

MARRIAGE AND CIVIL PARTNERSHIP (SCOTLAND) BILL

SUBMISSION FROM EQUALITY NETWORK

The Equality Network is a national Scottish charity working for equality and human rights for lesbian, gay, bisexual and transgender (LGBT) people. All of our policy work is based on wide consultation with diverse LGBT people across Scotland. We very much welcome this opportunity to submit evidence on the Marriage and Civil Partnership (Scotland) Bill.

Q4: The bill in general

The Equality Network strongly supports and welcomes the bill. As set out below, equal marriage is a high priority issue for LGBT people in Scotland. Along with our partners, we have been working for this legislation for many years, including at the Parliament since petitions on the issue were submitted to the Public Petitions Committee in 2009. We welcomed the fact that the SNP and Labour manifestos for the 2011 election committed to consult on same sex marriage, and that the LibDem and Green manifestos committed to legislate.

Scotland was the first part of the UK where the government consulted on same sex marriage, in September 2011. Since then, Scotland has been overtaken by England and Wales, where legislation has now been passed. While that is disappointing for same sex couples in Scotland who are waiting to marry, we recognise that the policy development process in Scotland has been highly consultative and deliberative, leading to a well-considered bill. In particular, the bill is significantly improved on the December 2012 consultation draft, with the submissions of those on all sides of the debate taken into account.

Nevertheless, we think that there are some areas where the bill could be further improved. These mostly concern issues for transgender and intersex people, and in part this reflects the fact that schedule 2 to the bill was not available in the consultation draft. The changes we think are needed are described below, and we have also prepared draft amendments if the Committee would find those useful at this stage.

Q5: Same sex marriage

The Equality Network strongly supports the introduction of same sex marriage, and, more generally, that marriage should be available to couples regardless of their genders. LGBT people should have full equality under the law, including the equal right to marry the person they love.

In our 2009/10 survey of 427 LGBT people in Scotland¹, 85% said that this change is needed. 53% said that implementing this change is a high priority, and a further 32% said that it is a priority. From more informal qualitative consultation, we believe that, if anything, those figures underestimate the proportion of LGBT people who consider

¹ The full report is here: <http://www.equality-network.org/wp-content/uploads/2013/08/Equal-Marriage-Report-26.1.11.pdf>

that equal marriage is required. At our five same sex marriage consultation events around the country in November 2011, every one of the 150 people present agreed that same sex marriage should be introduced.

In our survey and our consultation events we asked people why marriage should be opened up to same sex couples. People gave a number of reasons, with the following main themes.

Segregation is not equality

Even though the legal rights and responsibilities of civil partnership and marriage are almost identical, the two are not perceived as of equal status and value. Civil partnership is seen as a legal contract, while marriage is seen by many as the gold standard for celebrating the joy of love and commitment. Marriage is very widely understood for its symbolism and its personal, community, and in some cases, religious significance. Very few people propose to their partner by asking “Will you civil partner me?” – civil partnership just does not have the same meaning.

Civil partnership was invented specifically to deny same sex couples access to marriage, and is seen by many same sex couples as a second-class status.

Put simply, equality means making the same choices available to all. If mixed race couples were denied the opportunity to marry, and instead offered civil partnership with the same legal effects, that would readily be seen as unacceptable racist discrimination. The ban on same sex couples marrying is equally unacceptable.

In 2008, the Connecticut Supreme Court considered whether that state’s introduction of civil unions (a civil partnership type status for same sex couples with identical state-level legal effects to marriage) was consistent with the state constitutional equality guarantee. The Court concluded, “in the light of the history of pernicious discrimination faced by gay men and lesbians, and because the institution of marriage carries with it a status and significance that the newly created classification of civil unions does not embody, the segregation of heterosexual and homosexual couples into separate institutions constitutes a cognizable harm.” The Court ordered that marriage itself be opened up to same sex couples.

The unfair and arbitrary nature of the current law is particularly clear when considering the situation of bisexual people. A bisexual person might fall in love with someone of the same gender or of the opposite gender – apart from the gender of the person, there is no difference in the relationship. The law directs the person to civil partnership or to marriage, with no choice, depending only on the gender of their partner.

Reducing discrimination and its effects

Although the legal effects of marriage and civil partnership are almost identical, in our 2009/10 survey, of 103 people in civil partnerships, 58% said they had not been given the same rights and respect that a married couple would get. That rose to 64% for women civil partners. Examples included people being referred to as “not really married”; banks not understanding why civil partners wanted a joint account;

employers refusing to change Miss to Mrs on documentation; hospitals refusing to recognise the civil partner as next of kin; forms not including civil partnership status options alongside marital status.

These kinds of discrimination and less favourable treatment are in part due to an ignorance of what civil partnership is, and are in part due to prejudice for which the separate status of civil partnership provides an excuse.

The introduction of same sex marriage would not eliminate this discrimination against same sex married couples, but it would remove the problem of ignorance, and remove one of the excuses for prejudice.

Furthermore, the segregated status of civil partnership, including the separate terminology, in itself defines same sex couples as “other”, and thereby promotes stigma, prejudice and discrimination against LGBT people. This includes homophobia, biphobia and transphobia in forms including bullying and hate crime. The introduction of same-sex marriage would help reduce these forms of prejudice against LGBT people because it would eliminate the official “otherness” status of LGBT people. We believe that it would also help to reduce prejudice and discrimination more widely, because it would be a clear public demonstration of Scotland’s refusal to accept discrimination, and Scotland’s embrace of diversity, equality and freedom.

By reducing prejudice and discrimination, the introduction of same sex marriage will enhance the safety, self-esteem, health and wellbeing of LGBT people in Scotland.

Discrimination against same sex couples also affects their children. We estimate from our surveys that around 20% of same sex couples have children, whether from a previous mixed sex relationship, through adoption, or through assisted conception. Contrary to some claims, research shows that children do as well with two parents of the same sex as with two parents of opposite sex².

The introduction of same sex marriage will benefit the children of same sex couples by reducing prejudice in the ways described above.

Discrimination in international recognition

Although the domestic legal effects of civil partnership and marriage are almost identical, there is a significant difference in terms of international recognition. A Scottish same-sex marriage would be recognised in any other country which allowed same-sex marriage, because of the well-established international legal framework for recognising marriage. That is not the case for international recognition of civil partnership, which is more confused and irregular.

Discrimination against transgender people

² See, for example, ‘How does the gender of parents matter?’, Biblarz and Stacey, *Journal of Marriage and Family*, Feb 2010

A specific form of legal discrimination caused by the ban on same sex marriage is discrimination against married transsexual people in the provision of legal gender recognition. The requirement to divorce, or dissolve one's civil partnership, in order to obtain gender recognition is a truly iniquitous aspect of the current law. It forces a transsexual person and their partner to decide between their marriage, which may have continued for decades, and their right to legal recognition of the transsexual person's true gender. It is the only case where the law reaches into a happy marriage which the partners want to continue, and forces them to divorce, on pain of having to continue to live with the wrong legal sex. While it is possible for the same couple to register a civil partnership after the divorce and gender recognition have been granted, rights may be lost in the conversion of a marriage to a civil partnership (for example pension rights) and the change from marriage to civil partnership is seen as a "downgrade" because of the different public, social and personal status of marriage and civil partnership.

Couples may therefore choose to remain married and forgo gender recognition. However, the consequences of living in one gender while legally being the other gender are severe and harmful, as was recognised by the European Court of Human Rights in the cases of *Goodwin* and *I v UK*, which established gender recognition as a human right.

Freedom of religion and belief

Same sex couples cannot at present have their legal relationship solemnised by a humanist or religious celebrant. In our 2009/10 survey of 429 LGBT people, 22% said that they would consider a humanist marriage if it was available, and 22% said that they would consider a religious marriage.

Celebrants of the Humanist Society Scotland solemnise marriages (under the religious marriage law) and very much want to be able to solemnise same-sex marriage.

Other religious or belief bodies which we understand want the freedom to solemnise same sex marriages include the Unitarians, the Quakers, the United Reformed Church, the Metropolitan Community Church, the Open Episcopal Church, the Liberal Jewish community, some Buddhist communities, and the Pagan Federation of Scotland. For these religious groups, and for many LGBT people of faith, marriage has a significance that civil partnership does not, and consequently these groups and their members have played a significant role in calling for this legislation.

Freedom of religion and belief means respecting the right of those bodies that wish to solemnise same sex marriages, and the right of those couples who wish a religious same sex marriage to be solemnised by those bodies. It also means respecting the right of religious bodies that disagree with same sex marriage, to decline to conduct them.

Neither set of religious bodies (those that agree, and those that disagree with same sex marriage) has the right to impose their views about this issue on the other set. Marriage is not owned by any religious body (and in fact predates any current

religious faith), and no religious body should have a veto over the arrangements for marriage.

Wider effects of same sex marriage

Civil partnerships are currently running at about 2% of the rate of (non-tourist) marriages in Scotland – approximately 500 civil partnerships per year now; and 4500 in total. The future number of same sex marriages might be a little higher because of greater demand. The introduction of same sex marriage will have no effect on the existing or future marriage of any mixed sex couple. The law affecting mixed sex marriages is not changing, and there is not a finite limited number of marriages available. Rather it could be argued that introducing same sex marriage would strengthen the institution of marriage, by enriching it, and demonstrating that it is a modern, relevant and equitable institution, desired and valued across Scotland's diverse population.

The introduction of same sex marriage will be in line with Scotland's ideals of equality, diversity, tolerance, respect, freedom, dignity and fairness. By publicly embodying those values, the introduction of same sex marriage will also further strengthen those values in Scottish society.

The legal definition and effects of marriage have changed enormously over the past couple of hundred years, up to and including the major changes to divorce law brought about by the Family Law (Scotland) Act 2006. The introduction of same sex marriage, in contrast, will not change at all the law applying to mixed sex marriages, and is therefore arguably a relatively minor change compared to what has gone before.

Public opinion

Equal marriage is supported by a large majority of people in Scotland. Opinion polls by Ipsos MORI, Populus, YouGov and Angus Reid have been consistent. They show that the level of support in Scotland has been steadily rising, and that around two-thirds now believe that same sex couples should be able to marry³.

The opinion polls are also consistent with the academic research. The 2010 Scottish Social Attitudes Survey⁴ asked "Do you agree or disagree that gay and lesbian couples should be allowed to marry?" 61% agreed, while only 19% disagreed. Survey respondents were asked their religious denomination, so the results may be analysed by religious denomination. 54% of Catholics agreed with same sex marriage, with 21% disagreeing; 50% of Presbyterians agreed, with 25% disagreeing. Amongst those of no religion, 72% agreed with same sex marriage and 12% disagreed.

While Scottish Government consultations are not designed to provide a representative sample of public opinion, around 75% of responses to the

³ For more details, see: <http://equalmarriage.org.uk/wp-content/uploads/2012/10/Equal-Marriage-and-Public-Opinion.pdf>

⁴ Paragraph 3.18, <http://www.scotland.gov.uk/Publications/2011/08/11112523/0>

consultation on the draft bill, and 65% of full responses to the initial consultation on the policy, supported same sex marriage.

Support for same sex marriage is particularly strong amongst younger people, with 73% of under 25s in support as long ago as the 2006 Scottish Social Attitudes Survey⁵. An Ipsos MORI Scotland poll in June 2012 found that 75% of people under 55 now support same sex marriage. The introduction of same sex marriage has particular resonance for younger people, who see it as being about Scotland looking forward as a modern 21st century country.

International context

Nine western European countries surrounding us have already introduced same-sex marriage: Iceland, Norway, Sweden, Denmark, the Netherlands, Belgium, France, Spain and Portugal. There is no evidence from any of those countries of any of the negative consequences that some of the opponents of same-sex marriage suggest would follow⁶. Legislation for England and Wales has been passed and is due to be commenced next year. Scotland has fallen behind on this key equality issue.

Canada, New Zealand, South Africa, Argentina, Uruguay, Brazil, and a number of US and Mexican states have also introduced same sex marriage, and the issue is under active consideration in other countries such as Australia and Luxembourg.

Scotland's international reputation with key partners will be enhanced by the introduction of same sex marriage. Scotland (and the UK) seek to promote equality and human rights internationally, and to do this effectively we need to ensure full respect for equality and human rights at home.

This change is one whose time has come – future generations will look back with surprise that the law ever prevented same sex couples from marrying.

How the bill implements same sex marriage

We welcome that the bill to a very large extent places marriage on a gender-neutral basis. It would perpetuate discrimination to introduce two legally different species of marriage: “different sex” and “same sex”, and the bill rightly avoids this. Section 4 provides that the law on marriage applies equally to mixed sex and same sex marriages.

There are a couple of inescapable exceptions. Since the bill rightly allows religious or belief bodies to choose whether or not to solemnise same sex marriages, the arrangements for approving religious or belief celebrants necessarily must distinguish between same sex and mixed sex marriage.

There is one old rule of marriage law which is gender-discriminatory: the rule that a wife cannot be guilty of resetting goods stolen by her husband, while a husband may be guilty of resetting goods stolen by his wife. Arguably, that rule should be

⁵ Table 3.6, <http://www.scotland.gov.uk/Publications/2007/12/04093619/0>

⁶ See, for example, ‘When gay people get married’, MV Lee Badgett, New York University Press, 2009

abolished, but this bill is not the place to do that. Section 5(1) of the bill sensibly therefore clarifies that the rule does not apply to a woman in a same sex marriage.

Section 5(3) clarifies for the avoidance of doubt that the law on adultery will apply to same sex marriages exactly as it applies to mixed sex marriages. That is, sexual intercourse with a person of the opposite sex (who is not the spouse) is, in law, adultery, and as such can be the basis for a divorce. All other sexual activity with a person other than the spouse, whether that person is of the opposite sex or the same sex, can equally be the basis for a divorce, under the “unreasonable behaviour” rule. These rules will apply equally to all marriages, meaning that sexual infidelity can found a divorce for both a mixed sex and a same sex marriage, in the same way.

There has been some discussion, in relation to same sex marriage, of the law on consummation. That is an English law concept. In Scots law, there is no rule that a marriage must be consummated, and a marriage in Scotland cannot be annulled on the basis on non-consummation. Therefore the question of the meaning of consummation for mixed sex or same sex marriage does not arise.

Finally we note and agree with section 5(2) of the bill, which clarifies, for the avoidance of doubt only, that the old common law rule that a marriage can be annulled on the petition of either spouse, on grounds of the permanent and incurable inability of the spouses, from the time of the marriage, to achieve heterosexual penetration, does not apply to a same sex marriage. Under existing law, a spouse who is aware at the time of the marriage that such penetration will not be possible is personally barred from seeking an annulment on this ground.

Q6: Putting belief celebrants on the same footing as religious celebrants

As noted above, 22% of respondents in our survey of LGBT people said that they would consider a humanist same sex marriage if that was available. We welcome the fact that Scotland has allowed humanist marriages since 2005, under the religious marriage provisions of the Marriage (Scotland) Act 1977. We note that humanists now represent the third largest provider of marriages, after civil marriages and those solemnised by the Church of Scotland. It seems to us to make sense to clarify that marriage law applies to belief marriages as such, rather than inappropriately labelling them as a type of religious marriage.

Q7: Authorising celebrants to perform marriages

We agree that religious and belief organisations should be free to decide for themselves whether to solemnise only mixed sex marriages, or same sex marriages as well. As noted above, there is a range of religious and belief organisations in Scotland that wish to conduct same sex marriages. Others, including the larger churches, do not. Religious freedom should apply to both groups. The bill protects that freedom, and extends it for the first time to those bodies that support same sex marriage.

We think that an opt-in system is an appropriate way to do this. We note that the amendments to the Equality Act 2010 which the Scottish Government have agreed

with the UK Government will ensure that religious bodies and individual religious celebrants who choose not to conduct same sex marriages are free in law to do so. Changes made since the consultation on the draft bill have extended that protection to anyone who is an integral part of the religious (or belief) aspects of the ceremony, for example an organist or church choir member. We agree that those people should have the right to opt out of same sex marriages.

The Scottish Government do not intend that people providing commercial services in relation to a marriage, that are not an integral part of the religious ceremony, should be allowed to discriminate against same sex marriages. That would include for example chauffeurs and photographers. We agree with this. It is already the case under equality law that such commercial services have to provide their services for civil partnerships on the same basis as for marriages. To allow commercial businesses to discriminate simply because a staff member personally disagrees with same sex relationships would undermine the whole basis of anti-discrimination law.

Form of marriage ceremony

We believe that one amendment is needed to the parts of the bill that deal with the authorisation of religion and belief marriage celebrants.

When a religious or belief body nominates its celebrants to the Registrar General to be approved to conduct marriages, the body must give the Registrar General details of the form of its marriage ceremonies.

The current law (section 9(3) of the Marriage (Scotland) Act 1977) requires that marriage ceremonies must include these two declarations:

1. a declaration by the couple that they accept each other as husband and wife;
2. followed by a declaration by the celebrant that they are then husband and wife.

Section 11(2)(f) of the bill keeps the same rule for ceremonies for mixed sex marriages. Under section 11(2)(g), when religious or belief celebrants are nominated to conduct same sex marriages, the same sex marriage ceremonies must instead include:

1. a declaration by the couple that they accept each other in marriage;
2. followed by a declaration by the celebrant that they are then married.

We think that this form of ceremony for same sex marriages is fine – there is nothing to stop the celebrant adding extra words such as “wife and wife”, by agreement with the couple.

But we think that the required form for mixed sex marriages is too restrictive, because the law requires the use of the gender-specific terms “husband and wife”, and this will be very problematic for some couples for the reasons outlined below.

Clearly, some religious organisations will want to use the gender-specific terms “husband and wife” for all their marriages, and they should be free to do so. And those terms should continue to be available for couples who want to use them. But it

is wrong to impose those terms where the couple would prefer to use the gender-neutral language and the organisation conducting the marriage agrees to do that.

This is particularly important for mixed sex couples where one or both is transgender or intersex. A trans person's overseas gender recognition is not automatically recognised in the UK. For example, an American trans woman who has fully transitioned and received gender recognition as female in her home state, would still be regarded as legally male under UK law. When she and her lesbian partner marry in Scotland, they would regard their marriage as a lesbian same sex marriage (and it would visibly be that), but legally it would be a mixed sex marriage. It would be highly offensive and inappropriate to call the trans woman a "husband" during her marriage ceremony, when she lives permanently as a woman. In a similar way, where someone is born with an intersex physical variation in their biological sex, or is a trans person who lives in an androgynous manner rather than simply as either a man or a woman, they should not be forced to be called a husband or a wife against their wishes.

We therefore believe that a small amendment is needed to the bill to allow those religious or belief bodies that choose to, to use the gender-neutral ("you are now married") form of marriage ceremony wording for mixed sex marriages, as an alternative to the gender-specific ("you are now husband and wife") form. That would be entirely consistent with the religious freedom principle of the bill, by allowing religious and belief organisations to choose which form of ceremony to use.

Q8: Changing a civil partnership to marriage

In our 2009/10 consultation with LGBT people in Scotland, of 103 people already in civil partnerships, 54% said they would want to change their civil partnership to a marriage if that was possible. From our informal consultation meetings, we know that some civil partners would like the opportunity to do this via a full marriage ceremony (in some cases, conducted by a religious body that chooses to solemnise same sex marriages). Other civil partners have already had a big ceremony for their civil partnership, and would prefer to change to marriage via a simple and inexpensive administrative procedure.

We therefore welcome that the bill allows civil partnerships to be changed to marriages, and allows this by two alternative routes. Section 7 allows a couple who are already in a civil partnership to marry in the usual way, in a civil ceremony, or in a religious or belief ceremony by an organisation that chooses to solemnise same sex marriages. Section 8 allows a couple to change their civil partnership to a marriage via an administrative route.

We note that, in the case of the section 8 administrative route, the details are not yet available, as they will be in secondary legislation. It is important that the procedure is lightweight and low cost: civil partners have told us that they feel they have been discriminated against by the non-availability of same sex marriage in the past, and feel it would be unfair to have to pay a large sum to correct that now.

Marriage between civil partners registered outwith Scotland

As the bill stands, sections 7 and 8 only allow those who registered a civil partnership in Scotland to change that to a marriage. It makes sense that the administrative route in section 8 is only available to those whose documents are already held by National Records of Scotland. However, since marriage in Scotland is already available to couples who reside in any part of the world, we can see no reason why the rule in section 7 should not apply to couples with a civil partnership registered in other parts of the world.

Not allowing this would cause real problems for couples who registered a civil partnership abroad and then moved to Scotland. Because section 7 does not apply to them, they will be unable to change to a marriage unless they first dissolve their civil partnership. But that requires proving that the civil partnership has irretrievably broken down (which it clearly has not), by living apart for a year. It is very unfair to ask civil partners to do that in order to marry. Even if they return to the country where they registered their civil partnership, if that country does not allow same sex marriage, they would need to dissolve their civil partnership there in a similar way, before coming back to Scotland to marry. The practical result will be that such couples will effectively, and uniquely, be barred from marrying.

In contrast, same sex couples from any part of the world who are not in a civil partnership will be able to come to Scotland to marry, whether or not that marriage would be recognised in their home country. We see no reason why this should not also apply to couples who are already in a civil partnership, and we believe that section 7 of the bill should be amended to allow civil partners to marry in Scotland wherever their civil partnership was registered.

Q9: Places where civil marriage ceremonies are allowed

This is not specifically an issue for LGBT people, but we welcome the additional flexibility that will be allowed in choosing the location of civil marriage ceremonies.

Q10: Religious and belief registration of civil partnerships

We believe that most same sex couples will prefer a civil marriage, or a religious or belief marriage, or a civil partnership conducted by a registrar. Our 2009/10 survey of LGBT people found that 74% would consider a marriage in future, and 29% would consider a civil partnership, if the choice was available. Informal consultation suggests that significantly fewer than that 29% would consider a religious or belief civil partnership ceremony.

However, allowing the registration of civil partnerships in a ceremony conducted by a religious or belief body that chooses to do so, adds a useful extra option. In particular, there may be some religious bodies that would not wish to conduct same sex marriages, but would want to offer religious civil partnership ceremonies to same sex couples who are their members. There may also be some couples whose religious beliefs will lead them to prefer a civil partnership to a marriage.

We therefore welcome these provisions in the bill.

Q11: Marriage and gender recognition

We strongly support the principle of allowing transgender people who are married to obtain gender recognition without being required by law to divorce. In our view, however, a number of amendments are required to schedule 2 to the bill, which deals with this. Schedule 2 was not available in the consultation draft of the bill published in December 2012, and the need for amendments at this stage may reflect that. We have outlined the amendments we think are needed here – please see the submission of the Scottish Transgender Alliance (which is based at the Equality Network) for more details.

As the bill stands, a married trans person will require the consent of their spouse to obtain gender recognition. This enables the spouse to effectively “veto” the trans person’s gender recognition, or at least to delay it while the trans person applies for a divorce. If the relationship between the spouses is difficult, the divorce proceedings could take a long time, during which the trans person is unable to access their human right to legal recognition in their true gender.

When a trans person applies for gender recognition, they have already been living in their acquired gender for at least two years. Obtaining gender recognition does not therefore change the practical nature of their marriage, which has been same sex for at least two years. But it does free the trans person from discrimination by bringing their legal status into line with reality. That should be available with or without the spouse’s consent, because it is a matter personal to the trans person, and has no direct effect on their spouse. It is the re-registration of the marriage after gender recognition where both spouses have a direct interest, and where a requirement for the consent of the trans person’s spouse would be appropriate.

We therefore believe that spousal consent should not be required for the granting of gender recognition, but should instead be required for the subsequent re-registration of the marriage and the issue of a new marriage certificate. As at present, the non-trans spouse would continue to be able to obtain a (non-contestable) divorce in such circumstances, if they wished to end the marriage.

The bill is also currently missing a provision that was added to the corresponding English legislation (the Marriage (Same Sex Couples) Act 2013), allowing a person to obtain gender recognition with simpler evidence requirements if they transitioned to their acquired gender at least six years previously. When a person has been transitioned for a long time, it can be very difficult indeed to obtain all the medical evidence that is usually required for gender recognition applications. The doctors involved may have retired or even died. We therefore believe that, as in the legislation south of the border, a provision for simpler medical evidence for long-term transitioned people should be added to the bill – this would assist the Gender Recognition Panel as well as applicants for gender recognition.

We would also like to see the minimum age for applying for gender recognition brought into line with the minimum age for marrying in Scotland, that is, 16, rather than 18 as at present.

Q12: Protections for those with concerns about same sex marriage

We think that the bill strikes the right balance, and provides good protections for people with concerns about same-sex marriage. No religious organisation will be required to conduct same-sex marriages unless the organisation agrees to. Even where an organisation does agree, individual marriage celebrants within that organisation will be free to opt-out of same sex marriages, as will any person who plays an integral part in the religious marriage ceremonies of that organisation (eg the church organist, or a choir member). These are strong protections for religious activities.

No legal expert in human rights who has considered this issue is of the view that the European Court of Human Rights might overturn these protections and force unwilling religious bodies to conduct same sex marriages. In fact, quite to the contrary, religious bodies' rights to refuse to solemnise same sex marriage are protected by article 9 of the ECHR. See, for example, the opinion of Karon Monaghan QC, for Liberty⁷, which states at paragraph 42: "In my view, therefore, any requirement upon a church or religious organisation to conduct same-sex marriages, contrary to the religious convictions of its members, would violate their Article 9 rights (and those of any person compelled to take part, for example a minister)."

Nine European countries (all subject to the ECHR) already have same sex marriage, for up to 12 years, and in no country has any religious body been required by European law to conduct such marriages.

It has been proposed by some that the bill should give civil registrars a statutory right to opt out of conducting same sex marriages. We would strongly oppose that. Unlike religious celebrants, civil registrars are carrying out a civil function on behalf of the state, and therefore an opt-out on grounds of their personal religious belief is not appropriate. Civil registrars whose personal religious denomination disapproves of divorce are not given a statutory opt-out from marrying people who are divorced. Introducing a statutory opt-out would set a dangerous precedent that public service providers (in local government, NHS, etc) should have a legal right to pick and choose who they serve. This is no more acceptable on grounds of sexual orientation and gender identity than it would be on other grounds such as race.

We understand that the registrars' organisation, the Association of Registrars of Scotland, is not calling for a statutory opt-out. The registering of civil partnerships in Scotland by civil registrars has worked well without any such statutory opt-out, and we expect the registering of same sex marriages to work equally well in a similar way.

It has also been proposed by some that teachers should have the right to opt out of mentioning same sex marriage if a pupil asks about it or it comes up in class, and that parents should be able to remove their children from any class where same sex marriage might be mentioned. We would strongly oppose this. Teachers are there to teach the facts, not their personal views, and should answer questions factually. No teacher will be required to say that they personally agree with same sex marriage,

⁷ The opinion forms Annex 1 (pages 27 to end) of this document: <http://www.liberty-human-rights.org.uk/pdfs/policy12/liberty-s-submission-to-the-geo-consultation-on-same-sex-marriage-june-2012-.pdf>

but all teachers must treat all pupils with respect, whatever their family arrangements, including pupils with same sex married parents. It would be unworkable to allow opt-outs from lessons where same sex marriage is mentioned. Opt-outs are not available from lessons where divorce is mentioned, which is also strongly disapproved of by some religious denominations.

Q13: Freedom of speech

The bill will have no negative effect on freedom of speech, as section 14 confirms. People will remain free to disagree with same sex marriage and to express that disagreement publicly. The Equality Network strongly supports the freedom of those who disagree with same sex marriage to express that disagreement.

The Lord Advocate's guidance published with the bill makes clear that it is not a crime to disagree publicly with same sex marriage. The case of *Adrian Smith v Trafford Housing Trust*⁸ demonstrates clearly that it is unlawful for an employer to subject an employee to detriment simply because they say publicly that they disagree with same sex marriage. Mr Smith was demoted at work because he stated on his personal facebook page that he disagreed with same sex marriage. He claimed wrongful breach of contract, and won his case on the clear grounds that there was no legitimate justification for his employer to act against him. There is no evidence in Scotland of detrimental treatment by employers towards people because of their personal disagreement with same sex marriage.

The law already clearly protects freedom of speech, there is no evidence of any problem, and no further changes to the law are needed. Any legal provision that singled out same sex marriages or relationships as being specifically open to criticism would be discriminatory on grounds of sexual orientation, in a similar way to the notorious "section 28".

Q14: Other issues in relation to the bill

Mixed sex civil partnership

The bill is a huge step forward for equality, but it does not introduce full equal marriage. Apart from the amendments suggested above under questions 7, 8 and 11, the main substantive provision missing from the bill is the introduction of mixed sex civil partnerships. That has always been a core part of the campaign for equal marriage in Scotland. It is widely supported: Ipsos MORI Scotland found in July 2012 that 71% of Scots believe that mixed sex couples should have the right to register a civil partnership. We believe that the same choices – marriage or civil partnership – should be open to all couples regardless of their gender (for more detailed reasons, see⁹).

⁸ *Smith v Trafford Housing Trust* [2012] EWHC 3221 (Ch)
<http://www.judiciary.gov.uk/Resources/JCO/Documents/Judgments/smith-v-trafford-housing-trust-16112012.pdf>

⁹ See pages 13 and 14 of our submission to the consultation on the draft bill: <http://www.equality-network.org/wp-content/uploads/2013/08/Equality-Network-marriage-bill-consultation-response.pdf>

We therefore welcome the Scottish Government's public commitment on 27th June 2013 to conduct a review of civil partnership law, "driven by the need to consider the position on opposite sex civil partnership". We believe that review should start without delay, and, once it is complete, there should be prompt legislation to open up civil partnership in Scotland to couples regardless of their gender. This will also make it possible for a person in a civil partnership to obtain gender recognition without the need to change their civil partnership to a marriage.

Survivors' pensions

We note that the regulation of private sector pension schemes is reserved to Westminster, and that, under the current rules, private sector pension schemes will be allowed to pay much smaller survivors' pensions to people in same sex marriages than to those in mixed sex marriages. This is clear discrimination, and under section 16 of the Marriage (Same Sex Couples) Act 2013 the UK Government must set up a review of the situation, to report by 1st July 2014. The same section gives the UK Government power to change the law on this by statutory instrument, and we strongly believe that they should do that once the review is complete.

Section 25

We welcome section 25 of the bill, which corrects an error in the law on dissolution of civil partnership via the simplified procedure. The correction is needed to ensure that around 100 dissolutions which were obtained prior to the discovery of the error are not at risk of being overturned because of the error.

Technical issues

Finally, we believe that three technical amendments may be needed to the bill.

Firstly, we note that paragraph 154 of the Policy Memorandum states that, under the terms of section 4 of the bill, the remaining law on marriage by cohabitation with habit and repute will apply to same sex relationships. However, it has been pointed out to us that section 4(6), which extends common law rules on marriage to cover same sex marriage, may not be effective for the law on marriage by cohabitation with habit and repute. That is because section 4(6) refers to rules of law relating to being (or having been) married, whereas marriage by cohabitation with habit and repute is a rule about purported marriages. It is suggested that words such as "or being a party to a purported marriage" should be added to section 4(6).

Secondly, we think that an amendment may be needed to new section 4D of the Gender Recognition Act 2004, inserted by paragraph 5 of schedule 2 to the bill. Section 4D deals with the unfortunate circumstance of the partner of a transgender person dying before an application for a full gender recognition certificate under new section 4C (inserted by the same paragraph) is determined, and ensures that in such a case the transgender person can still obtain the certificate without having to reapply again from the start. However, section 4D does not appear to deal with the possibility, for case B, in section 4C(3), that the trans person's civil partner / spouse might die after notices to marry are submitted, and more than six months after the issue of the interim certificate, but before the application under section 4C(3) is

made. We think there would be value in amending section 4D to cover this case also.

Finally, we think that a small amendment is needed to paragraph 7(c) of schedule 2. That sub-paragraph allows the spouse of an applicant for gender recognition to apply to the Court of Session to quash the granting of the application by the Gender Recognition Panel, on the grounds that it was secured by fraud (for example, the applicant fraudulently claimed to be unmarried). We think that the same right should be available to the civil partner of an applicant for gender recognition, so that the provision should read "spouse or civil partner". This would be consistent with the general principle that the law treats civil partners and married couples the same unless differences are strictly necessary.

Q15:

We are responding as an LGBT organisation.

Tim Hopkins
Director
Equality Network
23 August 2013