

MARRIAGE AND CIVIL PARTNERSHIP (SCOTLAND) BILL

SUBMISSION FROM SCOTLAND FOR MARRIAGE

Freedom of speech – Section 14 of the Bill, which is intended to provide reassurance regarding freedom of expression, is worthless. The Lord Advocate's prosecutorial guidelines are also insufficient. Specific free speech safeguards should be included in public order legislation.

The Equality Act 2010 – Should be amended to specify that the protected characteristic of religion or belief includes the belief in marriage as presently defined.

Public Sector Equality Duty – The Scottish Government should pursue an amendment to the Equality Act 2010 making clear that compliance with the PSED requires ensuring that no-one should suffer any detriment as a result of holding or expressing the view that marriage is between a man and a woman. The PSED should not be used to deny religious organisations known to be opposed to same-sex marriage the ability to provide public contracts or to hire public buildings.

Public sector employment – Nobody working, or seeking a career, in the public sector in Scotland should have their equality and diversity credentials (and their suitability for employment) disputed merely because they hold to the existing view of marriage.

Protecting organisations and charities – There should be a principle of reasonable accommodation to ensure that organisations with traditional views on marriage can continue to operate in the public sphere. Charity law should be amended to specify that holding a belief in traditional marriage does not constitute a disbenefit for the purposes of the public benefit test.

Protecting chaplains – Chaplains operate in various spheres in the public sector and need protecting.

Protecting foster carers – The right of those who hold to the traditional definition of marriage to foster and adopt children must be upheld.

Protecting teachers, pupils and parents – Legislative changes and not simply provisions in guidance are necessary to safeguard the civil liberties of teachers, parents and pupils. Necessary steps include a reinforced right of withdrawal and a requirement to inform parents about relevant lesson content.

Protecting civil registrars – The Bill should protect civil registrars with a conscientious objection to officiating at same-sex marriages.

Protecting religious celebrants – There are many uncertainties surrounding the operation and stability of the proposed opt-in scheme.

1. Scotland for Marriage

Scotland for Marriage is a campaign to support marriage as the union of one man and one woman. Established in November 2011, our focus is on making the positive case for marriage based on its importance for society, and in particular its importance for children.

Though supported by partners such as CARE for Scotland, the Catholic Bishops' Conference, The Christian Institute and Evangelical Alliance Scotland, our campaign is broad-based and is open to Scots of all faiths and none.

The Scotland for Marriage petition, which supports the retention of the present definition of marriage, recently passed 50,000 signatures and currently stands at 51,245.

We have a high level of grassroots support. Over the past year we have held over 80 public meetings for supporters the length and breadth of Scotland attended by almost 2,000 people. We are supported by a team of several hundred volunteers who have helped to deliver well over half a million pieces of literature door to door, and have collected in excess of 2,500 signatures for our petition at on-street campaign days.

2. The case for marriage

The current understanding of marriage as a lifelong, exclusive commitment between one man and one woman has served Scotland well for centuries.

While a variety of circumstances may prevent it, it is our sincere conviction that the ideal scenario for every child is that they be brought up by their own biological mother and father in a stable relationship. Marriage is therefore a key, foundational building block of any society, and we are genuinely concerned about the potentially far-reaching implications of tampering with it.

3. Equality

The main argument used by those in favour of redefining marriage is that it will provide equality ('equal marriage') for same-sex couples. However it is far from clear what additional legal benefits (if any) same-sex couples will enjoy to which they are not already entitled via civil partnerships. If there were any, civil partnership legislation could simply be amended to cater for that.

As noted above, marriage has always been understood as a unique relationship between a man and a woman. Scotland already recognises a variety of different relationships, so there is no credible equality argument for redefining marriage.

Furthermore, as discussed in more detail below, the disproportionate impact of the Bill in terms of potential infringements of civil liberties outweighs any benefits which might accrue to those who wish to see the law changed in the manner proposed.

4. Public support

We are genuinely concerned that the Scottish Government is intent on fundamentally altering the long-established definition of marriage without any obvious mandate. The SNP election manifesto promised to consult on same-sex marriage, which as a minimum implies that the views duly expressed by those responding would be taken into account.

The fact that around 77,000 people chose to respond to the consultation underscores the huge strength of feeling on this issue, and represents a far greater number of people than any opinion polls are able to. **On the specific question of whether same-sex marriage should be allowed in Scotland, it is hugely significant that of the 62,057 responses from within Scotland, 64% (39,724) said that it should not.**¹

As noted above, our own petition currently stands at 51,245 signatures and rising, which further demonstrates the huge number of Scots who fundamentally disagree with the Bill. The best test of public opinion on this issue would be to hold a referendum.

While it is clear that a significant majority of MSPs support the redefinition of marriage, it is hard to escape the conclusion that the level of support within the Scottish Parliament is wholly disproportionate to that exhibited among the population as a whole.

5. Free to disagree

At the very least, the high level of public concern about same-sex marriage should cause the Scottish Government and the Scottish Parliament to make absolutely certain that, should the law be changed, those who hold to the current definition of marriage will be fully protected. This goes way beyond the oft-cited issue of preventing churches or religious celebrants being required to marry same-sex couples.

It is essential that both the Scottish Government and the Equal Opportunities Committee fully appreciate the strength of deep, personal conviction with which a great many people hold to the view that marriage can only be between a man and a woman. This has nothing to do with bigotry or intolerance. On the contrary, belief in the current definition of marriage has been the mainstream, prevailing view in our society for centuries and is an integral tenet to the faith of many Christians, Muslims, Jews and others. It is surely the hallmark of any free, liberal and democratic society to show the utmost tolerance and respect for those whose views may differ from the state's own position, and to celebrate that difference. We note that the Director of Stonewall Scotland, Colin Macfarlane, recently said in giving oral evidence to the Equal Opportunities Committee that not believing in same-sex marriage does not make an individual homophobic "in any way, shape or form".

Sadly, Mr Macfarlane's view is not shared by everyone in our society and a lack of respect for those who disagree with same-sex marriage has been much in evidence in Scotland of late. For example:

- Rev Brian Ross, a retired Church of Scotland minister and police chaplain in Strathclyde was removed from his chaplaincy role because he voiced support for traditional marriage on his own personal blog.²
- Gordon Wilson, the former leader of the SNP, was voted off the board of Dundee Citizens Advice Bureau in October 2011 for publicly supporting traditional marriage.³

¹ The Scottish Government – Registration of Civil Partnerships Same Sex Marriage: Consultation Analysis (SGSR, 2012), page 85

² *The Daily Telegraph*, 1 March 2013, see <http://www.telegraph.co.uk/news/religion/9901134/Police-chaplain-forced-out-after-criticising-gay-marriage.html> (accessed 5 September 2013)

³ *The Courier*, 28 October 2011, see <http://www.thecourier.co.uk/news/local/dundee/former-snp-leader-gordon-wilson-voted-off-dundee-citizens-advice-bureau-board-because-of-same-sex-marriage-comments-1.32801> (accessed 5 September 2013)

- John Mason MSP was attacked from within his own party for lodging a parliamentary motion on same-sex marriage. SNP MEP Alyn Smith wrote in *Scotland on Sunday* that: “What is in the small, mean, angry heads of bigots is a matter for them.”⁴
- Labour MSP Elaine Smith was vilified for expressing her opposition to same-sex marriage at a meeting in her constituency in June 2013, including being labelled “akin to a Ku Klux Klan member” and “no better than a racist”.⁵

It is interesting that the description of a belief as being “worthy of respect in a democratic society” is a key test used by the European Court of Human Rights. While the Policy Memorandum states that “Many people and organisations hold the view that marriage can only ever be between a man and a woman. The Government has made clear its respect for this view”, we firmly believe that this statement should appear on the face of the Bill.⁶

Should the redefinition of marriage be agreed by Parliament, it is vital that individuals and organisations who do not agree with the new definition be free to express that disagreement without fear of reprisal. We are very strongly of the view that the Bill, as introduced, fails to take account of this, and we would therefore urge the Equal Opportunities Committee to scrutinise the following areas in some detail.

(a) Freedom of speech

While Section 14 of the Bill is clearly intended to provide reassurance regarding freedom of expression, it falls well short of fulfilling the Scottish Government’s pledge that the “legislation will be accompanied by important protections for freedom of speech.”⁷ We believe it is particularly important that the relevant public order legislation be amended to specify that it is not wrong simply to criticise same-sex marriage.

The Bill fails to properly protect free speech in at least two respects. Firstly, Section 14 simply states that there is no effect on the exercise of existing rights, whether under the Convention or rule of law – something that must necessarily be true of any Scottish Parliament legislation with or without this section. Section 14 is therefore meaningless. Secondly, it simply refers to “nothing in this Part” affecting the exercise of free speech, i.e. the section only applies to the Bill itself. Yet the free speech issues do not necessarily arise with the Bill directly. The concerns relate to the impact of the redefinition of marriage on how existing public order law will be applied in practice. It must be recognised that in a completely new situation where marriage has been redefined, the effectiveness of existing rights could well be reduced. What is needed to protect free speech and reassure those with reservations in this area is clear protection within public order legislation itself, to reflect the fact that there are sharply differing views in society on what the definition of marriage should be.

Free speech clauses have very clear precedent, both at Westminster and Holyrood. The incitement to religious hatred offence created in 2006 by Westminster includes a robust free speech clause that was passed with SNP support.⁸ The Scottish Government included a free speech clause in Section 7 of the Offensive Behaviour at Football and

⁴ BBC News, 7 August 2011 see <http://www.bbc.co.uk/news/uk-scotland-14435856> (accessed 5 September 2013)

⁵ *The Herald*, 18 June 2013, see <http://www.heraldscotland.com/politics/political-news/msp-attacked-after-objecting-to-same-sex-marriage-bill.21370982> (accessed 5 September 2013)

⁶ Policy Memorandum - Marriage & Civil Partnership (Scotland) Bill (Para. 97)

⁷ Scottish Government Press Release, 25 July 2012

⁸ Section 29J of the Public Order Act 1986

Threatening Communications (Scotland) Act protecting religious debate in the light of the threatening communications offence. The Scottish Government took important steps to mitigate the dangers posed by its legislation. The same applies to the redefinition of marriage: in order to protect free speech and debate, free speech clauses should be included in public order legislation. We note that the Marriage (Same Sex Couples) Act 2013 adds a specific subsection to the incitement to hatred on grounds of sexual orientation offence, making it clear that disagreeing with same-sex marriage does not breach that law.⁹

The Lord Advocate's new prosecutorial guidelines with regard to hate crimes are inadequate. Although expressing opposition to same-sex marriage would not be the sole grounds for prosecution, it may be a factor used to justify the prosecution of street preachers, football fans and, should an incitement to homophobic hatred offence be introduced at a later date, academics, ministers of religion or those in churches who record sermons for distribution via the internet or other means. As such, it represents a significant threat to freedom of speech and religious liberty. Moreover, to relegate a hugely important issue to guidance, when the proper way to deal with it is through free speech clauses in the law, is highly unsatisfactory. Specific amendments should be made to existing legislation, such as the Offensive Behaviour at Football and Threatening Communications (Scotland) Act 2012 and the 'threatening or abusive behaviour' offence under Section 38 of the Criminal Justice and Licensing (Scotland) Act 2010.

(b) The Equality Act 2010

Arguably the key piece of legislation in ensuring that the beliefs of those who hold to the current definition of marriage are protected is the Equality Act 2010. The Policy Memorandum confirms that the Scottish and UK Governments are in the process of preparing amendments to the Equality Act relating to celebrants, other persons involved in a marriage ceremony and persons controlling the use of premises.¹⁰ There is however scope for further alterations to the Equality Act on the basis that the Act generally, and the Public Sector Equality Duty (PSED) specifically, are at the root of many of the concerns with the Bill.

The Act is meant to protect against discrimination on the grounds of "religion or belief". However it has not, so far, protected people with strong beliefs about marriage, such as Adrian Smith. Mr Smith, a housing manager in Manchester, was demoted and had his salary cut by 40% because of his views on marriage expressed on his Facebook page.¹¹ His subsequent victory in the High Court came under contract law; the court had no power to reinstate him and could only award him £98 for lost earnings. He was advised by his lawyers that he would not succeed on a religion or belief discrimination claim.

We would therefore like to see the Equality Act amended to specify that the protected characteristic of religion or belief includes the belief in marriage as presently defined, thereby making clear that beliefs about marriage are covered by the religion or belief ground of discrimination law. It would not guarantee success in court, but would confirm that the belief is capable of being protected by the Equality Act.

(c) Public Sector Equality Duty

⁹ See Schedule 7, para. 28 of the Marriage (Same Sex Couples) Act 2013, amending Section 29JA of the Public Order Act 1986

¹⁰ Policy Memorandum - Marriage & Civil Partnership (Scotland) Bill (Para. 93)

¹¹ *Daily Mail*, 24 October 2011

The Public Sector Equality Duty (PSED) in Section 149 of the Equality Act 2010 puts public authorities under a duty to have regard to the need to “eliminate discrimination”, “advance equality of opportunity” and “foster good relations”, including the need to “tackle prejudice”.

Although on paper the Equality Act, including the PSED, protects religion or belief just as much as sexual orientation, the protected characteristic of belief has consistently been trumped by that of sexual orientation, both in the courts and the actions of public authorities. Under the PSED, the local authority effectively chooses which rights will prevail in any clash. We therefore believe that the Scottish Government should pursue a further amendment to the Equality Act making clear that compliance with the PSED requires ensuring that no-one should suffer any detriment as a result of holding or expressing the view that marriage is between a man and a woman. The European Court of Human Rights case law demonstrates that religion or belief is a category in which weighty reasons are required to justify any difference of treatment.¹²

Ultimately, nobody working, or seeking a career, in the public sector in Scotland should have their equality and diversity credentials (and their suitability for employment) disputed merely because they hold to the existing view of marriage – whether expressed or not.

(d) Protecting organisations and charities

An important principle which should be prioritised in assessing how to fulfil the PSED is that of reasonable accommodation. Many organisations, such as churches and religious charities, are at the forefront of tackling social problems in their area, such as work with the homeless or food-banks. It must therefore be made clear that the PSED should not be used to deny religious organisations known to be opposed to same-sex marriage the ability to provide public contracts or indeed to hire public buildings (as many churches do). Public bodies should therefore seek to make reasonable accommodation for religious groups in order to facilitate those organisations maintaining their ethos.

This principle has not been implemented to date, as exemplified by the case of the Catholic adoption agencies. Scotland for Marriage is concerned that churches which do not ‘marry’ same-sex couples may be targeted by over-zealous officials in public bodies. For example, a local authority may claim that it would be in breach of the PSED if it were to give a grant towards the cost of a community project to, or to enter into a contractual relationship with, a local church if the church concerned is unwilling to marry same-sex couples.

We are also concerned that the Office of the Scottish Charity Regulator (OSCR) may seek to remove charitable status from churches and other faith groups which are unwilling to marry same-sex couples. Despite previous ministerial assurances regarding the future of the Catholic adoption agencies, OSCR is in the process of removing charitable status from St Margaret’s Children and Family Care Society because St Margaret’s gives preference to married couples. That which politicians currently say will not happen, may very quickly become normal practice if there are no robust legal protections in place. We therefore strongly urge an amendment to existing charity law to specify that holding a belief in traditional marriage cannot be treated as a disbenefit for the purposes of the public benefit test.

¹² Carson, R (on the application of) v Secretary of State for Work and Pensions [2005] UKHL 37, para. 58

Many of these concerns were tackled in the Westminster legislation in Section 2. That section states that no person may be “compelled by any means (including by the enforcement of a contract or a statutory or other legal requirement)” to be involved in a same-sex marriage. This will prevent a tit-for-tat scenario occurring, for example a religious organisation being refused hire of public buildings because it has not registered for same-sex marriages. The Marriage and Civil Partnership (Scotland) Bill should include a similar safeguard.

(e) Protecting chaplains

Chaplains operate in various spheres in the public sector – schools, NHS, police – sometimes on a voluntary basis. Volunteers would have no statutory employment rights, therefore adequate protection for them is doubly important.

Cause for concern in this area was highlighted recently in the Scottish Borders, where the Deputy Leader of Scottish Borders Council, Catriona Bhatia, implied that school chaplains who disagree with same-sex marriage should not be allowed to say so in schools. Councillor Bhatia said: “Some chaplains will stay away from issues such as [gay marriage], but others may sway into it. Some religions have different rules and they are entitled to that, but they should not be introduced in our schools.”¹³

(f) Protecting foster carers

The Scottish Government’s willingness to consider amending existing fostering guidance “to make it clear that a would-be fosterer should not be rejected just because of his or her views on same sex marriage” is welcome and necessary.¹⁴

A case in Derby saw a Christian couple turned down as foster carers apparently on the basis of their religious views on homosexuality. Lord Justice Munby and Mr Justice Beatson said that placing children with foster carers who objected to homosexuality and same-sex relationships “may well be a conflict with the local authority’s duty to ‘safeguard and promote the welfare’ of looked-after children”.¹⁵ Aidan O’Neill QC has affirmed that there “is no doubt that similar considerations would apply in Scotland” and is of the view that it would be lawful for a local authority to refuse a couple’s application to be foster carers on this basis.¹⁶

Whether or not a local authority would similarly object based on a couple’s view of same-sex marriage is as yet untested, however it would be a terrible injustice for everyone concerned if otherwise suitable foster carers were turned down because of their views on marriage. The legislation should therefore include a clause stating that views on the nature of marriage cannot be taken into consideration during the process of approving prospective foster or adoptive parents and upholding the right of those who hold to the traditional definition of marriage to foster and adopt children. A statutory safeguard should also be introduced into the Children and Young People (Scotland) Bill to ensure that the views of potential adopters on same-sex marriage do not influence decisions on their applications.

¹³ *Southern Reporter*, 16 March 2013, see <http://www.thesouthernreporter.co.uk/news/local-headlines/council-amends-chaplain-policy-1-2836951> (accessed 5 September 2013)

¹⁴ Policy Memorandum - Marriage & Civil Partnership (Scotland) Bill (Para. 126)

¹⁵ BBC News, 28 February 2011, see <http://www.bbc.co.uk/news/uk-england-derbyshire-12598896> (accessed 5 September 2013)

¹⁶ The Implications for Freedom of Conscience and Religious Liberty Arising from Redefining Marriage in Scotland Advice – Aidan O’Neill QC, June 2012 (Para. 11)

(g) Protecting teachers, pupils & parents

One of our key areas of concern is education. With same-sex marriage being an undeniably controversial issue, it is paramount that the rights of parents as to what their children are taught, and the rights of teachers as to what they are obliged to endorse, are fully protected. It is of course correct that children be taught the law of the land, regardless of whether they, their parents or their teachers agree with it. This is not in dispute. However this is very different from lessons which essentially endorse or promote a particular lifestyle to which many parents, teachers and children may have a sincere moral objection – such as same-sex marriage.

The Scottish Government appeared to concede the need for safeguards in this area in July 2012 when it promised that the consultation would “consider any additional measures that may be required to guarantee freedom of speech and religion in specific circumstances, including education”.¹⁷ It is therefore unfortunate that this area has seemingly been neglected in the Bill itself.

The Scottish Government’s approach appears to be to simply rely on guidance, and the consultation ruled out strengthening the parental right of withdrawal. This is unacceptable. Guidance does not carry sufficient weight, and the current right of withdrawal is limited to religious and sex education. The issue of same-sex marriage will inevitably be dealt with more broadly across the curriculum. There must be mechanisms in place for parents to be made aware of lessons that are going to be focused on this issue, with a corresponding right of withdrawal from such lessons. It must be guaranteed that neither parents nor pupils will suffer any detriment at the hands of schools as a result of their traditional views on marriage. When schools teach about same-sex marriage it must be done sensitively and with awareness that there is no consensus on the issue in society.

For **pupils**, it is crucial that those who believe in traditional marriage or have parents holding those beliefs are not victimised at school. Bullying is a blight on the lives of many young people. In recent years there has been an emphasis on the need to eradicate bullying based on sexual orientation. Emphasis must also be given to preventing those who believe in the traditional definition of marriage being bullied.

For **teachers**, we believe that a conscience clause should be inserted into the Education (Scotland) Act 1980, under which teachers with a conscientious objection to same-sex marriage would be protected from being forced to actively endorse it. While in Scotland there is no statutory duty equivalent to that in England and Wales to teach about the importance of marriage in sex education, there is guidance which mentions both marriage and stable relationships. (The Scottish Government specifically recommends that schools teach children about the value of marriage as part of sex education.¹⁸) Clearly teachers with a conscientious objection to same-sex marriage would be in a difficult position in attempting to adhere to the guidance and the ‘new’ meaning of marriage. We are already aware of a teacher at a Scottish secondary school who was told that he would have to teach a relationships course promoting same-sex marriage “without exemptions or safeguards”, despite it contradicting his beliefs.

For **parents**, we would support a further amendment to the Education (Scotland) Act allowing parents to withdraw their children from lessons on marriage. Many parents, because of their religious or other convictions, will not want their children to learn about

¹⁷ Scottish Government Press Release 25 July 2012

¹⁸ Scottish Executive Education Department, Circular 2/2001 (Para. 7)

same-sex marriage before a certain age, fearing they will find it confusing. Others may be concerned that teaching on the subject will not be balanced, or will not respect their own convictions on the matter.

According to official guidance parents have the right to withdraw their children from sex education¹⁹, but same-sex marriage could be included in a range of other subjects across the curriculum to which the right of withdrawal does not apply. There is a danger that without an extension of the right of withdrawal the deeply-held beliefs of parents will be undermined and their ability to have their children educated in accordance with their own convictions (Article 2 of the First Protocol to the European Convention on Human Rights) will be infringed. We note that the UN Convention on the Rights of the Child also points to the central role of parents in the raising of children and the duty of State Parties to respect the rights of, and support, parents in this role (see e.g. Articles 3.2, 5 and 29).

It is important that the Committee and the Government take note of what has already happened elsewhere:

- In 2009, Muslim and Christian parents in Waltham Forest, East London, were threatened with prosecution for withdrawing their children from primary school lessons that used the gay marriage story book, 'King & King'. The council said the withdrawals were "unauthorised" absences and that action would be taken against the parents.²⁰
- International experience also illustrates the likely dangers. Gay marriage was legalised in the US state of Massachusetts in 2004 following a state court ruling. In 2006 two sets of parents took legal action against the school district of their children's elementary school. A teacher in a second-grade class (children aged 7 to 8) had used the 'King & King' storybook, in which a prince marries another prince in a gay wedding. The parents said the book's themes were not appropriate for their children's age, and that using the book without their consent was a violation of their civil rights.²¹ But judges in a federal appeal court ruled against the parents and sided with the school.²² Stonewall recommends King & King for use in Scottish primary schools.

It should be made a part of Education Scotland's inspections to ensure the system of withdrawal is operating properly and that parents, pupils and teachers suffer no detriment as a result of their views on marriage.

(h) Protecting civil registrars

The Bill does not protect civil registrars who do not wish to officiate at same-sex marriages. The Scottish Government claims that as registrars conduct a civil function it is not appropriate to allow them an opt-out on conscience grounds. A longstanding member of staff being required to do something, against their conscience and which has never previously been part of their job, is surely a scenario that employees should be protected from. Registrars face having their job transformed around them, and since the Scottish Government is responsible for this transformation it is incumbent upon the Scottish Government to provide protection for those who are disproportionately affected. The

¹⁹ Scottish Executive Education Department, Circular 2/2001 (Para. 13)

²⁰ *Daily Mail*, 7 March 2009, see <http://www.dailymail.co.uk/news/article-1160067/Parents-face-court-action-removingchildren-gay-history-lessons.html> (accessed 5 September 2013)

²¹ *The Boston Globe*, 27 April 2006

²² *New York Times*, 24 February 2007, see http://www.nytimes.com/2007/02/24/education/24brfs-gay.html?_r=0 (accessed 5 September 2013)

Scottish Government's approach to the issue of civil registrars is fundamentally illiberal. There are other areas where – in a free society - conscientious objections are respected. The right of doctors to refuse to participate in an abortion is an example, as is the right of conscience not to fight in time of war, or the right of atheists not to participate in religious observance in schools.

Public bodies are able to fulfil their duties whilst respecting the consciences of their employees. If there is no disruption to the carrying out of the civil function, why should there not be scope for conscientious objections to be respected? It seems perfectly clear that reasonable accommodation could be made, to the effect that a registrar would be able to opt-out of solemnising same-sex marriages as long as the service provision was not unduly disrupted. The Bill should therefore contain a specific conscience clause requiring local authorities to allow civil registrars to opt-out of performing same-sex marriages.

Additionally, the Bill should include a clause which requires individual civil registrars to opt-in along the lines of that proposed for religion and belief celebrants. Moreover, the Scottish Parliament's Equal Opportunities Committee should ask the Westminster Government to amend the Equality Act 2010 in order to incorporate the principle that an employer must make reasonable accommodation of the manifestation of religious belief by employees. It is essential that this protection is provided. Until a commitment is obtained from the UK Government, the Scottish Parliament should refrain from pursuing the introduction of same-sex marriage.

(i) Protecting religious celebrants

Even if the proposed amendment to the Equality Act does provide the necessary legal protection, many questions remain about how the proposed opt-in system will operate. Under the proposed scheme, both the religious body and the individual celebrants will have to be authorised. There will be different ways of doing this, including in some cases all the celebrants belonging to a particular body being authorised if the religious body is 'prescribed'. To be prescribed, the religious body must assure the Registrar General in writing that all their celebrants are content to carry out the ceremonies. There are many questions about how this will work in practice. There is a heavy reliance on the religious body in question. In a large body, is it realistic for the hierarchy to be certain how all their celebrants feel? How can the Government be sure that the written assurance provided by the body is comprehensive?

From the consultation document, it seems as though the religious body is also responsible for informing the Government of any dissenting celebrants as and when they arise. There must be a mechanism for the individual celebrants themselves to inform the Government that they do not wish to be able to marry same-sex couples. If the religious body is not prescribed, they will be able to send to the Registrar General a list of celebrants to be authorised. Will this list have some kind of evidence that each celebrant on the list has agreed? Otherwise, how can the Registrar General be sure of the reliability of the list? Would there be a mechanism for individual celebrants being informed that they had been listed, giving an opportunity to decline? Would individual celebrants be able to contact the Registrar General directly to ask to be removed from the list, or would it have to be through the religious body? There are too many unanswered questions about the proposed opt-in scheme.

In addition, there is doubt over whether such a scheme would survive a challenge at the European Court of Human Rights. Currently the Court has said it will leave whether or not

member states provide same-sex marriage to the member states, as there is no consensus on the issue across Europe. Clearly, such a consensus may emerge and the Court, in line with its treatment of the Convention as a 'living instrument', may find there is a right to same-sex marriage. The Scottish Government needs to be sure that its arrangements are future-proofed. More importantly in the short term, the Court insists that where same-sex marriage is allowed, it is allowed on the same basis as opposite-sex marriage.²³ It is this requirement of like-for-like treatment that could leave the proposed opt-in scheme open to challenge.

Scotland for Marriage
6 September 2013

²³ Sexual orientation discrimination has been identified by the Court as being deserving of particular attention, and particularly weighty reasons are required to justify difference of treatment.