

MARRIAGE AND CIVIL PARTNERSHIP (SCOTLAND) BILL

SUBMISSION FROM CHURCH OF SCOTLAND

Same sex relationships

1. The 2013 General Assembly affirmed the Church of Scotland's historic and current doctrine and practice in relation to human sexuality. Nevertheless it moved towards permitting individual congregations to depart from that doctrine so that they could call as their minister a man or woman who is in a civil partnership. However, this has not yet become the law of the Church since enabling legislation has not yet been presented and it will require to be passed by two successive General Assemblies and, in the intervening 12 months, a majority of presbyteries (under the Church's Barrier Act 1697).
2. The Church's 2011 General Assembly declared that:
 - (1) It is contrary to God's will that Christians should be hostile in any way to a person because he or she is homosexual by orientation and in his or her practice. In other words we view homophobia as sinful. We do not include in the concept of homophobia both the bona fide belief that homosexual practice is contrary to God's will and the responsible statement of that belief in preaching or writing.
 - (2) It is the duty of the Church to welcome, minister, and reach out to people regardless of their sexual orientation and practice. The Church should strive to manifest God's love to all of his people.
 - (3) In particular, the Church should recognise the heavy burden which a homosexual orientation continues to place on some who find it difficult or impossible to reconcile their orientation with their understanding of God's purposes as revealed in the Bible. There is a particular need for the Church to reach out pastorally to them and to make them welcome.
 - (4) People who are homosexual by orientation are not barred by their orientation from membership of the Church or from taking up leadership roles in the Church, including the ministry of Word and Sacrament, the diaconate and eldership.
3. The General Assembly maintained the unlawfulness of discrimination in the Church on the ground of sexual orientation (see Church's Act V, 2007 Anent Discrimination).
4. The Church recognises that there is intense and passionate debate within Scottish society about same sex relationships. This is reflected with the Church itself. The issue impacts upon the lives of our fellow citizens, particularly among those Scots who are lesbian, gay, bi-sexual or transgender. There is much pain and sorrow, as well as frustration. The Church has undiminished concern and desire to care for all people in

Scotland regardless of sexual orientation or theological opinion. Therefore, the Church believes that it has a responsibility to our nation to be part of that debate and to help to shape public opinion and state policy in accordance with what it understands to be the will of God. In making this submission, the Church has no desire to stifle the ongoing debate and hopes that it will be a helpful contribution.

Principle of same sex marriage

5. The Church of Scotland does not support the introduction of marriage between persons of the same sex.
6. This would fundamentally change marriage as it is understood in our country. The nature of marriage in Scottish culture is that it is a relationship between one man and one woman. This is the position in law and fact.
7. If the Church were to support the redefinition of marriage to include same sex marriage this would involve a fundamental change in its understanding of marriage. In accordance with the historic position of the Christian Church, the Church of Scotland has always viewed marriage as being between one man and one woman. Despite recent discussions on the status of same-sex and other relationships, and of civil partnerships, the General Assembly has at no point been invited to consider any such redefinition of marriage. Indeed, a recent consultation among elders and ministers indicated only limited support for same-sex marriage (Report to General Assembly 2011 of Special Commission on Same Sex Relationships and the Ministry).
8. The Church has only ever taught that marriage is the union of a man and a woman. Scriptural references to marriage, whether literal or metaphorical, all operate under this understanding. Furthermore the point is established within the Reformed tradition of the Church, not least in its subordinate standards. The Church sees itself as part of the catholic or universal Church within which there is agreement, across confessional divides, that marriage is between one man and one woman. Most recent work under the auspices of the General Assembly, in particular the work conducted by the Joint Commission on Doctrine (with the Roman Catholic Church) through the 1980s and 1990s, and the specific report on marriage from the Panel on Doctrine in 1994, have likewise upheld what can only be called the conventional or regular understanding of marriage.
9. If the Church were to change its position on marriage to include same-sex marriage, such a change would only be enacted into the law of the Church under its Barrier Act 1697.
10. The Church remains concerned at the speed with which the introduction of same sex marriage is proceeding. It appears that the Government has, with only limited exceptions, failed to persuade the religious community in Scotland. The Church believes that much more measured consideration is required before the understanding of marriage which is entrenched and

valued within the culture of Scotland, both secular and religious, is surrendered to accommodate this. To redefine marriage to include same-sex marriage may have significant and, as yet, inadequately considered repercussions for our country and, in particular, for the well-being of families and communities and of individuals.

11. There is no legal requirement for the Scottish Parliament to enact legislation introducing same-sex marriage (*Schalk and Kopf v. Austria* (2011) 53 E.H.R.R. 20). If they choose to be registered as civil partners, same-sex couples are not disadvantaged either legally or fiscally by not being 'married'.

Principle of religious civil partnerships

12. The Church of Scotland does not support the introduction of religious civil partnerships.
13. In 2006/7, the Church of Scotland decided against declaring that a minister or deacon 'who conducts any service marking a civil partnership does not commit a disciplinary offence.' In the light of this decision, the Church cannot agree that legislation should be changed so that civil partnerships may be registered through religious ceremonies whether these are conducted by religious celebrants or not or take place on religious premises or not.
14. If the Church were to agree to register civil partnerships through religious ceremonies this would require it to depart from the traditional understanding of same-sex relationships. Reference is made to paras. 1-4 of this Submission.
15. If registration of civil partnerships through religious ceremonies or in religious premises were permitted, this would so fundamentally alter the nature of civil partnerships that they would cease to be such. Civil partnerships are a creation of statute (Civil Partnership Act 2004, s. 1). Ministers or deacons and other religious celebrants are not included in the definition of 'authorised registrars' who may carry out registration as civil partners (s. 87). Section 93(3) specifically excludes 'religious premises' as a 'place of registration.' Therefore, the Church believes that civil partnerships were intended to be a civil institution only. Registration through religious ceremonies or in religious premises is antithetical to the original purpose for which they were introduced.
16. Furthermore, the Church is concerned at the speed with which the Scottish Government is proceeding on this issue. It appears that the Government has, with only limited exceptions, failed to persuade the religious community in Scotland. Civil partnerships, as a civil institution, were only introduced on 5 December 2005 (The Civil Partnership Act 2004 (Commencement No. 2) (Scotland) Order 2005). There is no legal requirement for the Scottish Parliament to enact legislation permitting civil partnerships to be registered through religious ceremonies (*Courten v United Kingdom* ((4479/06) ECtHR November 4, 2008). Civil partners are not legally or fiscally disadvantaged in comparison with married couples.

The provisions of the Bill

17. Moving beyond its positions in principle on same sex marriages and religious civil partnerships, the Church broadly welcomes the essentially permissive, 'opt-in' scheme outlined in the Bill. However, much of the detail of that scheme will be contained in an amendment to the Equality Act 2010 and delegated legislation which have not yet been published (see paras. 26-32 of this Submission).
18. The Church is also concerned that even if enacted and issued, such legislation and guidance is subject to repeal and revocation and to potential challenge in the Scottish and UK courts and in the European Court of Human Rights.
19. The Church has been considering how the permissive, 'opt-in' scheme outlined in sections 8 and 9 of the Bill might be rendered less vulnerable to challenge under the European Convention on Human Rights. As the Marriage (Scotland) Act 1977 is currently presented and proposed to be amended, celebrants of religious bodies, including the Church's ministers and deacons, appear to be authorised by the State to solemnise marriages (and, in future, same-sex marriages and register religious civil partnerships), making it arguable that the celebrant is acting on behalf of not only the Church but also the State. A decision by the Church or by any of its ministers or deacons to decline to do so would be vulnerable to challenge under section 29 of the Equality Act 2010 and the European Convention on Human Rights. If the religious celebrant is considered to be (in part) an agent of the State, then (after "marriage" has been redefined to encompass same sex marriage) the compatibility with the European Convention on Human Rights of any consequent amendment to section 29 becomes questionable. However, if it were put beyond doubt that the solemnisation of marriages, both opposite and same sex, and the registration of civil partnerships by a religious body's celebrant (of any confession) were not authorised by the State but merely recognised by it (like a marriage solemnised abroad) this would mean that a decision to decline to solemnise a same sex marriage or register a religious civil partnership would be an act done in the capacity only of agent of the religious body concerned, in the exercise of that body's religious freedom and in no sense attributable to the State. A scheme based solely upon 'recognition' by the State would respect the autonomy of the religious body concerned and, in particular, be consistent with the terms of the Church of Scotland Act 1921 which declares the Church's independence in spiritual matters generally and in matters of doctrine, worship, government and discipline as well as with article 9 of the European Convention on Human Rights and with article 17 of the Treaty on the Functioning of the European Union. At the same time, such a 'recognition' scheme would limit the act of civil authority to the recognition by the State of a religious marriage or civil partnership. This should substantially reduce the risk of a successful challenge to provisions of the Marriage and Civil Partnership (Scotland) Bill and subordinate legislation and amendments to the Equality Act 2010 intended to preserve the freedom of religious bodies and individual celebrants

to refrain from solemnising same sex marriages or registering religious civil partnerships. It would still allow different sex marriage solemnised by the same bodies to be recognised by the civil authority as having full effect in law. Furthermore, it would allow same sex marriages and civil partnerships solemnised and registered by individual celebrants who were permitted by their religious bodies and who wished to do so to be recognised by the state as having full effect in law.

20. In order to achieve a 'recognition' scheme for solemnisation of marriages, the Bill could be amended as follows:

Section 8

in new section 8(1D) delete "empowered" and substitute "competent".

Section 9

- (a) in existing section 9(1), delete "empowered" and substitute "competent";
- (b) in new section 9(1D), delete "empowered" and substitute "recognised as competent";
- (c) in section 9(4):
 - (i) delete "empowered" and substitute "recognised as competent";
 - (ii) delete "empowered" and substitute "recognised as competent"

The parallel provisions relating to registration of civil partnerships would be similarly amended as would the provisions relating to temporary status as a celebrant if thought necessary.

21. The Church welcomes the proposed extension of section 8(1)(a)(i) of the 1977 Act to include Church of Scotland deacons.
22. The Church welcomes the intention of the Scottish Government to prescribe, after public consultation, qualifying requirements to apply to religious and belief bodies and celebrants in relation to the solemnisation of marriages and registration of civil partnerships (Policy Memorandum, paras. 65-74; Delegated Powers Memorandum, paras. 29-62).
23. The Church is deeply concerned that specific provisions have not been introduced to protect public servants who may face situations where there is a real conflict between their religious beliefs and the expectations of their employment, such that they may face job loss or disadvantage if they do not support same sex marriage or civil partnerships. The Church accordingly urges the Government to provide appropriate protections in the legislation to ensure that the rights enshrined in Article 9 of the European Convention on Human Rights will be upheld.

24. The Church believes that registrars should not be forced to solemnise same sex marriages or register civil partnerships under threat of job loss or disadvantage. Registrars should be entitled to the same protections as celebrants. This is particularly so for registrars who are already in post.
25. The Church believes that teachers should not be forced to support same sex marriage or civil partnerships in the course of teaching under threat of job loss or disadvantage. Teachers should be entitled to equivalent protections to celebrants. This is particularly so for teachers who are already in post.

Proposed Amendment to Equality Act 2010

26. The Church welcomes the agreement of the Scottish Government that the proposed amendment to the 2010 Act should not be restricted only to cases where solemnising same sex marriage or registering civil partnerships would conflict with the celebrant's religious or philosophical beliefs or to cases of sexual orientation discrimination (Statement on the Equality Act, para. 17). However, it awaits sight of the final wording.
27. The Church welcomes the agreement of the Scottish Government that the proposed amendment to the 2010 Act should cover persons who play an integral part in the religious aspects of the marriage ceremony or the registering of a religious civil partnership (Statement on the Equality Act, para. 21). However, it awaits sight of the final wording.
28. The Church welcomes the agreement of the Scottish Government that the amendment of the 2010 Act will provide that a person controlling the use of religious premises does not contravene section 29 of the 2010 Act by refusing to allow the premises to be used for a same sex marriage or a civil partnership (Statement on the Equality Act, para. 29). However, it awaits sight of the final wording.
29. The Church welcomes the agreement of the Scottish Government that the amendment to the 2010 Act will provide similar protection for chaplains working for secular employers as is offered by section 2(5) of the 2013 Act (Statement on the Equality Act, para. 32). In fact, it urges that the protection provided should be in the same terms.

Proposed Delegated Powers

30. The Church welcomes the statement of the Scottish Government that it would not expect to use the powers conferred by proposed section 8(1B) of the 1977 Act to prescribe a body which was prepared to solemnise same sex marriage but some of whose celebrants objected to doing so (Delegated Powers Memorandum, para. 38).
31. The Church also welcomes the statement of the Scottish Government that it would use the powers conferred by proposed section 9(2A) of the 1977 Act to prescribe that a body which was prepared to allow its celebrants to solemnise

same sex marriage would be allowed to nominate only those of its celebrants who consented to do so (Delegated Powers Memorandum, para. 38).

32. The Church understands that the Scottish Government intends to use its powers in relation to authorising celebrants to register religious civil partnerships in line with those relating to same sex marriage (Delegated Powers Memorandum, para. 40).

Church of Scotland
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