

Marriage and Civil Partnership (Scotland) Bill
Briefing for stage 3 debate – 4th February 2014
APPENDIX – Details of the substantive amendments

Equality Network and Scottish Transgender Alliance

Email: tim@equality-network.org

Phone: 0131 467 6039

The substantive amendments are listed here in the order they appear in the Marshalled List.

Amendment 25 (John Mason)

This amendment is identical to stage 2 amendment 38, which the Equal Opportunities Committee disagreed to.

The amendment provides that no religious or belief body may be compelled by any means to apply to the Registrar General to be prescribed to solemnise same-sex marriages, or to nominate to the Registrar General any of its celebrants to be empowered to solemnise same-sex marriages.

It also provides that no individual may be compelled by any means to apply to the Registrar General for temporary authorisation to solemnise same-sex marriages.

The amendment would override any private contractual arrangements, including future contracts.

In our view, part of this amendment is unnecessary, and the other part would be an unwarranted interference in the internal affairs of religious or belief bodies.

Section 10(2) of the bill already states (at new subsection (1D)) that there is no duty imposed by the bill on religious or belief bodies to request to be prescribed to conduct same-sex marriages, or to nominate any of their celebrants for registration to conduct same-sex marriages. It also states that no individual is under a duty under the bill to apply for authorisation to conduct same-sex marriages, nor are celebrants placed under any duty by the bill to conduct such marriages even if they have been authorised to do so.

The amendments to the Equality Act 2010, agreed between the Scottish and UK Governments, which will be made before the bill comes into effect, will ensure that equality legislation imposes no such duty on religious or belief bodies or celebrants. No other legislation or law imposes such a duty.

The parts of this amendment that refer to statutory or legal requirements are therefore unnecessary – no such requirements exist, and there are already strong protections for religious and belief bodies and their celebrants.

The amendment would also invalidate any contractual requirement, involving a religious or belief organisation or person, to apply for authorisation to conduct same-sex marriages. In our view, this is an unwarranted interference in the internal workings of religious or belief organisations. For example, a belief body, such as a humanist organisation, might employ a person on the specific understanding that the person will be approved as a celebrant to conduct same-sex as well as mixed-sex marriages. The body and the person should be free to choose to contract to do that if they wish, but the amendment would make that impossible.

Such an interference in the contractual powers of religion and belief organisations may well constitute a breach of their article 9 (freedom of thought, conscience and religion) rights under the European Convention on Human Rights, as was explained to the Equal Opportunities Committee by Aidan O’Neill QC and Karon Monaghan QC in stage 1 oral evidence on 19th September 2013 (Official Report columns 1496 & 1497).

For these reasons, we ask you please to vote against amendment 25.

Amendment 26 (John Mason)

This amendment is identical to stage 2 amendment 39, which the Equal Opportunities Committee disagreed to.

The amendment provides that “a belief in marriage as a voluntary union between one man and one woman to the exclusion of all others for life is a belief worthy of respect in a democratic society”. It would not apply to

any other belief, including for example a belief that marriage can include same-sex marriage, or a belief that marriage may not last for life.

In our view, the amendment is unnecessary, is also discriminatory, could undermine general freedom of speech rights, and is ill-defined.

The amendment is unnecessary because section 14 of the bill already provides that nothing in the part of the bill relating to same-sex marriage affects people's rights to freedom of thought, conscience, religion and expression. Quite rightly, the freedom to hold and express views, including views opposed to same-sex marriage, is protected by the religion and belief equality provisions of the Equality Act 2010, and by the Human Rights Act 1998. The Lord Advocate's recent guidance on freedom of speech around the issue of same-sex marriage provides further protection.

The amendment is discriminatory, because it singles out a belief that marriage can only be between a man and a woman as being worthy of particular respect. This discriminates against people who hold other views, for example that marriage can be between people of the same sex – surely that view is equally worthy of respect in a democratic society? The introduction of same-sex marriage is intended to give same-sex couples the same legal status as mixed-sex couples, but this cannot be achieved if it is written into the bill that only a belief in mixed-sex marriage is worthy of respect.

The amendment could undermine general freedom of speech rights because if a particular belief is enshrined in legislation as being worthy of respect, courts may infer that the Parliament intends that all other beliefs are less worthy of respect. The belief that marriage can only be between a man and a woman may be interpreted by the courts to be deserving of a higher level of respect than other beliefs, because the amendment singles it out for mention as worthy of respect. But surely all other beliefs that a person may hold, whether that be about divorce, poverty, or any other subject, are equally worthy of respect in a democratic society?

The amendment is also ill-defined because it does not specify what "worthy of respect" means. What are the practical consequences intended to be, in law, and would there be unintended consequences? Would it become unlawful, for example, to criticise the belief that marriage can only be between a man and a woman?

For these reasons we ask you please to vote against amendment 26.

Amendment 3 (Siobhan McMahon)

This amendment is identical to stage 2 amendment 42, which the Equal Opportunities Committee disagreed to.

The purpose of this amendment appears to be to prevent any public body from withholding or terminating, or altering the terms of provision of, any service or facility to any person, where that is done because the person believes that marriage can only be between a man and a woman.

In our view, amendment 3 is discriminatory and unnecessary.

It is discriminatory because it singles out a belief that marriage can only be between a man and a woman as worthy of specific protection, without giving that protection to any other belief. Why shouldn't people who hold a belief that marriage can be between a same-sex couple be equally protected? Why shouldn't all other personal beliefs be protected? Singling out one specific belief as being specially protected not only discriminates against other beliefs but also tends to undermine protection afforded other beliefs in law, because courts may take the view that the Parliament intended that beliefs not specifically listed in legislation should be less protected.

The amendment is also unnecessary because equality and human rights law already provide the intended protections across a wide range of religious and other beliefs. If a public authority withheld services from any person, or provided them with less good services, because of the person's religious or other philosophical beliefs, including a belief that marriage can only be between a man or a woman, the public authority would be in breach of the religion and belief equality provisions of the Equality Act 2010. The public authority would also be likely to be in breach of article 9 (freedom of thought, conscience and religion) of the European Convention on Human Rights. The person discriminated against would be able to take the authority to court to end the discrimination and to obtain compensation.

At stage 2, the Cabinet Secretary expressed the view that this amendment could amount to regulating discrimination and could therefore stray into the reserved area of equal opportunities.

For these reasons, we ask you please to vote against amendment 3.

Amendment 1 (Richard Lyle)

This amendment is identical to stage 2 amendment 43, which the Equal Opportunities Committee disagreed to.

The amendment would prevent an adoption agency, court or local authority from taking into account a person's views about same-sex marriage, in making decisions on approving the person as an adopter, or relating to the adoption of a child, or on approving the person as a foster carer.

In our view, amendment 1 is discriminatory and unnecessary. It is discriminatory because it singles out beliefs about same-sex marriage as being worthy of particular protection. Why should other beliefs not be equally protected – for example a belief that divorce is wrong? Passing legislation that gives greater protection to one particular belief may undermine the legal position of all other beliefs, because courts may take the view that the Parliament intended that beliefs not specifically listed in legislation should be less protected.

The amendment is unnecessary because adoption and fostering legislation already requires decisions to be based on one paramount consideration: the best interests of the child. Constraining the courts, local authorities and adoption agencies in the way this amendment requires could unacceptably interfere with their ability to ensure that the best interests of the child remain the paramount consideration.

Clearly, a person's view on same-sex marriage should not (and must not, as both family law and equality and human rights law already stand) be the determining factor in deciding their suitability as adoptive or foster parents. However it would be disproportionate, and would distort the decision-making process, to exclude all consideration of such views. For example, where a child has been successfully brought up for some years by a same-sex couple, and is now in need of adoption or fostering, the fact that a possible adoptive or foster parent has very strong views against same-sex marriage, and says that they would seek to teach the

child those views, might count against their suitability as adoptive or foster parent for that particular child.

For these reasons, we ask you please to vote against amendment 1.

Amendment 2 (Richard Lyle)

This amendment is identical to stage 2 amendment 44, which the Equal Opportunities Committee disagreed to.

The amendment makes changes to the interpretation of whether an organisation provides a public benefit in charity law; this is relevant for determining whether the organisation meets the charity test. The amendment provides that no disbenefit is incurred by the public in consequence of a body holding the belief that a marriage can only be between a man and a woman.

In our view, amendment 2 is discriminatory and unnecessary.

It is discriminatory because it singles out the specific belief that marriage can only be between a man and a woman as having special protection. Why should other beliefs not be equally protected – for example a belief that marriage can be between two people of the same sex, or a belief that divorce is wrong? The amendment could skew the process of decision-making about whether an organisation's objects are charitable. If the amendment was passed, then, all other things being equal, an organisation which objects to same-sex marriage could be more likely to be granted charitable status than one which supports same-sex marriage. That cannot be right – beliefs either way on this subject should be equally worthy of respect, as should beliefs on a wide range of subjects.

Passing legislation that gives greater protection to one particular belief may undermine the legal position of all other beliefs, because courts may take the view that the Parliament intended that beliefs not specifically listed in legislation should be less protected.

Furthermore, the amendment could be interpreted as requiring OSCR, the charity regulator, to ignore actual discrimination by organisations against married same-sex couples, when making decisions about charitable status.

The amendment is unnecessary, because it is already unlawful for OSCR to discriminate on grounds of religion or other philosophical belief, or to breach article 9 (freedom of thought, conscience and religion) of the European Convention on Human Rights. An organisation which was denied charitable status solely because it believed that marriage should be between a man and a woman only, would have grounds to overturn the decision and obtain compensation through the courts, under both the Equality Act 2010 and the Human Rights Act 1998.

In this context, we note the ruling of the Scottish Charity Appeals Panel on 31st January 2014 that St Margaret's adoption agency does provide a public benefit, and does qualify for charitable status. The key point of the ruling was that St Margaret's does not directly discriminate against same-sex couples, because civil partners are considered by St Margaret's as potential adoptive parents and are treated in the same way as married couples. The ruling demonstrates that so long as an organisation does not directly discriminate on grounds of sexual orientation, the organisation can hold a range of religious beliefs about family and can qualify for charitable status.

For these reasons, we ask you please to vote against amendment 2.

Amendment 27 (John Mason)

This amendment is almost identical to stage 2 amendment 48, which the Equal Opportunities Committee disagreed to.

The amendment would require the Scottish Government to review the effects and operation of the same-sex marriage provisions in the bill, within five years of the commencement of those provisions. The amendment requires the review to include consultation, and requires a report of the review to be laid before the Scottish Parliament and published.

The amendment requires the review to focus in particular on:

- the provisions in the bill that no religious body or person is under a duty to apply for authorisation to solemnise same-sex marriages,
- the provisions in the bill that specify that the bill does not affect freedom of speech, and

- any court proceedings related to the effect of introducing same-sex marriage.

In our view this amendment is unnecessary and unhelpful.

The amendment is unnecessary because the Scottish Government and Parliament should be conducting post-legislative scrutiny of all legislation. To add a section to this bill, requiring a review of just part of it, would undermine the generality of that, and would call into question the need to review other Acts. Either every Act should include a full statutory review requirement, or none should, and the post-legislative review should be standard practice for all legislation.

The amendment is unhelpful because it singles out one part of this bill (same-sex marriage) as being particularly in need of review, and by implication as being particularly problematic. In addition, the amendment says that the review must examine the effects of the bill on freedom of religion and freedom of speech. Why should that be the particular focus of post-legislative review? The central purposes of the bill are both to increase equality for LGBT people and to increase freedom of religion, by introducing same-sex marriage, religion or belief civil partnerships, gender recognition for people who are married or civil partners, and some other small changes to marriage law. The focus of any post-legislative scrutiny should be on whether a bill is delivering on all its purposes, as well as on any other effects it may be having.

In short, in our view, the amendment is unnecessary and is based on a restricted and negative view of the value, purpose and effect of the bill.

For these reasons, we ask you please to vote against amendment 27.

Amendments 28 and 29 (Patrick Harvie)

Amendment 28 inserts a new section into the bill. The new section would require the Scottish Government to consult on the future of civil partnership in Scotland, and to lay a report on this before the Scottish Parliament within 9 months of the bill receiving Royal Assent. The amendment specifies that the options set out in the report must include the option of enabling mixed-sex couples to enter into civil partnerships.

On 27th June 2013, the Scottish Government announced a review of the operation and future of the Civil Partnership Act 2004. The proposed remit of that review was published in September 2013 and is set out here: <http://www.scotland.gov.uk/Resource/0043/00434010.pdf>

Amendment 28 would place the Scottish Government review on a statutory footing, with requirements related to timescale and coverage.

Amendment 29 is a consequential amendment which would provide that the new section requiring the review of civil partnership, inserted by amendment 28, would come into force the day after Royal Assent.

The Equality Network suggests that you may wish to consider the Cabinet Secretary's response to amendment 28, before deciding on how to vote on the amendment.

Amendment 30 (John Mason)

This amendment is identical to stage 2 amendment 49, which the Equal Opportunities Committee disagreed to.

Amendment 30 would have the effect of preventing the commencement of the provisions in the bill related to same-sex marriage, until certain specified amendments had been made, by the UK Government and Parliament, to the Equality Act 2010.

The specified Equality Act amendments are

- that the protected characteristic of religion and belief be extended to specifically include a belief that marriage can only be between a man and a woman; and
- that the public sector equality duty be extended to require all public bodies to ensure that no person may suffer any detriment for holding or expressing a belief that marriage can only be between a man and a woman, and that such beliefs are respected.

In our view, this amendment is discriminatory, unworkable, and would potentially wreck the bill by preventing the main part of it coming into effect.

The amendment is discriminatory because the specified changes to the Equality Act single out a belief that marriage can only be between a man and a woman as being worthy of particular protection and respect in equality law. This discriminates against people who hold other views, for example that marriage can be between people of the same sex – surely that view is equally worthy of protection and respect in equality law? The protected characteristic of religion and belief already covers beliefs such as beliefs either way on same-sex marriage, and of course the whole range of other beliefs, and it would unbalance the law for the legislation to be changed to specifically mention one particular belief only.

The introduction of same-sex marriage is intended to give same-sex couples the same legal status as mixed-sex couples, but that cannot be achieved if it is written into the bill that a belief in mixed-sex marriage only must be protected in equality law above other beliefs.

The amendment is unworkable because it is not possible for public bodies to deliver the proposed amended public sector duty, which is very widely drawn. Public bodies do not have the power to ensure that no person suffers any detriment as a result of holding or expressing a belief. It is already the case under equality and human rights law that public bodies must not themselves discriminate against people or organisations because of their religious or similar philosophical beliefs, including beliefs about same-sex marriage.

The amendment could prevent large parts of the bill coming into effect, because it requires that specified amendments must be made to reserved equality law, before same-sex marriage can commence. The specified amendments to equality law have already been rejected by the UK Government and Parliament, when the Marriage (Same Sex Couples) Act 2013 was considered at Westminster. Because equality law is reserved, decisions on it are for the UK Government and Parliament. If the changes to equality law specified in this amendment were rejected by the UK Government and Parliament again, as they have already been once, then the bill would effectively be wrecked by this amendment, because its main provision could not be brought into effect.

For these reasons, we ask you please to vote against amendment 30.

Amendment 31 (Alex Neil)

Amendment 31 inserts a new section 4F into the Gender Recognition Act (GRA), by amending paragraph 5 of schedule 2 to the bill.

New section 4F inserted by amendment 31 deals with an issue raised by the Equality Network in our stage 1 written evidence on the bill to the Equal Opportunities Committee.

We wrote: “[W]e 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.”

New section 4F, in amendment 31, addresses this issue. It provides that where:

- a person in a civil partnership has applied for gender recognition and has been issued with an interim certificate, and
- that person and their partner are in the process of converting their civil partnership to a marriage and then applying for a full gender recognition certificate, under new section 4C of the GRA, and
- the person’s civil partner (or spouse if the conversion to marriage has taken place) dies, either before the conversion of the civil partnership to marriage is completed (case A in the amendment), or before the subsequent interim to full gender recognition certificate conversion application is submitted (case B),

then the person can apply to the Gender Recognition Panel to convert their interim gender recognition certificate to a full certificate in the six months following their partner’s death, without having to restart the entire gender recognition application process from the beginning. This would not apply where the person has entered a new marriage or civil partnership following their partner’s death – in such a case the gender

recognition application process would have to start again, because the applicant now has a different spouse or civil partner.

We ask you please to vote for amendment 31.

Government amendments 4 to 11, and 13 to 24 (Alex Neil)

These Scottish Government amendments are minor – consequential amendments, tidying-up amendments and amendments that correct a small error.

We therefore ask you please to vote for these amendments.