

# PE1239 – same-sex marriage

Submission to the Public Petitions Committee

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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 welcome the invitation to submit our views on petition PE1239 to the Public Petitions Committee.

The Equality Network agrees with the aim of the petition. The ban on same-sex marriage is the last remaining major discrimination against LGBT people in Scots law. We believe that marriage should be available to same-sex couples, and that this should include both civil and religious marriage (the only difference between these is the way they are solemnised). Our reasons are:

- Freedom of religion and religious expression. Religious bodies that want to solemnise same-sex marriages should be able to do so.
- Ending discrimination in the law, and working to end discrimination in practical treatment, for LGBT people.
- Ending the enforced segregation of same-sex and mixed-sex couples into separate institutions. Even with identical legal effects, a “separate but equal” segregated system can never provide genuine equality.

## Freedom of religious expression

A number of representatives of religion or belief communities have said to us that they wish to be able to solemnise same-sex marriages on the same basis as mixed-sex marriages. Those include the Metropolitan Community Church, a world-wide church founded 40 years ago in the US LGBT community, Quakers, and Humanists. (As Committee members know, Humanists conduct marriages in Scotland under the religious marriage provisions.) The submission to the Committee from the Pagan Federation makes the same point.

Many couples agree. For example, Christian same-sex couples have told us of their disappointment that they cannot enter a legally recognised marriage solemnised by the Metropolitan Community Church, and how negatively this affects them.

Some religious bodies currently conduct blessings of same-sex couples, for example on the same day as the registration of the couple's civil partnership. However, civil partnership law requires the civil registration ceremony and any religious ceremony to be kept strictly separated. This is perceived as falling significantly short of the legally effective religious solemnisation that is an option provided by marriage law.

The principle of religious freedom works both ways on this issue, and we believe that legislation to allow same-sex marriages should make clear that no religious body shall be obliged to provide these. We agree with the submission made to the Committee by Major Alan Dixon on behalf of the Salvation Army. Religious bodies which do not agree with same-sex marriage should be free not to provide it; religious bodies that support it should be free to provide it.

## Ending the remaining discrimination in law and practice

The Scottish Government (and the UK Government, as regards reserved issues such as tax and immigration) have taken care to ensure that the legal obligations and rights of civil partnership and marriage are the same. However there remains one important area of legal discrimination, and other discrimination in practice.

The remaining legal discrimination affects transsexual people. Under the Gender Recognition Act 2004, a transsexual person can obtain full legal recognition of their acquired gender (the gender opposite to their original birth certificate gender), once they have lived in the acquired gender for at least two years. Some transsexual people are already married before they transition to living in their acquired gender, and then apply for gender recognition. Because granting a married person gender recognition would create a same-sex marriage, the law requires the applicant for gender recognition and their spouse to divorce, before gender recognition is granted. (Accordingly, pending gender recognition is now a ground for divorce.)

This rule forces people to choose between their marriage, and their human right (upheld by the European Court of Human Rights <sup>1</sup>) to be treated as their true gender. Living as one gender while still legally the other gender causes so many difficulties that this choice is agonisingly difficult. Although the divorced couple can register a civil partnership immediately after gender recognition is granted (since they are now legally a same-sex couple), there are significant losses of legal protection in doing this. For example, the start date for calculating matrimonial property moves forward to the date of the civil partnership, instead of the date of the marriage which may have been decades earlier. Civil partnership is also not perceived as a full replacement for marriage. This is the only situation where the law reaches into a marriage and forces a lawfully married couple to divorce against their agreed wish to remain married. If same-sex marriage was lawful, there would be no need for transsexual people to divorce before obtaining gender recognition.

There are practical differences in the treatment of civil partners and married couples. Civil partners have reported to us that they are not always afforded the same treatment as married couples, for example by public services such as the NHS. Although direct discrimination in the treatment of civil partners compared to married partners is unlawful, there is evidence that it is still happening, and, more generally, of lesser respect afforded to civil partners.

Introducing same-sex marriage would not guarantee equal respect for same-sex couples, but it would certainly remove what is, for some people, a justification for continuing to treat couples differently.

A further practical difference is in the recognition given to UK couples abroad, both in the EU and elsewhere. For example, civil partners from Scotland face major problems in France, where their civil partnership is not recognised as equivalent to a French PACS <sup>2</sup>. The framework for international recognition of marriage is well established in international private law. Although countries that regard same-sex marriage as contrary to public policy are not required to recognise foreign same-sex marriages, the framework and practice exists for that recognition in countries without a public policy objection. There is no framework of law in place for international recognition of civil partnership style status, and

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<sup>1</sup> Goodwin v. UK, application 28957/95, European Court of Human Rights, 11<sup>th</sup> July 2002, available here: <http://www.pfc.org.uk/node/350>

<sup>2</sup> PACS = civil solidarity pact; the French system for registering a same-sex partnership

developing such a framework is made harder by the big differences in the legal effects of such registered partnerships in different countries.

## Ending enforced segregation

The law segregates same-sex and mixed-sex couples into separate institutions: civil partnership and marriage. Even though the law applying to the two institutions is virtually identical, a segregated system can never provide full equality.

This has been well recognised in a series of court judgments in the United States. Judgments have cited *Brown v. Board of Education of Topeka*, the 1954 US Supreme Court judgment which ended racially segregated schooling, establishing that claims of “separate but equal” provision in reality mask continued inequality.

For example, in 2008, the Supreme Court of Connecticut ruled<sup>3</sup> that that state’s provision of civil unions for same-sex couples, with the same legal effects as marriage, breached Connecticut’s constitutional equal treatment provisions. The court of first instance had ruled against an application for same-sex marriage, on the grounds that “because this state’s statutes afford same sex couples the right to enter into a civil union, which affords them the same legal rights as marriage, the plaintiffs had not established a constitutionally cognizable harm.” The Supreme Court disagreed: “We conclude that, in 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 ruled that marriage in Connecticut must be opened to same-sex couples.

We consider that this analysis is equally true in Scotland: marriage carries a status and significance that civil partnership does not, and so the segregated system is inherently discriminatory.

Segregation has a negative influence on public attitudes. This affects not only same-sex couples, but their children, who are known to be the children of a civil partnership rather than a marriage (our survey work

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<sup>3</sup> Elizabeth Kerrigan et al v. Commissioner of Public Health et al, Supreme Court of Connecticut, SC17716, released 28<sup>th</sup> October 2008 <http://www.jud.ct.gov/external/supapp/Cases/AROCr/CR289/289CR152.pdf> (page 5)

indicates that up to 10% of same-sex couples have children). Prejudiced attitudes also have broader negative consequences, for social cohesion and good relations in society generally. Introducing same-sex marriage will not eliminate prejudice, but it will certainly help.

## Public opinion on same-sex marriage

The Scottish Social Attitudes Survey <sup>4</sup> asked in 2006 whether people agreed or disagreed that “Gay or lesbian couples should have the right to marry one another if they want to”. 54% agreed or strongly agreed while 21% disagreed or strongly disagreed, with 21% saying they neither agreed nor disagreed, and 4% not answering. Public opinion has been steadily moving in favour of same-sex marriage, and we would expect a wider margin in favour today.

## Mixed-sex civil partnership

If marriage is opened up to same-sex couples, the question arises of what should happen to civil partnership. The US state of Vermont has had civil unions (similar to our civil partnership) since 2000, and is this year introducing same-sex marriage. Existing civil unions will continue to be legally recognised, but new civil unions will no longer be available. Those couples already in civil unions will have the option of converting their civil union to a marriage, or remaining in a civil union.

In contrast, the Netherlands, which introduced registered partnership (similar to our civil partnership) in 1998, and introduced same-sex marriage in 2001, has retained both systems, running in parallel, both equally available to mixed-sex and same-sex couples. The same approach has been taken in Belgium.

We believe that civil partnership should continue to be available after the introduction of same-sex marriage, and that civil partnership should be opened up to mixed-sex couples. This would give the same choices to all. A minority of same-sex couples have told us that, given a choice between same-sex marriage and civil partnership with the same legal effects, they would prefer to register a civil partnership. In addition, a number of cohabiting mixed-sex couples have told us that they do not wish to marry, for a variety of reasons, but that if civil partnership was open to them, they would register a civil partnership. This would give greater legal protection to them and their families.

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<sup>4</sup> <http://www.scotland.gov.uk/Publications/2007/12/04093619/0>

## Action by the Equality Network

The Equality Network strongly supported the introduction of civil partnership, and worked with the Scottish Executive to ensure that the legal effects were the same as marriage. Around 2500 couples in Scotland have registered civil partnerships, and the current rate of civil partnerships is running at around 2% the rate of marriages. Civil partnerships have made a huge practical difference to people's lives, and have helped move public attitudes towards acceptance of LGBT people.

However, when we gave evidence on civil partnership to MSPs in 2004, we made clear that we believed that same-sex marriage was also needed for full equality, for the reasons explained above: religious freedom; legal and practical equality; and an end to segregation. The Equality Network would welcome working with MSPs and the Scottish Government, together with our partners in the LGBT communities and beyond, to help bring this change about.