

PE1239 – same-sex marriage

Second submission to the Public Petitions Committee
27th July 2009

Equality Network, 30 Bernard St, Edinburgh, EH6 6PR
Tel: 07020 933 952

en@equality-network.org

www.equality-network.org

The Equality Network is a network of around one thousand lesbian, gay, bisexual and transgender (LGBT) individuals and organisations in Scotland, working for LGBT equality. We thank the Committee for inviting us to comment further on PE1239.

The Committee asked us to comment on the Scottish Government's response, the potential complexity of legislation to introduce same-sex marriage, and also on other points discussed by the Committee in considering the petition on 16th June.

The required legislation

We do not believe that this legislation would be unduly complex. There is a specific issue relating to reserved matters and UK cross-border matters, but we believe that there is a relatively straightforward solution to this that does not raise any significant new constitutional or UK-level policy issues.

We suggest that a Marriage (Same-Sex Couples) (Scotland) Bill would require the following provisions, which add up to a relatively short bill¹:

1. A section that repeals section 5(4)(e) of the Marriage (Scotland) Act 1977 – this would remove the legal impediment to a same-sex marriage. For clarity, this section could also state for the avoidance of doubt that a same-sex marriage may be lawfully solemnised in Scotland. Additionally, this section could insert a definition of “marriage” into section 26 (Interpretation) of the 1977 Act to make clear that the common law definition of marriage is extended to include a marriage between a same-sex couple.

¹ We are very grateful to Professor Kenneth McK. Norrie for information on the law. However, the suggestions in this submission are the responsibility of the Equality Network alone.

2. A section, accompanied by a table in a short schedule, amending the “forbidden degrees” provision in section 2 and schedule 1 to the 1977 Act, so that the forbidden degrees apply to same-sex as well as mixed-sex couples (eg, two brothers would not be able to marry, etc).
3. A section stating that all the legal concomitants of marriage (whether statutory or otherwise, and including divorce) apply, with such changes as may be required by the context, to same-sex marriages. This is the approach taken in the South African legislation, and is much simpler than individually amending where necessary all the relevant law. However, if the latter approach were taken, we note that the work required in identifying all the law relating to marriage has already been done, in preparation for drafting the Civil Partnership Act 2004 and associated statutory instruments.
4. A section making clear that three of the common law rules relating to marriage shall not apply to same-sex marriages. All three are rules that cannot be applied to same-sex couples without significant amendment. (The rules may also be considered to be out of date or gender-discriminatory!) The three rules are:
 - The rule that a marriage is voidable if one or other of the parties is permanently and incurably impotent at the date of marriage (“impotent” here means unable to achieve full penetration of the vagina with the penis).
 - The rule that a wife is exempt from criminal liability for resetting goods stolen by her husband.
 - The rule that a wife is exempt from criminal liability for harbouring a fugitive from justice, if that fugitive is her husband.
5. A section providing for the “religious lock”. By this we mean a provision that ensures that religious bodies and religious celebrants who do not wish to conduct same-sex marriages, are under no obligation to do so. One way to do this would be to provide that an authorised celebrant must apply (with the support of their religious body) for additional authorisation from the Registrar General, before they can begin to conduct same-sex marriages. This could be done by inserting a short section or two into the 1977 Act.
6. A section providing for conversion between civil partnership and marriage. A neat and simple way to do this would be to provide

that an existing civil partnership (or marriage) between two people is not a bar to the same two people registering a marriage (or civil partnership), in the usual way. This section would also provide that the duration of the previous civil partnership (or marriage), would be treated as part of the duration of the new marriage (or civil partnership). This would mean for example that where a couple have registered a civil partnership, and later marry each other, the start date for calculating matrimonial property would be the date of registration of the original civil partnership. An example of this kind of provision may be seen in section 18 of the New Zealand Civil Union Act 2004.

7. A section, perhaps with an associated short schedule of amendments, amending the Gender Recognition Act 2004 to remove the rule in section 4 that full gender recognition cannot be granted to a married person.

Reserved issues and cross-border issues within the UK

Legislation along the lines outlined above would provide for same-sex marriage in Scotland which would be legally identical (apart from the three gender-specific rules mentioned at 4 above) to mixed-sex marriage, for all devolved purposes.

However, some of the consequences of marriage are reserved to Westminster, including the tax, benefit, pension regulation, and immigration rules. The laws dealing with these issues provide equivalent rules for civil partnership.

Ideally, one would want Scottish same-sex marriages to be treated by the UK Government as if they were marriages. However, if the UK Government was unwilling to take the step of recognising same-sex marriage, we would favour an alternative simple way forward that would allow Scottish same-sex marriages to be introduced and recognised as such in Scotland for all devolved purposes, while being recognised as civil partnerships for all other UK purposes.

Sections 212 to 218 of the Civil Partnership Act 2004 provide that a same-sex marriage registered in any foreign country or territory is treated in the UK, for all purposes, as if it is a civil partnership. As a result, for example, a same-sex marriage registered in South Africa, or in the US state of Iowa, will be treated as a civil partnership in the UK.

It would therefore require no significant change to UK Government policy to provide that Scottish same-sex marriages should be treated, for UK reserved purposes, and for all purposes in parts of the UK outwith Scotland, as if they are civil partnerships. Minor amendment would be needed to the Civil Partnership Act 2004, to provide that a same-sex marriage entered into in Scotland shall be treated as a civil partnership for all purposes in the UK outwith the competence of the Scottish Parliament.

We suggest that such an amendment would not require primary legislation at Westminster, but could be done by the UK Government by statutory instrument, under the power in section 104 of the Scotland Act 1998 to amend reserved legislation in consequence of an Act of the Scottish Parliament.

Such a change would deal with reserved and UK cross-border consequences of Scottish same-sex marriage. Consideration would also need to be given to the treatment of same-sex couples who wish to marry in Scotland, if one or both are subject to immigration control. Again, since the rules applying for couples coming to the UK to register a civil partnership are the same as the rules applying for marriage, there would be no significant policy change involved in the UK Government applying the same rules to those coming to Scotland to register a same-sex marriage.

Clearly these are matters that will require negotiation between the Scottish Government and the UK Government, but we hope that we have shown that they are issues that can potentially be solved without significant policy change or major legislative amendment, at UK level.

Recognition of foreign same-sex marriages for devolved purposes

Under the provisions of the Civil Partnership Act 2004, foreign same-sex marriages are currently recognised, for both reserved and devolved purposes, as if they were civil partnerships. This rule could be retained without amendment. A same-sex couple married abroad would therefore be recognised in Scotland as being civil partners, rather than being married. However, under the rule set out at paragraph 6, in the section “The required legislation” above, they could, if they wished, convert their civil partnership to a marriage recognised in Scotland, by marrying here.

The European Court of Human Rights case

At the Committee's meeting on June 16th, members discussed the case currently before the European Court of Human Rights, addressing the issue of same-sex marriage. This is the case of Schalk and Kopf v. Austria, in which the original application to the Court was made in 2004 (application number 30141/04).

The Equality Network would strongly advise against delaying consideration of the petition, pending the outcome of this case. That could involve a long delay, and we believe that the outcome of the case is unlikely to shed much light on the issue.

Article 12 of the European Convention on Human Rights provides the right to marry, but qualifies this: "according to the national laws governing the exercise of this right". The European Court therefore grants a wide margin of appreciation to states in interpreting Article 12, and generally defers to national law on marriage.

The European Convention is a living instrument, which the Court interprets in the light of the legal and social conditions in the Council of Europe member states. In interpreting Article 12, the Court has previously required a clear majority view to emerge across member states before requiring an individual state to change its marriage law. For example, for more than 20 years, the Court refused applications from transsexual people in the UK to require the UK to allow them to marry in their acquired gender. Only when 90% of Council of Europe member states allowed such marriages, did the Court change position, in 2001, and require the UK to do so also.

At present only five of 47 Council of Europe member states allow full same-sex marriage (the Netherlands introduced same-sex marriage in 2001, Belgium in 2003, Spain in 2005, and Norway and Sweden in 2009). If Scotland waits until we are forced to introduce same-sex marriage by the European Court of Human Rights, we are likely to be one of the last European countries to do so.

The whole point of the wide margin of appreciation is to allow states wide discretion to make their own decisions on marriage law. We believe that this is a matter that should be decided here in Scotland via our own democratic processes. We hope that Scotland will continue to give a lead on equality and freedom.

The way forward

Committee members discussed two possible ways forward, on 16th June. One was to appoint a Committee member as reporter for the issue, to investigate and report back. The other was to ask the Equal Opportunities Committee to investigate.

LGBT people consistently tell us that this issue is a priority for them. We have come a long way in recent years, but full equality is still denied us – the segregation of marriage and civil partnership is the one remaining area of law where we are still treated as second class citizens. We therefore disagree with the Scottish Government's comment (in their submission PE1239/G) that this is not a priority.

We believe that the petition merits further consideration. This could include wider consultation, and a more detailed consideration of the issues raised by this and other submissions. We hope that this can start very shortly and be completed by some time in 2010. We would hope that the Committee would discuss with the Equal Opportunities Committee the scope for an inquiry by that Committee on that timescale, before taking any decision to refer the petition to that Committee.

The Equality Network would be happy to work with either Committee, and with any MSPs, in any appropriate way that would be of help, including facilitating engagement with LGBT people and organisations, for consultation purposes.