in far too many instances, to suicide. I have lived long enough to see that stigmatization well on the way to disappearing.
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> I am old enough to remember when homosexual orientation was thought to be a mental illness, a psychiatric disorder. I have lived long enough to see the science of psychiatry abandon that theory.
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> I am old enough to remember when gay and lesbian couples were the victims of gross discrimination and could only live in metaphorical closets. I have lived long enough to see many civilized societies guarantee equality and freedom from discrimination for all persons regardless of sexual orientation. Many jurisdictions have formally legitimized same-sex relationships using labels like civil union, civil partnership and domestic partnership.

[1] I was 77 at the time.

> And five[2] civilized nations, of which Canada is one, and one[3] state in the American Union, have redefined marriage to include such relationships.
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> In our marriage liturgies the priest pronounces a blessing of the newly married couple. It is not the Church's blessing, nor is it the priest's blessing. It is the blessing of God, Father, Son and Holy Spirit. The Church is the agency, and the priest is the agent, through whom God's blessing is visibly and audibly manifested.
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> I hope to live long enough to see the Church and its clergy become God's agents in blessing same-sex couples who commit themselves to faithful, loving lifelong relationships.

Although the "goal posts had been moved" in 2005 when Parliament redefined marriage to mean "the lawful union of two persons to the exclusion of all others" in the Church we continued to discuss blessings rather than marriage. It remained for two rank and file members of the 2013 Synod, rather than the leadership of the Church, to propose the resolution that is the focus of the Commission's work.

For a long time I had reservations about redefining marriage. I was finally persuaded by a 2005 decision of the Constitutional Court of South Africa in a case known as *Minister of Home Affairs v. Fourie* which can be read at http://www.saflii.org/za/cases/ZACC/2005/19.html .

The Constitutional Court was, of course, dealing with a question of constitutional rights, not one of theology or biblical interpretation. I call attention to these extracts from the principal decision authored by Justice Albie Sachs.[4] [I have omitted the footnotes found in the original].

> [2] Finding themselves strongly attracted to each other, two people went out regularly and eventually decided to set up home together. After being acknowledged by their friends as a couple for more than a decade, they decided that the time had come to get public recognition and registration of their relationship, and formally to embrace the rights and responsibilities they felt should flow from and attach to it. Like many persons in their situation, they wanted to get married. There was one impediment. They are both women.
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> [3] . . . Their complaint has been that the law excludes them from publicly celebrating their love and commitment to each other in marriage. Far from enabling them to regularise their union, it shuts them out, unfairly and unconstitutionally, they claim.

[2] Now 17.
[3] Now 19 and the District of Columbia.
[4] See his biographical sketch at
http://www.constitutionalcourt.org.za/site/judges/justicealbiesachs/index1.html

[4] In the pre-democratic era same-sex unions were not only denied any form of legal protection, they were regarded as immoral and their consummation by men could attract imprisonment. . . . Section 9(1) of the Constitution now reads:

> "Everyone is equal before the law and has the right to equal protection and benefit of the law."

Section 9(3) of the Constitution expressly prohibits unfair discrimination on the grounds of sexual orientation. It reads:

> "The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, *sexual orientation*, age, disability, religion, conscience, belief, culture, language and birth."

[50] . . . The sting of past and continuing discrimination against both gays and lesbians was the clear message that [an earlier decision of the Court] conveyed, namely, that they, whether viewed as individuals or in their same-sex relationships, did not have the inherent dignity and were not worthy of the human respect possessed by and accorded to heterosexuals and their relationships. This discrimination occurred at a deeply intimate level of human existence and relationality. It denied to gays and lesbians that which was foundational to our Constitution and the concepts of equality and dignity, which at that point were closely intertwined, namely that all persons have the same inherent worth and dignity as human beings, whatever their other differences may be. The denial of equal dignity and worth all too quickly and insidiously degenerated into a denial of humanity and led to inhuman treatment by the rest of society in many other ways. This was deeply demeaning and frequently had the cruel effect of undermining the confidence and sense of self-worth and self-respect of lesbians and gays. . . .

[60] A democratic, universalistic, caring and aspirationally egalitarian society embraces everyone and accepts people for who they are. To penalise people for being who and what they are is profoundly disrespectful of the human personality and violatory of equality. Equality means equal concern and respect across difference. It does not presuppose the elimination or suppression of difference. Respect for human rights requires the affirmation of self, not the denial of self. Equality therefore does not imply a levelling or homogenisation of behaviour or extolling one form as supreme, and another as inferior, but an acknowledgement and acceptance of difference. At the very least, it affirms that difference should not be the basis for exclusion, marginalisation and stigma. At best, it celebrates the vitality that difference brings to any society. The issue goes well beyond assumptions of heterosexual exclusivity, a source of contention in the present case. The acknowledgement and acceptance of difference is particularly important in our country where for centuries group membership based on supposed biological characteristics such as skin colour has been the express basis of advantage and disadvantage. South Africans come in all shapes and sizes. The development of an active rather than a purely formal sense of enjoying a common citizenship depends on recognising and accepting people with all their differences, as they are. The Constitution thus acknowledges the variability of human beings (genetic and socio-cultural), affirms the right to be different, and celebrates the diversity of the nation. Accordingly, what is at stake is not simply a question of removing an injustice experienced by a particular section of the community. At issue is a need to affirm the very character of our society

as one based on tolerance and mutual respect. The test of tolerance is not how one finds space for people with whom, and practices with which, one feels comfortable, but how one accommodates the expression of what is discomfiting.

[61] . . . The strength of the nation envisaged by the Constitution comes from its capacity to embrace all its members with dignity and respect. In the words of the Preamble, South Africa belongs to all who live in it, united in diversity. What is at stake in this case, then, is how to respond to legal arrangements of great social significance under which same-sex couples are made to feel like outsiders who do not fully belong in the universe of equals.

[70] . . . the rights and obligations associated with marriage are vast. Besides other important purposes served by marriage, as an institution it was (at the time the SALRC Paper was produced) the only source of socio-economic benefits such as the right to inheritance, medical insurance coverage, adoption, access to wrongful death claims, spousal benefits, bereavement leave, tax advantages and post-divorce rights.

[71] The exclusion of same-sex couples from the benefits and responsibilities of marriage, accordingly, is not a small and tangential inconvenience resulting from a few surviving relics of societal prejudice destined to evaporate like the morning dew. It represents a harsh if oblique statement by the law that same-sex couples are outsiders, and that their need for affirmation and protection of their intimate relations as human beings is somehow less than that of heterosexual couples. It reinforces the wounding notion that they are to be treated as biological oddities, as failed or lapsed human beings who do not fit into normal society, and, as such, do not qualify for the full moral concern and respect that our Constitution seeks to secure for everyone. It signifies that their capacity for love, commitment and accepting responsibility is by definition less worthy of regard than that of heterosexual couples.

[72] It should be noted that the intangible damage to same-sex couples is as severe as the material deprivation. To begin with, they are not entitled to celebrate their commitment to each other in a joyous public event recognised by the law. They are obliged to live in a state of legal blankness in which their unions remain unmarked by the showering of presents and the commemoration of anniversaries so celebrated in our culture. It may be that, as the literature suggests, many same-sex couples would abjure mimicking or subordinating themselves to heterosexual norms. Others might wish to avoid what they consider the routinisation and commercialisation of their most intimate and personal relationships, and accordingly not seek marriage or its equivalence. Yet what is in issue is not the decision to be taken, but the choice that is available. If heterosexual couples have the option of deciding whether to marry or not, so should same-sex couples have the choice as whether to seek to achieve a status and a set of entitlements and responsibilities on a par with those enjoyed by heterosexual couples. It follows that, given the centrality attributed to marriage and its consequences in our culture, to deny same-sex couples a choice in this respect is to negate their right to self-definition in a most profound way.

[1] It is convenient at this stage to restate the relevant provisions of the Constitution. Section 9(1) provides:

> "Everyone is equal before the law and has the right to equal protection and benefit of the law."

It is clear that the exclusion of same-sex couples from the status, entitlements and responsibilities accorded to heterosexual couples through marriage, constitutes a denial to them of their right to equal protection and benefit of the law.

[76] It is equally evident that same-sex couples are not afforded equal protection not because of oversight, but because of the legacy of severe historic prejudice against them. Their omission from the benefits of marriage law is a direct consequence of prolonged discrimination based on the fact that their sexual orientation is different from the norm. This result is in direct conflict with section 9(3) of the Constitution, which states:

> "The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth."

[77] Some minorities are visible, and suffer discrimination on the basis of presumed characteristics of the group with which they are identified. Other minorities are rendered invisible inasmuch as the law refuses them the right to express themselves as a group with characteristics different from the norm. In the present matter, the unfair discrimination against same-sex couples does not flow from any express exclusion in the Marriage Act. The problem is that the Marriage Act simply makes no provision for them to have their unions recognised and protected in the same way as it does for those of heterosexual couples. It is as if they did not exist as far as the law is concerned. They are implicitly defined out of contemplation as subjects of the law.

[78] Sections 9(1) and 9(3) cannot be read as merely protecting same-sex couples from punishment or stigmatisation. They also go beyond simply preserving a private space in which gay and lesbian couples may live together without interference from the state. Indeed, what the applicants in this matter seek is not the right to be left alone, but the right to be acknowledged as equals and to be embraced with dignity by the law. Their love that was once forced to be clandestine, may now dare openly to speak its name. The world in which they live and in which the Constitution functions, has evolved from repudiating expressions of their desire to accepting the reality of their presence, and the integrity, in its own terms, of their intimate life. Accordingly, taking account of the decisions of this Court, and bearing in mind the symbolic and practical impact that exclusion from marriage has on same-sex couples, there can only be one answer to the question as to whether or not such couples are denied equal protection and subjected to unfair discrimination. Clearly, they are, and in no small degree. The effect has been wounding and the scars are evident in our society to this day. By both drawing on and reinforcing discriminatory social practices, the law in the past failed to secure for same-sex couples the dignity, status, benefits and responsibilities that it accords to heterosexual couples. Although considerable progress has been made in specific cases through constitutional interpretation, and, as will be seen, by means of legislative intervention, the default position of gays and lesbians is still one of exclusion and marginalisation. The common law and section 30(1) of the Marriage Act continue to deny to same-sex couples equal protection and benefit of the law, in conflict with section 9(1) of the Constitution, and taken together result in same-sex couples being subjected to unfair discrimination by the state in conflict with section 9(3) of the Constitution.

The reasoning of the Constitutional Court is persuasive and compelling.

It is my submission to the Commission that for the Canons of the Church to continue to deny same sex couples the opportunity to be married in the Church is a failure to respect the dignity we promise them in the baptismal covenant.

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