



Briefing for the Public Petitions Committee

Petition Number: [PE1239](#)

Main Petitioner: Nick Henderson, on behalf of the LGBT Network

Subject: Calls on the Parliament to urge the Scottish Government to amend the Marriage (Scotland) Act 1977 to allow two persons of the same sex to register a civil marriage and a religious marriage if the relevant religious body consents.

Background

The Marriage (Scotland) Act 1977 (c 15) does not permit marriage between same sex couples. However, the Civil Partnership Act 2004 (c 33) ('the 2004 Act') enables same sex couples to obtain legal recognition of their relationship by registering as same sex partners. The effects of registration are very similar to marriage for opposite sex couples.

An important difference between marriage and civil partnership is that civil partnership, as its name suggests, is a secular institution and cannot be solemnised before a religious celebrant. In contrast, a marriage may be either a religious marriage or a civil marriage, ie it can be solemnised before a religious celebrant (such as a Church of Scotland minister) or before a registrar in a Registry Office or other venue licensed to carry out non-religious services.

Scottish Government Action

In 2003, in its [consultation document](#) on civil partnerships, the then Scottish Executive stated that, in its view, marriage should not be an option for same sex couples (para 5.8). In respect of the possibility of civil partnership ceremonies being performed by a religious celebrant the former Executive's position was as follows:

"We are creating a legal, civil recognition of a relationship between two people and we are giving rights, responsibilities and protection. To introduce a religious dimension would bring us into a totally different scenario and one that we do not support"¹

(Hugh Henry, former Deputy Justice Minister giving evidence at the [meeting](#) of Justice 1 Committee on 12 May 2004)

¹ Meeting of the Justice 1 Committee, 12 May 2004, col 804.

SPICe recently contacted the Scottish Government to obtain their current position on same sex marriages. The response received was that the Government had no plans to change the law at present, but would give due consideration to the current petition before the Committee.

Scottish Parliament Action

As the (UK) Civil Partnership Bill related to Scottish family law (a matter devolved to the Scottish Parliament) a Sewel Motion² pertaining to the Bill was agreed to by the Scottish Parliament on [3 June 2004](#), following consideration of the Bill by the then Justice 1 Committee.

In 2004 the Petitions Committee also considered [Petition 737](#) calling for an amendment of the Civil Partnerships Bill so that religious celebrants could officiate at civil partnership registrations. Failing that, the petition proposed that registrars should be free to conduct civil partnership registrations at venues which have a religious connection. The Justice 1 Committee took account of the petition in its consideration of the Bill and the Petitions Committee, prior to closing the petition, advised the petitioner to make representations to the House of Lords which was considering the Bill in detail at that time.

Around the time of the consideration of the Bill by the UK Parliament several parliamentary questions were also answered by the then Scottish Executive in relation to the issue of religious celebrants officiating at civil partnership registrations. These include:

Linda Fabiani (Central Scotland) (SNP) (S2W-8245): To ask the Scottish Executive whether it has, since the publication of the Civil Partnerships Bill in the House of Lords, consulted with Scottish faith communities to ask if they would wish the freedom to choose whether they will be able to officiate in the creation of the civil status that will arise from the Civil Partnerships Bill once enacted in the same way as they may officiate in the creation of the civil status of marriage under the Marriage (Scotland) Act 1977 and what the results of any such consultation were.

Hugh Henry: The Executive consulted widely prior to the publication of the Civil Partnership Bill including with faith groups. Since the publication of the Civil Partnership Bill on 31 March 2004, the Scottish Executive has not consulted with Scottish faith communities to ask if they wish to officiate in the formation of civil partnerships. It is of course the case that faith groups if they wish will be able to conduct blessings or other forms of ceremony in line with the wishes of the partners, before or after a civil partnership is registered.

Linda Fabiani (Central Scotland) (SNP) (S2W-8246): To ask the Scottish Executive what legal advice it has taken on whether, if the Civil Partnerships Bill is enacted in the form currently proposed, it would be acting contrary to

²'Sewel motions' were replaced with 'legislative consent motions' in 2005. These parliamentary motions provide the mechanism by which the Scottish Parliament gives consent to the UK Parliament to legislate on issues devolved to the Scottish Parliament. See further: <http://www.scottish.parliament.uk/business/legConMem/index.htm>.

Articles 9(1) and 14 of the European Convention on Human Rights and Fundamental Freedoms by allowing mixed-sex couples to manifest their faith in the creation of the civil status of marriage while not giving same-sex couples the freedom to manifest their faith in the creation of the civil status arising out of the Civil Partnerships Bill.

Hugh Henry: The Scottish Executive is satisfied that the devolved provisions in the Civil Partnership Bill comply with the requirements of the European Convention on Human Rights.

Other recent developments

In 2006, a British same sex couple, married lawfully in Canada, challenged UK law claiming that their human rights were impeded by only being viewed as civil partners in the UK. They lost their high court case.³

In January 2009, California, Florida and Arizona in the United States, passed constitutional amendments prohibiting same sex marriage. In California this overturned a Supreme Court decision that recognised same sex marriage in California as a fundamental right. On the other hand, Connecticut began performing same sex marriages in November 2008 and Massachusetts also currently permits same sex marriages. It is not always appreciated in the UK that the political controversy in the United States surrounds the issue of whether same sex couples should be able to marry in exactly the same way that opposite sex couples can. California, for example, still permits 'domestic partnerships' entered into by same sex couples, similar to civil partnerships in the UK.

In Europe the test case of *Schalk v Austria* is currently pending before the European Court of Human Rights. The claimants are arguing that same sex couples' right to marry is protected by the European Convention of Human Rights.

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³ (*Wilkinson v Kitzinger & Ors* [2006] EWHC 2002 (Fam)).