

MARRIAGE AND CIVIL PARTNERSHIP (SCOTLAND) BILL

SUBMISSION FROM ELAINE SMITH MSP SCOTLAND

I am writing to you regarding the timescale for the committee's consultation on The Marriage and Civil Partnership (Scotland) Bill.

It only recently came to my attention that the consultation had been launched the day that the Parliament went into recess and it closes prior to the end of recess which also coincides with the Scottish school holiday period. Whilst there may be some precedent for having a consultation during the Scottish school holidays, I hope you will accept that it may exclude people who wish to respond, not least teachers.

I have also had representation from the North Lanarkshire Muslim Women and Family Alliance with concerns about the timescale and also the language barrier which caused them problems with the government consultation on this matter.

In my own case, the timescale causes difficulty due to staff holidays. Therefore, I would be grateful if you could take this as notice that I wish to put in an official response to the consultation but will not be able to do so fully by the 23rd August. Please advise if there is any problem with that.

Given that committee consultation prior to stage 1 is designed to consider as wide a range as possible of views, I would be grateful for confirmation that schools and other groups who have not been meeting over the school holiday period will be given appropriate time to respond if they indicate their desire to do so.

Thank you for your time regarding this matter.

Elaine Smith MSP
15 August 2013

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FURTHER SUBMISSION FROM ELAINE SMITH MSP SCOTLAND

Introduction

I would not normally submit evidence to a Parliamentary Committee in their stage 1 consideration but in the case of the Marriage and Civil Partnership (Scotland) Bill I feel compelled to do so, particularly since it is being considered by the Equal Opportunities Committee. I would like to draw to the attention of the committee my experience on equality issues over many years.

I served on the Equal Opportunities Committee from 1999, including as Deputy Convener, for 12 years in total and my commitment to equalities and fighting discrimination has been well-documented over those years. I was also a trade union equalities officer and went on to be branch secretary of Unison Highland for nearly a decade. Therefore, when I say that I do not consider the redefinition of marriage to be a simple equality issue I trust that the committee will accept that I have some knowledge of equality matters and I did not come to that conclusion without a great deal of consideration.

One of the main reasons that I feel obliged to submit evidence to your enquiry is that I have personally been at the forefront of the nasty reaction to anyone expressing dissent on the matter of same sex marriage. Whilst I do not wish to give any further credence to emails, twitter remarks and other so called social media comments by including them in this public document I will make those which I have been able to save available privately if the committee would consider it helpful to see some of the remarks. I will comment further on this later in this document.

Given that same sex marriage is being portrayed as a matter of equality, then it is deeply concerning that anyone with an alternative opinion is facing such vilification and bigotry. It may also act as a disincentive to any MSP's who are having doubts about the legislation itself, or the principle of redefining marriage, to speak out or question the detail. That is concerning in a modern democracy.

I fully appreciate and share the desire of my parliamentary colleagues to ensure that discrimination against LGBT people in our society is eradicated. However, I do not believe that this legislation will contribute to the just fight against homophobia and discrimination for LGBT people and may even exacerbate it by infringing the rights and freedoms of others.

There is a major focus, in the push for this legislation to be enacted, on the rights of a relatively small number of individuals to pursue their desired outcome of entering into a same sex marriage rather than the already existing civil partnership. However, human beings are both individual and social and our social order depends upon cooperation and consideration of the needs and rights of all. The rush to legislate on such a controversial issue may end up with chaotic outcomes which will have a detrimental impact on society as a whole.

Background to the legislation

Overall, I am extremely concerned about the introduction of this legislation in Scotland and feel the whole process has lacked the in-depth consultation that is required with the proposal of such a major societal change. This legislative proposal is extremely radical and controversial as evidenced by the 77,000 respondents to the Government's consultation: the largest number responding to any consultation to date.

It seems, then, that the proposal by the Scottish Government to re-define marriage, following on from the Tory/Liberal Government position at Westminster, has taken place with unnecessary haste and with no clear manifesto commitment by the SNP, who are in Government, or the two main opposition parties. Of course there are times when emergency legislation is required and as such there may have been no manifesto commitment. However, on an issue such as this which is not an emergency but has far reaching consequences for society it is very unusual for it to be brought forward in this manner.

Due to this there should have been full and frank exchanges of views across the country with the Government holding public meetings as they have on other issues and consideration given to a referendum. Instead, the Government's written consultation was then quickly followed by a legislative proposal despite the fact that the majority of all respondents opposed changing the law to allow same sex marriage. Whilst any Government for good reasons may not feel obliged to follow the majority verdict on a consultation, it should at least indicate a need for further in-depth engagement rather than a rush to legislate.

This action by the Government also completely disregards the evidence received during the civil partnership legislative process where civil partnerships were considered "separate but equal" by the Equality Network who went on to point out that: *"Unlike the Netherlands who introduced same sex marriage in 2001, marriage in Scotland is not entirely secular. Religious celebrants from a variety of faiths conduct legal marriages in Scotland, and even in the Executive's most recent family law white paper proposals, certain detailed aspects of the proposal for family law still relate to the requirements of religious faiths. There is no doubt that religious organisations in Scotland would wish to have a say in the extension of marriage itself to same-sex couples, and this is something that would require debate and discussion over some period."*

<http://archive.scottish.parliament.uk/business/committees/historic/equal/reports-03/eoc03-resp-01-01.htm>

Given that the redefinition of marriage is such a controversial matter, which should have been robustly debated throughout the country, it seems curious then that it has been rushed through, seemingly promoted by lobbyists and quangos, and with no opposition party scrutiny of the Government's proposal.

The tactic of encouraging MSP's to sign a pledge in support of "Equal Marriage" may also have made it difficult for some to then decide against supporting the legislation even although they would not have seen the detail when signing this pledge nor have considered their own constituents views or the results of the consultation exercise. However, it is of course perfectly legitimate for any member to alter their position

when the facts change or the detail of legislation raises concerns. Some members signed with the specific condition that they would only support same sex marriage if religious celebrants were not forced into carrying out ceremonies. Given that even the Government seem unable to guarantee that and are seeking further protections from Westminster, as well as the legal challenge proposed against the Church of England, it is difficult to see how that condition can be met by this legislation. I will return in more detail to this issue later.

The committee may wish to consider whether the lobbying tactic of persuading MSP's to sign a pledge some time ago played a major part in this legislation being introduced so rapidly with no opposition scrutiny at an early stage.

Government Consultation

I would like to make some specific comment on the process. The initial Government consultation on the Bill can be easily misinterpreted and more worryingly, misrepresented.

Question 10 of the consultation was the first, and most fundamental, question about same sex marriage and therefore all postcards, standard forms and prepared letters were included in the responses. To question 10, *'do you believe that the law in Scotland should be changed to allow same sex marriage'*, 67% of all respondents said no (or 64% if you only include those currently living in Scotland).

Question 13 of the consultation, which asked *'Do you agree with the introduction of same sex marriage both religious and civil'* comprised less than half the respondents because responses such as postcards were not included. In this question 68% of people said yes, a result which would have been very different if all respondents had been included.

Postcards not being included in this question meant the responses could be easily misinterpreted. Furthermore, the exclusion of postcards in Question 13 and other questions no doubt disadvantages those who are not computer literate.

Due to the confusing results on the Government's consultation, apart from Question 10 which was perfectly straight forward, further in-depth public consultation is undoubtedly required to ensure that the clear views and opinions of the Scottish people on this issue are known before recommending support for the principle of such a major societal change.

<http://www.scotland.gov.uk/Publications/2012/07/5671/0>

I was also concerned when I was approached by the North Lanarkshire Muslim Women and Family Alliance who stated that their members found responding to the consultation particularly difficult given the layout and language barrier.

The Government did, of course, carry out a second consultation between December 2012 and March 2013 but only on their specific proposals for legislation. There were 15,064 respondents to this consultation and an overwhelming majority of these were connected to one of the three main campaigns (73%). A further 16% were amended campaign responses. Only 128 responses were from individuals. The significantly smaller number of respondents could indicate that opinions were not sought widely

throughout the country on the detail of the Government's intentions.

<http://www.scotland.gov.uk/Publications/2013/06/2782>

In considering the Government's evidence, the Committee may wish to reflect on why postcards were not accepted for many questions in the original consultation and whether this was discriminatory to people who are not computer literate or connected to the internet.

Therefore, due to the fact there was no manifesto commitment by the Government or other main parties, and that the result of the initial consultation response was against the introduction of this legislation, the committee may wish to consider whether it would be reasonable for it to proceed without further in-depth consultation.

Given that similar legislation has been passed by Westminster and that within the year we face a referendum in which the outcome could mean a great many legislative changes, the Committee may wish to consider whether it would be prudent to wait and see how the legislation impacts south of the border before Scottish legislation is enacted.

Changing the essential nature of marriage

I believe the redefinition of marriage is unnecessary and is likely to cause problems for society overall. It is not clear what additional legal rights, if any, same-sex couples would receive from marriage that they do not already from civil partnerships. Also, the Government's proposal involves different types of marriage for homosexual couples as opposed to heterosexual; so it is not 'equal'.

Turning to the main issues involved in considering the legitimacy of introducing this legislation, the current nature of marriage should be considered. The reason that marriage is restricted in this country to two people is that it is based on one man and one woman in a complementary union for the possibility of the pro-creation of children. While that possibility of children may not be initiated for various reasons in a marriage, the potentiality is the key factor. This is in tune with the Christian basis of marriage since, until recently, Britain was a Christian country rather than the increasingly secular one that it is becoming.

A secular society should be about pluralism, not about overturning Christian values. Indeed, our society actually adopted Christian values because they are in accord with reason. This explains why so many cultures and faiths share those values and recognise marriage in essentially the same way.

The Government have categorically stated that they have "*no intention of allowing polygamous marriages to take place in Scotland.*" They go on to cite a case which they agree with whereby a judge in the British Columbia Supreme Court outlined the harms polygamy can cause, however they do not explain their objection in any detail. <http://www.scotland.gov.uk/Publications/2012/12/9433/272395>

The Campaign organisations seeking legislation to introduce same sex marriage organise under the banner of "Equal Love". If that is the argument for change, and marriage is simply about love, then there seems no logical reason for discriminating against more than two people who love each other equally if that is the basis for the

drive to redefine marriage. If however, it is part of the secularisation of society then evidence should be considered as to whether a further redefinition is inevitable. This has already been the progression elsewhere in the EU: specifically in the Netherlands where same sex marriage was introduced in 2001. Below is a link to an article published in 2005 stating that Holland had conducted its first ceremony to unite three people in a relationship. <http://www.brusselsjournal.com/node/301>

Whilst the Government has said that it has no intention of allowing polygamous marriages as part of this legislation which changes the essential nature of marriage, it has not explained in any detail and with research analysis its reasons for taking that position. Further, if the Government is sincere about its support for 'equal love' then it appears to have a contradiction on its hands.

On a wider equality issue and with relevance to this legislative proposal, if Christianity is no longer the framework for society consideration must then be given to what is replacing it. This is an issue explored in the recently published book *"Divided Scotland: ethnic friction and Christian crisis"* by Professor Tom Gallagher, who described himself recently on Newsnight Scotland as a gay atheist.

Professor Gallagher also comments that *"anti-Catholicism remains an option that is acquiring respectability of the kind that it never had for almost a century"*. The reaction to Catholic objections to same sex marriage seems to echo that statement. Further, he notes that in Scotland the various Christian denominations came to mutual accommodation over issues like education but he ponders what will happen now in secular Scotland. *"In a firmly secular Scottish state run along rationalist principles will there be the same pragmatism, or will it be that 'shouty' interest groups decide to go for absolute secular primacy along the lines of what happened in post-1789 France?"* www.argyllpublishing.co.uk

Other implications of redefining marriage have included in Spain the removal of "mother" and "father" from birth certificates to be replaced with the terms "Progenitor A" and "Progenitor B"; the proposal in Mexico City of two year fixed term marriages and the attempts in Canada to legalise polygamy.

The Committee may wish to ascertain why "Equal Love" must be constrained to two people. Further, if marriage is to be redefined from the centuries old understanding of one man and one woman complementary with the potential for procreation, then the committee may wish to determine the basis for restricting it to two people.

The Committee may also wish to consider whether a redefinition of marriage will inevitably lead to further changes, not only for society but also for marriage itself. Undoubtedly there will be consequences both intended and unintended if this legislation is enacted.

It may be helpful to the debate if the Committee could consider how marriage has been redefined in other countries, whether it has been restricted to two persons or widened out and what impact that has had on those societies.

Changing civil partnerships to marriage

Having served on the Equal Opportunities Committee when civil partnerships were introduced, I recall that those giving evidence considered such unions to be different but equal. Therefore, given that legal equality has already been achieved by civil partnerships, it is not clear what benefits the change from civil partnerships to marriage would bring to same sex couples. Additionally, same sex couples who have already entered into civil partnerships may not want to enter into marriage and equally may feel that the proposal that they should change their relationship to marriage is diminishing their legal civil partnership.

When civil partnerships were introduced it was intimated by some groups representing LGBT people that changes to the institution of marriage would not be pursued for various reasons and, in some responses it was proposed that a different form of partnership may be preferable. Indeed, some evidence given to the committee was actually against marriage for same sex couples including that of Ali Jarvis representing Stonewall who said: *“We have also had feedback from some people that marriage still has connotations of gender and power, with which a lot of people living in same-sex relationships feel uncomfortable—they would prefer a new type of partnership that better reflects their relationships. We are comfortable saying that civil partnership is probably the best answer.”*

http://www.scottish.parliament.uk/parliamentarybusiness/28862.aspx?r=1109&mode=html#iob_4899

The Committee may wish to reflect on previous evidence and consider why civil partnerships are no longer considered by the Government to be equivalent to marriage.

Introducing religion into same sex partnerships

Introducing religious same sex partnerships could cause legal problems for churches who do not want to carry out such unions and believe in traditional Christian marriage of one man and one woman. It is not, in my view, the Government's job to interfere in the operation of churches, which is what this proposal seems to do. Currently, it is my understanding, that those who have entered into civil partnerships can have a religious blessing if it is within the ethos of the institution or church to do so.

One of the main concerns expressed by my constituents is that of how religious celebrants will be treated if the law is changed to allow same sex religious marriage or civil partnerships. I am personally concerned that there will not be sufficient protection for religious celebrants and I think it is inevitable that when this law is enacted there will be legal challenges. Indeed, there are already reports of such challenges being pursued against the Church of England following the enactment of the Westminster legislation.

My concerns are reinforced by the promises given in the chamber by Ministers when same sex adoption was debated and passed at stage 3. Again, I served on the Equal Opportunities Committee during the passage of that legislation. Parliament was assured that Scottish Ministers did not foresee any 'unintended consequences' and that, specifically, Catholic adoption agencies would be able to continue their work; I supported the legislation on that basis. There are currently legal challenges pursuing their closure.

<http://www.scottish.parliament.uk/parliamentarybusiness/28862.aspx?r=4692&i=37783&c=885261&s=gay>

The Government themselves have stated that further protection is needed for celebrants opposed to same sex marriage and, as such, believe that the 2010 Act needs to be amended. This is concerning and requires in-depth scrutiny. Several cases in the European Court of Human Rights show that the Article 9 right of freedom of thought, conscience and religion does not provide protection when there is conflict between Article 9 and other rights.

<http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-115811>

The Committee may wish to examine why the Government believes that further protection is required for celebrants and what the consequences would be if that was not possible.

The Committee may wish to explore the reports of legal challenges against the Church of England.

The Committee may wish to consider the issue of amendments to the Equality Act 2010.

Protection for those who oppose same sex marriage

The future of marriage in our society should matter to everyone but some people may be uninterested in this legislation as they do not believe it will have any impact on them or they have not considered the possibility of it affecting them.

I previously noted concerns for religious celebrants who do not wish to conduct same sex ceremonies. The potential consequences, of course, would not stop with the ceremony. There are fears for those who may wish to speak out against these proposals and outline their concerns; I will discuss this in further detail later since it appears that anyone speaking out against the redefinition of marriage at the moment has their opinion dismissed by being branded a bigot or homophobic.

The consequences of the legislation will be far reaching and would not just affect religious celebrants but could impact on people right across the country, particularly those with personal religious views. Teachers, local council workers and parents could all fall into categories potentially affected. The possible consequences have been considered by Aiden O'Neill QC and I attach a copy of a document he has produced for the Committee's interest. Within the document Mr O'Neill advises that it could be within the law for a Catholic school teacher to be dismissed for not teaching about same sex marriage even although it conflicts with their religious beliefs. The Government's bill as introduced seems to substantiate that. He also claims that an NHS Chaplain could be subject to disciplinary action if he was found to be speaking against same sex marriage outside of work and to his own congregation.

On the specific issue of teachers, there are particular concerns. The Government's proposal indicates that they would not expect a local authority to take "*immediate*" disciplinary action against a teacher who expresses concerns about the use of certain educational materials. This then indicates that such disciplinary action could

be taken following “discussion”.

<http://www.scotland.gov.uk/Resource/0041/00410328.pdf>

The Government also indicate that they support the right of the Roman Catholic Church to give witness to its faith and further do not have any intention of changing the current position whereby faith aspects of the curriculum in Catholic schools are determined by the Scottish Catholic Education Service. However, that may require specific protection on the face of the bill and also further consideration of how faith schools can remain true to their faith in areas outwith the curriculum..

There is also the issue of parents and what control they have over the information their child receives. I have already been approached by parents with children at non-denominational schools who are concerned about sex education in primary schools. They are aware that they can seek to withdraw their child but are concerned that in doing so their child will then suffer from bullying and be set apart from their peers.

The Government proposal for this legislation is that parents can withdraw their children from sexual health education programmes if they wish. Of course, that assumes that parents will be given full information about such programmes in time to take action. However, the Government has indicated that it does not consider it appropriate to say that issues relating to same sex marriage, same sex relationships and homosexuality should never be raised in primary schools and neither can parents opt their children out of such discussions.

The Committee may wish to consider this matter further with particular regard to the way in which parents would be notified. They might also wish to view some of the books and material already available for use with primary aged children since concerns have been raised about the content by some respondents to the various consultations.

The Committee may wish to consider whether the Government is giving enough protection specifically to Catholic teachers or whether legal challenges could be forthcoming.

The Committee may wish to consider the potential impact on those in society who do not agree with the redefinition of marriage: particularly those who hold that view based on religion or belief.

The Committee may wish to consider inviting Aiden O’Neill QC to give oral evidence.

The impact on freedom of speech

I am deeply concerned about the impact on freedom of speech and freedom of religion even before this legislation is enacted. I would like to take this opportunity to share my own personal experience.

As outlined previously, prior to the summer recess I stated my intentions to vote against the proposals to redefine marriage and because of that I was subjected to a torrent of personal abuse: mostly on so-called social media but also via email. This was particularly regrettable since the Minister responsible for this Bill said he hoped

“the debate will be conducted in a good spirit and civilised manner, with respect on all sides”.

Unfortunately, based on my own personal experience, this has not been the case resulting in the debate being shut down with those opposing the legislation, including elected members of Parliament, being branded ‘homophobic’. Indeed, I was personally labelled ‘homophobic’ and ‘bigoted’ when I merely stated my intention to vote against the plans to redefine marriage, a decision in tune with the wishes of the majority of constituents who have contacted me.

It remains to be seen whether the actual legislative proposal can be considered and scrutinised by Scotland’s parliamentarians without the hysteria and bigotry directed at those opposed to the redefinition by some proponents of the bill. On that specific issue I am concerned that the only opportunity for all members of Parliament to debate the issue in the chamber will be at the time of the Committee’s stage 1 report. On such a controversial issue, and given the wide ranging opposition to the proposal, it might have been expected that the Government would have sought a debate to help inform them prior to introducing a bill to Parliament. It is regrettable that they did not take that opportunity to hear from elected members.

Religion and Belief is a protected characteristic within the Equality Act alongside Sexual Orientation but it appears from the same sex marriage debate thus far that currently one characteristic is more protected than the other; with those opposing the change on religious grounds being subjected to intolerant, bigoted and abusive conduct. It seems then that some wish to consider that disagreement with those of a particular sexual orientation is an infringement of the protected characteristic but that logic would then necessarily mean that disagreeing with the views of people of faith is an infringement of their protected characteristic.

The Committee may of course hear evidence from those promoting the bill that some of its opponents have been using language which is offensive or homophobic and I’m sure there are people who would wish to oppose it simply because they do hate homosexuals. That is equally unacceptable. However, the vast majority of people who have contacted me opposing the redefinition of marriage have not been in that category.

The Lord Advocate’s guidance to prosecutors for those who oppose same sex marriage also gives cause for concern and would benefit from separate consultation. The fact that it is required at all seems to suggest that anyone opposing same sex marriage is highly likely to face legal challenges. Therefore, if this legislation is to proceed, including protections on the face of the bill rather than in guidance is necessary to at least attempt to protect freedom of speech and religious belief.

I also note with regret that the Government’s Equality Impact Assessment doesn’t seem to include, under the section on impact on people because of their religion or belief, the genuine fears that people of faith have with regard to this proposed legislation.

The Committee may wish to fully analyse the EQIA and in particular the research cited therein.

The Committee may wish to consider the need for robust protections in more detail and scrutinise the Lord Advocate's guidance.

The Committee may also wish to consider the current reaction to those opposing the legislation and whether this provides an indication of future actions against those who are opposed if this legislation is enacted

Equality

I have several concerns about this legislation in general; as I have pointed out I do believe it will have far reaching consequences for many. I am also concerned that the issue is being portrayed as a simple matter of equality which I do not believe it is.

I served on the Equal Opportunities Committee when civil partnerships for same sex couples were considered and the committee were assured at that time that this would bring legal equality and parity with marriage. Indeed, some same sex couples who have entered into civil partnerships may now feel that their relationship is being diminished in the push for "marriage" whereas previously they considered their union to be 'different but equal'. There is also currently the opportunity for any church, whose ethos allows, to perform a religious service after the civil partnership has been entered into. This already happens with some mixed religious couples who may have a civil wedding but then pursue a religious blessing.

When giving evidence to the Equal Opportunities Committee on 28 October 2003, Tim Hopkins from the Equality Network said *"It was clear that people felt that the solution to the big problems faced by same-sex couples and their families was to introduce civil partnership with a similar range of secular obligations, protections and rights as marriage has."*

http://www.scottish.parliament.uk/parliamentarybusiness/28862.aspx?r=1109&mode=html#iob_4899

Therefore, I do not regard same sex marriage as a simple matter of equality particularly as we already have civil partnerships for same sex couples. Just because something is not identical does not make it unequal. Diversity is important in society and we should be very wary of trying to make relationships conform to identical patterns of state dictated uniformity.

The gay columnist Andrew Pierce said *"The truth is that no one has been able to explain to me the difference between gay marriage and a civil partnership. I have asked Ministers and friends. None has an answer. But I do. We already have gay marriage — it's called civil partnership"* He also said *"Perhaps the Prime Minister has calculated that anyone who stands up and argues against his proposals will be branded a homophobe and a bigot. Well, Mr Cameron, I am a Conservative and a homosexual, and I oppose gay marriage. Am I a bigot?"* He went on to quote the gay Labour MP Ben Bradshaw who said *"This isn't a priority for the gay community, which has already won equal rights with civil partnerships,''This is pure politics.'*

<http://www.respublica.org.uk/item/>

The Committee may wish to deliberate on the previous evidence received when the legislative proposal on civil partnerships was being scrutinised and

consider what has changed in the intervening period to promote this major societal change.

The Committee may also wish to consider the exact detail of the societal and equality benefits of redefining marriage and compare those to the potential detriments.

Conclusion

The Scottish Parliament has the opportunity to assess how similar legislation impacts our neighbours before progressing. Therefore, the Committee may wish to consider whether it is possible for the Scottish Government to suspend the legislative proposal to determine what impact the Marriage (Same-Sex Couples) Act has south of the border, particularly given the indication of a legal challenge to force celebrants to conduct same sex ceremonies.

Overall, the Committee may wish to consider whether recommending support for this legislation would impact adversely on the existing rights of many Christians, Muslims, Jews and others of different religious persuasions and none, who do not support redefining marriage and whether this legislation is therefore a legitimate way to challenge discrimination in society.

When looking at the Bill in general, the Committee may wish to consider whether or not it is good legislation including consideration of the possible consequences, both intended and unintended, and who they will impact on.

It is the ultimate responsibility of the Committee to thoroughly scrutinise this legislative proposal and fully investigate potential consequences before providing Parliament with a recommendation on whether or not to support the general principles or give qualified support of this legislative proposal at stage 1. That is an extremely serious and responsible duty as the decision of the Committee will have far reaching consequences.

I hope that my contribution may be of some assistance to the Committee in carrying out their vitally important task of scrutinising this controversial legislative proposal and deciding whether it is legislation which would result in too many negative or unintended consequences with a detrimental impact on the existing rights and liberties of others in society.

The reputation not only of the Scottish Government but also of the Scottish Parliament will be harmed if legislation is enacted which later proves to be detrimental to our Scottish social order.

Elaine Smith MSP
30 August 2013

Summary of the Aidan O'Neill legal opinion on gay marriage and liberty of conscience

Concerns about gay marriage and freedom of conscience have largely centred on places of worship and ministers of religion who conduct weddings. But the impact in the workplace, in schools and in other areas of everyday life has been overlooked.

Those details are contained in a legal opinion written by leading human rights lawyer, Aidan O'Neill QC. Mr O'Neill was asked to give his expert advice on a series of scenarios related to legalising gay marriage.

■ NHS CHAPLAIN

A Church of England minister is also the chaplain at an NHS hospital. While conducting a wedding service in his parish church he preaches that marriage is only for one man and one woman. His NHS bosses find out, and he is later disciplined for breaching the NHS diversity policy.

Aidan O'Neill QC advises that under the Equality Act 2010 the NHS managers would have proper grounds for justifying their action, even if the chaplain was preaching in his own church outside work time.

The situation would be the same for any chaplain employed within the public sector, such as armed forces chaplains or university chaplains.

■ TEACHER

A primary school teacher is asked to use a storybook about gay marriage called "King & King". It is recommended by the local authority and by a gay rights charity. The teacher says using the book would conflict with her religious beliefs about marriage. She is told that she faces dismissal unless she backs down.

O'Neill says "yes", the school would be within its legal rights to dismiss the teacher if she refuses to use the material.

■ PARENTS

Parents ask for their child to be withdrawn from school lessons on the history of gay marriage, for deeply-held religious reasons. The parents say they have a right to withdraw their child under European Convention on Human Rights. But the school refuses, saying it is under a legal duty to promote equality.

O'Neill says the parents do not ultimately have a right to insist that their child be withdrawn from such history lessons, and the parents "will have little prospects of success in challenging the schools insistence that their child attend" the lessons.

■ FAITH SCHOOLS

Aidan O'Neill was asked about the above scenario in relation to faith schools or religious-ethos State schools.

He said: "If the school in question were a faith school or otherwise one with a religious ethos within the State sector in England and Wales this would make no difference to my answer."

■ FOSTER COUPLE

A couple applies to be foster carers. They tell social workers they are motivated to care for children because of their

Christian faith. On hearing this, the social workers ask them whether they support gay marriage. The couple says they do not, and the social workers halt the application because of equality and discrimination policies.

O'Neill says "yes", a local authority fostering agency would have legitimate legal grounds for acting this way.

■ PUBLIC FACILITIES

A church hires a council-owned community centre each week for its youth club. The church website states that it will only conduct opposite-sex marriages. Someone complains to the council, and while the church can't be forced to conduct gay weddings, it is stopped from hiring the community centre.

Aidan O'Neill says "yes", the council would be within its legal rights to do this.

■ MARRIAGE REGISTRAR

A local authority decides to accommodate the religious beliefs of one of its registrars by not designating her to be a 'civil partnership registrar'. Other registrars within the local authority's team are sufficient to provide the service to the public.

Aidan O'Neill says that if gay marriage becomes law, "that kind of adjustment to accommodate a registrar's particular beliefs would no longer be an option for any employing authority because there would then be only be one system of marriage (rather than, as at present, a distinct civil partnership regime for same sex couples)."

■ RELIGIOUS GAY WEDDINGS

The O'Neill legal opinion also addresses whether religious marriage celebrants could be forced to conduct gay weddings against their will. The legal opinion suggests that an outright ban on religious gay weddings could be overturned under European human rights laws.

If a law is passed which allows religious gay weddings for those who wish to conduct them, but doesn't compel anyone to act against their conscience, that could be challenged under domestic equality laws. O'Neill says that churches, in general, would be better protected from hostile litigation if they stopped holding weddings altogether.

■ ESTABLISHED CHURCH

O'Neill advises on the position of the Church of England. As the established church, it is under a legal obligation to marry any persons who are eligible to marry in England. Even if Parliament passes a law which allows (but does not oblige) churches to host gay weddings, O'Neill advises that the UK Government could be in breach of European human rights laws if it allows the C of E to refuse gay weddings. This is because of the C of E's unique status as the established State church. O'Neill says the church would be in a safer position if it was disestablished.

■ SEX EDUCATION

The O'Neill opinion also considers the impact of redefining marriage on teaching within schools. It says that the law will require that children learn about gay marriage in sex education lessons. This is because Section 403(1A)(a) of the Education Act 1996 imposes a duty on the Secretary of State "to issue guidance" ensuring that pupils "learn the nature of marriage and its importance for family life and the bringing up of children". If gay marriage becomes law then "its importance for family life and the bringing up of children" must be taught as part of sex education.