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Consultation on the Draft Marriage and Civil Partnership (Scotland) Bill: Analysis of Written Responses

Equalities



**CONSULTATION ON THE DRAFT MARRIAGE AND
CIVIL PARTNERSHIP (SCOTLAND) BILL: ANALYSIS
OF WRITTEN RESPONSES**

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EXECUTIVE SUMMARY

Introduction

1. In December 2012, the Justice Directorate of the Scottish Government launched a public consultation on proposed changes to Scottish marriage and civil partnership law. The consultation sought views on the detail of the legislation which will introduce same sex marriage, allow civil partnerships to be registered through religious or belief ceremonies and make other changes to marriage law. These measures are contained in The Marriage and Civil Partnership (Scotland) Bill (the draft Bill).
2. This summary presents the key findings from the independent analysis of the responses submitted to the Scottish Government's consultation on the draft Bill. The analysis focused on issues that relate specifically to the draft Bill or the other proposals contained within the consultation document. However, many respondents also made comments about their support for, or opposition to, the introduction of same sex marriage or the religious registration of civil partnerships.

Responses received

3. The total number of analysable responses received was 15,064. The majority of responses (73%) were connected with one of three campaigns (organised by CARE Scotland, Equality Network or Scotland for Marriage) and contained only the suggested text that had been provided to respondents by the campaign group. A further 16% of responses were amended campaign responses, in which the suggested text had been amended or a further comment had been made; 10% were submitted on the standard Scottish Government response form; and the remaining 1% of responses did not use the standard response form and were not campaign responses.
4. All but 128 (or <1%) of responses were submitted by individual members of the public. The 128 group respondents included 16 of the religious or belief bodies that currently solemnise marriages in Scotland, and 11 of the 32 Scottish local authorities that deliver the civil registrar function and employ Scotland's civil registrars.

Impact assessments

5. Part 1 of the consultation document included information on the two impact assessments the Scottish Government has prepared in relation to the proposed legislation – the Equality Impact Assessment (EQIA) and the Business and Regulatory Impact Assessment (BRIA).
6. Around 1,150 respondents made a comment about the impact assessments. Some respondents made short, supportive statements and referred to the assessments as being comprehensive, competent and coherent, for example.

7. The principal issue raised by respondents who had concerns about the assessments, and the EQIA in particular, was that they make little or no mention of the probable negative effects of the proposed legislation on those whose religious or other beliefs lead them to disagree with same sex marriage. Many of the other comments made focused on freedom of speech, children and their education and employment.

General changes to marriage law

8. The draft Bill includes a number of proposed changes to marriage law over and above the introduction of same sex marriage and the religious registration of civil partnerships. Part 2 of the consultation document set out these changes and sought respondents' views on five areas.

Permitted locations for opposite sex and same sex civil marriages

9. Under the current legislation, civil marriage ceremonies can take place at premises approved by the local authority and civil partnership ceremonies can take place at any place agreed by the registrar and the couple, so long as not on religious premises. The draft Bill removes references to approved places from the legislation and would make it possible in Scotland to have a civil marriage ceremony at any place agreed by the registrar and the couple. It would still not be possible to have a civil marriage ceremony in religious premises.
10. Around 1,200 respondents commented on this issue, with many simply expressing their broad support or disagreement with the proposals. Respondents who agreed with the proposals tended to make only brief further comments, which focused on the changes seeming sensible and reasonable, creating equivalent arrangements for opposite and same sex ceremonies and broadening out the choices available to couples.
11. Other respondents suggested a range of changes or clarifications they would wish to see included in any final Bill, including clarifying (or, if required, extending) the exclusions relating to religious premises to include all premises owned or occupied principally by any religious or belief body that does not wish to solemnise same sex marriages. Some respondents, including a number of groups that either employ or represent registrars, raised specific and practical issues that would need to be considered in taking these proposals forward. Many of these comments focused on risk assessment requirements.

Belief ceremonies

12. At present there are two types of marriage ceremony in Scotland, religious and civil. The draft Bill proposes the establishment of a third category of marriage ceremony in Scotland, which would be known as a belief ceremony. The arrangements for authorising belief celebrants would be along the same lines as those for authorising religious celebrants.
13. Around 1,200 respondents commented on this issue, with those that agreed with the introduction of a third type of ceremony giving a range of reasons for doing

so. These included that the proposals reflect the reality of the range of ceremonies already available and would remove the anomaly of belief ceremonies being mis-labelled as religious in nature.

14. However, a number of other respondents disagreed, with some suggesting that this proposal is indicative of a wider secularist agenda. Other reasons for disagreeing included that the arrangements seem unduly complicated and that the need for those who do not hold religious beliefs to have a particular and distinct type of ceremony is not clear. A number of respondents also raised what was a recurrent theme – namely that marriage should be a civil function, undertaken through a civil ceremony, with any subsequent religious or belief ceremony of no interest to the state.

Church of Scotland deacons

15. The Marriage (Scotland) Act 1977 provides that opposite sex marriages may be solemnised by ministers of the Church of Scotland. Church of Scotland deacons have been given temporary authorisation to solemnise marriage since 2006. The draft Bill would amend the 1977 Act, so that Church of Scotland deacons would be authorised automatically to solemnise opposite sex marriage.
16. Around 1,050 respondents made a comment, with many simply stating that this is a decision for the Church of Scotland. The Church of Scotland welcomed the provision in its response to this consultation. Another common view was that Church of Scotland ministers and other officials should simply be governed by the same rules as any other religious body.

Establishing tests

17. The draft Bill proposes the introduction of tests which a religious or belief body (other than the Church of Scotland, in relation to opposite sex marriage) would have to meet before the body's celebrants could be authorised to solemnise a marriage or register a civil partnership. The type of tests which might be laid down include that the religious or belief body and their celebrants would not be allowed to solemnise marriages or register civil partnerships for profit or gain and would have to show that they have a track record in carrying out relevant ceremonies, such as marriages or funerals.
18. Around 1,200 respondents commented on this issue. Respondents who broadly agreed with the proposals tended to suggest that having tests seemed to be reasonable and sensible. However, some respondents did have concerns, including that any requirement for a track record could lead some bodies – including smaller bodies or those which have not traditionally operated in Scotland - to be excluded. Another concern was around celebrants being unable to solemnise marriage for profit or gain - points raised included that it is often standard practice for a celebrant to charge a professional fee, for charges to be made for using premises, or for couples to make a donation to the funds of the church or other religious group of the celebrant who is solemnising their marriage.

Marriage by cohabitation with habit and repute

19. Scotland has a long tradition of 'irregular' marriages. The only type of irregular marriage that remains in Scotland is that of marriage by cohabitation with habit and repute. The draft Bill would repeal the legislation which allows for marriage by cohabitation with habit and repute when a couple erroneously believed themselves to be married overseas.
20. Only around 750 respondents commented on this issue, with some having no particular view other than that any changes that are made should apply equally to opposite and same sex marriages. Those who disagreed with the proposals sometimes saw them as harsh and as having the potential to cause considerable upset. In addition, some respondents felt that putting a bereaved spouse in a situation where they had to apply to the courts in order to receive payment from their partner's estate would introduce further stress and anxiety at what is likely to be one of the most distressing periods of anyone's life.

Same sex marriage

21. Part 3 of the consultation document sets out the Government's plans to introduce same sex marriage in Scotland. Specific areas covered include authorising religious and belief celebrants to solemnise same sex marriage, whether there should be legislative opt-outs for civil registrars, plans to protect freedom of speech and proposals relating to same sex marriage and the education system.

Authorising religious and belief celebrants to solemnise same sex marriage

22. The proposals for authorising religious and belief celebrants to solemnise same sex marriage include that bodies and their celebrants will have to opt in to be able to solemnise same sex marriage. Some religious and belief bodies may be prescribed by regulations, meaning that all of their celebrants would be authorised to solemnise same sex marriage (though bodies will only be prescribed in this way where it is clear that all of their celebrants are content to solemnise same sex marriage). In other cases, religious and belief bodies could nominate celebrants who wish to solemnise same sex marriage to the Registrar General. The consultation document also notes that the Scottish Government has asked the UK Government for an amendment to the Equality Act 2010 to protect an individual celebrant who is opposed to same sex marriage, even though the celebrant's religious or belief body has chosen to solemnise same sex marriage.
23. Around 14,700 respondents made a comment about this issue, which was one of those for which suggested text was available from all three campaign organisations. Some respondents stated their broad support for the proposals for authorising religious and belief celebrants who wish to solemnise same sex marriage. Respondents who agreed with the proposed arrangements generally made only limited further comments.

24. Some of the respondents who disagreed with the proposals simply stated their opposition to the introduction of same sex marriage, whilst others went on to raise specific concerns about the arrangements proposed. There were two main and, for many respondents, connected issues raised by those who disagreed with all or some aspect of the proposals: first, the protection of freedom of speech in general and of religious freedoms in particular; and secondly, concerns about the workability of the opting-in system as set out in the Bill.
25. In terms of protecting freedom of belief and speech, the principal concern of many opposed to the proposals was that bodies and celebrants that did not wish to solemnise same sex marriage could still find themselves subject to litigation. In particular, respondents noted that any amendment to the Equality Act 2010 is not yet in place and cannot be guaranteed. Another concern was that, having been designed to protect religious and belief bodies, the proposed opt-in system fails to give necessary consideration to the position of individual celebrants.
26. Other concerns about the opt-in system included that they impose decision-making standards (such as the requirement for the unanimous support of celebrants) on those bodies that might wish to solemnise same sex marriage. Some respondents also questioned the practicality and/or fairness of requiring all celebrants to be willing to solemnise same sex marriage before a body can be prescribed in regulations to solemnise same sex marriage or register civil partnerships. Finally, a number of respondents were concerned that unwillingness to conduct same sex marriage should not affect any body's or celebrant's authorisation to solemnise opposite sex marriages.

Civil registrars

27. The draft Bill does not include any legislative opt-outs for civil registrars. Around 14,750 respondents commented on this issue, with those who agreed that registrars should not be able to opt-out frequently pointing out that registrars are performing a public function on behalf of a public body and should be expected to carry out a full range of registration duties.
28. Other respondents took a strongly contrasting view. A commonly expressed position was that registrars should have the same protections as religious or belief celebrants and that the failure to include a conscience clause for registrars ignores the fact that those of faith aim to live their whole lives - including their work lives - according to the tenets of their faith. Many respondents were concerned about the likely repercussions for some registrars, including that registrars who have a conscientious objection to solemnising same sex marriages may be forced out of their jobs.

Freedom of speech

29. The Scottish Government has included a provision in the draft Bill making it clear that the introduction of same sex marriage does not affect existing rights under the European Convention on Human Rights and elsewhere to freedom of thought, conscience, religion and expression.

30. Around 14,500 respondents made a comment on this issue, with suggested text available from all three of the main campaigns. For many respondents, the Scottish Government's plan to protect freedom of speech was welcome and seen as sufficient. However, other respondents had concerns that essential safeguards to protect freedom of speech and conscience are lacking from the proposals. Those who felt the proposed protections to be insufficient frequently cited recent examples of people who have been penalised for having expressed their opposition to same sex marriage.
31. In terms of the actions required to mitigate these risks, respondents frequently suggested that employment discrimination law should be amended to bar employers from taking action against employees who hold to the traditional view of marriage.

Education

32. The Scottish Government's proposed approach includes that parents will continue to have the right to withdraw their child from religious education and from programmes of sexual health education. There are no plans to allow parents to opt children out of any class which might happen to mention same sex marriage or civil partnership.
33. Around 14,700 respondents made a comment, with some simply stating their broad support for the Scottish Government's plans. However, this issue was unusual in that many of those who appear to support the introduction of same sex marriage, as well as many of those who do not, had concerns about the intended approach. These concerns tended to crystallise into one of two broad positions.
34. Some respondents (many of whom also made their support for the introduction of same sex marriage clear) were concerned that schools should be fully inclusive of LGBT people and that young LGBT people and young people with LGBT parents have a right to an education which addresses their needs and reflects their lives. It was suggested that the focus of these proposals should be on the needs of these young people, rather than on the impact any changes will have on those opposed to same sex marriage.
35. The alternate position, frequently taken by respondents who made their opposition to the introduction of same sex marriage clear, concentrated on the principle of freedom of conscience being extended to the education system. Points raised included that denominational schools should continue to be able to teach children according to the values and beliefs of their religion and that parents or guardians should have the right to withdraw a child from any lessons covering same sex marriage.

Other consequentials as a result of same sex marriage

36. The Scottish Government's intention is that, where possible, opposite sex and same sex marriage should be treated in the same way and that the move to gender-neutral drafting of legislation should continue. Around 14,300

respondents commented on this issue. Whilst some applauded the gender-neutral approach, others suggested that this issue exemplifies just how profound the changes the Scottish Government plans will be on the whole of society.

37. Many of the comments made related to fostering and adoption. A frequent concern was that amendments might be made to guidance, which would result in it stating that a would-be foster carer, or someone wanting to adopt, should not be rejected because of his or her views on same sex marriage. Respondents taking this view urged the Government to give careful thought to the possible implications of such an amendment on a young person who is being fostered and who comes to realise that they are, or may be, LGBT. However, other respondents took a contrasting position and were concerned that those with a conscientious objection to same sex marriage should not suffer discrimination in the adoption and fostering processes.

Adultery, permanent and incurable impotency and bigamy

38. The proposals also considered how the introduction of same sex marriage could impact on a range of other marriage-related legislation and in particular in the areas of adultery (which can be used in Scots divorce law to show a marriage has irretrievably broken down), permanent and incurable impotency (which can be grounds for voiding a marriage) and bigamy (the crime of purporting to enter into a marriage when already married).
39. Many of the comments made on these issues focused on the respondents' preference for all law regulating marriage to apply equally to opposite and same sex marriages. Others took the view that the very fact that the same approach is not always being taken is symptomatic of a lack of consistency and clarity in the Scottish Government's thinking and that, whilst claiming the proposed changes are designed to ensure that everyone is treated the same, the Government is then choosing to treat people differently when this suits or is easier.

Civil partnership

40. Part 4 of the consultation document set out the Scottish Government's intentions to proceed to allow civil partnerships to be registered through religious and belief ceremonies. Around 900 respondents commented on this issue.
41. Some respondents simply stated their support for the Government's plans or made only limited further comments in support of the proposals. Others noted that, whilst not necessarily supporting the introduction of the religious registration of civil partnerships, they were broadly in agreement with the proposal for an opt-in system should the Government proceed. Other respondents disagreed with the proposals and, as with the same sex marriage proposals, raised a number of concerns with the primary one being about protecting the freedom of speech and of conscience of those who did not wish to be involved in the religious registration of civil partnerships.
42. Around 11,650 respondents commented on the proposals for changing existing civil partnerships into marriages. Many of those who disagreed with the

proposals suggested that civil partnerships are, and should remain, a civil, secular arrangement. Others expressed their broad support for giving same sex couples the option to change their partnership into a marriage, but frequently went on to raise issues about some of the specific arrangements. Those with concerns tended to the view that the 'second ceremony' which is currently proposed should not be required and that it is not fair to charge a fee for changing a civil partnership into a marriage since couples have already paid for their civil partnership ceremony and did not have the option of a marriage ceremony at that time.

43. A number of respondents (including those responding through one of the campaigns) made a comment about opposite sex civil partnerships at this question. Some respondents simply stated that civil partnerships should also be available to opposite sex couples. Other comments focused on the inequity of having non-equivalent arrangements for opposite and same sex couples.

Transgender people

44. The final part of the consultation considered marriage-related issues affecting transgender people and, specifically, whether married transgender people should need to divorce before obtaining a full Gender Recognition Certificate (GRC). Under the current provisions, a transgender person faces a choice between staying in his or her marriage and obtaining a full legal recognition in his or her acquired gender. The proposed changes would enable a transgender person to stay in the relationship, if that is what both parties to the marriage wanted.
45. Around 11,500 respondents made a comment on this final issue. Many gave their support for the Scottish Government's intended approach, which was sometimes referred to as compassionate, caring and thoughtful. However, it was also suggested that the revised gender recognition process as proposed is not, but should be, simple, user-friendly and incur no greater costs to the applicant than under the current process. One of the primary concerns raised was the intended requirement for a second marriage ceremony. Another issue raised was the need for the process to be effective for those who are resident in Scotland, but who were married or entered into a civil partnership outwith Scotland. It was also suggested that some work may be required to ensure that neither partner in a marriage where one party has transgendered loses any pension rights.

1 INTRODUCTION

- 1.1 On 12 December 2012, the Justice Directorate of the Scottish Government launched a public consultation on proposed changes to Scottish marriage and civil partnership law. The consultation sought views on the detail of the legislation which will introduce same sex marriage, allow civil partnerships to be registered through religious or belief ceremonies and make other changes to marriage law. These measures are contained in The Marriage and Civil Partnership (Scotland) Bill (the draft Bill).
- 1.2 The draft Bill and the consultation document ***The Marriage and Civil Partnership (Scotland) Bill: A Consultation*** are available from the Scottish Government's website¹.
- 1.3 This report presents the findings of the independent analysis of the responses submitted before the consultation closing date and time of 5pm on 20 March 2013.

Background to this consultation

- 1.4 In 2011, the Scottish Government undertook a consultation on the possible introduction of same sex marriage and the religious registration of civil partnerships to Scotland. Over 77,500 responses were received, and an analysis of the consultation responses is available from the Scottish Government's website².
- 1.5 In July 2012, the Scottish Government announced its intention to proceed with the introduction of same sex marriage and the religious registration of civil partnerships. These measures are contained within the draft Bill. The consultation document accompanying the draft Bill also sets out the Government's proposals for providing protections for those who may have concerns about same sex marriage. In some cases, these protections are provided for in the draft Bill. Other protections are contained in existing legislation or in existing or proposed guidance.

Consultation themes and questions

- 1.6 The consultation document is set out in five parts: the introduction (which includes the impact assessments prepared in relation to the proposed legislation); general changes to marriage law; same sex marriage; civil partnership; and transgender people. The consultation questions posed within each of these are as follows:

Part 1 - Introduction

Question 1: Do you have any comments on the impact assessments prepared in relation to the proposed legislation?

¹ <http://www.scotland.gov.uk/Publications/2012/12/9433>

² <http://www.scotland.gov.uk/Publications/2011/09/05153328/0>

Part 2 - General changes to marriage law

Question 2: Do you have any comments on allowing opposite sex and same sex civil marriage ceremonies to take place anywhere agreed between the registrar and the couple, other than religious premises?

Question 3: Do you have any comments on establishing belief ceremonies as a third type of ceremony, alongside religious and civil, for getting married in Scotland?

Question 4: Do you have any comments on amending section 8 of the Marriage (Scotland) Act 1977 so that Church of Scotland deacons are authorised automatically to solemnise opposite sex marriage?

Question 5: Do you have any comments on establishing tests that a religious or belief body must meet before its celebrants can be authorised to solemnise marriage or religious civil partnership?

Question 6: Do you have any comments on abolishing the concept of marriage by cohabitation and repute where a couple erroneously believed themselves to be married overseas but it transpired after one of them died that the marriage was not valid?

Part 3 - Same sex marriage

Question 7: Do you have any comments on the proposals for authorising religious and belief celebrants who wish to solemnise same sex marriage?

Question 8: Do you have any comments on opt-outs for civil registrars who do not wish to solemnise same sex marriage?

Question 9: Do you have any comments on the proposed approach in relation to freedom of speech?

Question 10: Do you have any comments on the proposals in relation to education and same sex marriage?

Question 11: Do you have any comments on the Government's proposals on the impact of same sex marriage on legislation, the common law or on private arrangements?

Question 12: Are you aware of legislation where there is a need to make it clear that references to marriage or spouse should not extend to both opposite sex and same sex marriage or spouses? If you are, please give details of the legislation and explain why it should not be extended in this way.

Question 13: Do you have any comments on the proposed approach to the law on adultery?

Question 14: Do you have any comments on the proposed approach to the law on permanent and incurable impotency?

Question 15: Do you have any comments on the proposed approach to the law on bigamy?

Part 4 - Civil partnership

Question 16: Do you have any comments on the proposed approach to ensuring that religious and belief bodies and celebrants do not have to register civil partnerships?

Question 17: Do you have any comments on the proposals for changing civil partnerships to a marriage?

Part 5 - Transgender people

Question 18: Do you have any comments on the detailed proposals for allowing transgender people in a relationship to stay together, if they and their partner wish so, when obtaining the full Gender Recognition Certificate?

Approach to the analysis

- 1.7 The purpose of this consultation exercise was to gather views on various proposals that have been included in, or excluded from, the draft Bill. Rather than seeking general agreement or disagreement with each proposal, the 18 consultation questions sought detailed comments, such as suggestions for why the proposals might not work in practice and how they could be improved. The analysis undertaken reflects this approach, and focuses on identifying key issues raised by respondents, rather than quantifying how many agreed or disagreed with each proposal.
- 1.8 A number of respondents made particularly detailed or specific points, including around the drafting and content of the draft Bill. The research team has grouped many of these comments into an annex, a copy of which is included as Annex D to this report³. Where appropriate, the key issues or themes underpinning these comments have been taken into account when undertaking the overall analysis.
- 1.9 The analysis focused on issues that relate specifically to the draft Bill or the other proposals contained within the consultation document. However, it should be acknowledged that many respondents also made comments about their support for, or opposition to, the introduction of same sex marriage or the religious registration of civil partnerships. Some respondents also noted that they were re-stating their position, having also submitted a response to the consultation on the introduction of same sex marriage. Some of these respondents also expressed their disappointment that the Scottish

³ Only comments made by respondents who asked for their response to be published have been included within the version for publication.

Government has not taken the majority opinion of respondents to that consultation on board and has decided to proceed with its plans to introduce same sex marriage. This led some to question the value of carrying out public consultations.

Structure of the report

- 1.10 The next section of this report summarises the ways in which responses could be submitted and the number and type of responses received.
- 1.11 The remainder of the report mirrors the structure of the consultation document, with each of the 18 questions set out in turn. Brief summaries of each proposal or policy area are included at each question to set the subsequent analysis in context. However, further explanatory information relating to each question is available within the relevant section of the consultation document.

2 TYPES AND NUMBER OF RESPONSES

2.1 This section gives details on the ways in which responses were submitted, how many responses were analysed to produce the findings set out in this report and the profile of group respondents to the consultation.

Ways of submitting a response

2.2 Individual members of the public or organisations could submit a response to the consultation in a number of ways. On-line submissions could be made using a standard response form available on the Scottish Government website. Alternatively, electronic or hard copies of the standard response form could be posted or emailed to the Family Law Team at the Scottish Government.

2.3 Electronic or hardcopy non-standard responses (those that did not use the standard response form) were also accepted. These responses were varied and included those in letter format and some in which respondents had elected to answer only certain questions.

2.4 Three campaign groups (CARE for Scotland, Equality Network and Scotland for Marriage) encouraged people to submit a response to the consultation. Each of these campaigns provided suggested text for submission to the Scottish Government via their own website. The suggested texts are set out at Annex A to this report.

2.5 The three campaign groups provided suggested text for only some of the 18 questions set out within the consultation document. The content of each campaign was as follows:

- **CARE for Scotland** provided non-editable text for nine questions (Questions 1, 5, 7-11, 13 and 16) and also included a space to make any further comments.
- **Equality Network** provided a short introductory paragraph, non-editable text for seven questions (Questions 7-11, 17 and 18) and also included a space to make any further comments.
- **Scotland for Marriage** provided suggested text for five questions (Questions 7-11). The text could be amended or added to, but there was no dedicated space to make further comments.

Number of responses received

2.6 The number of responses received according to the route through which they were submitted is set out in the table below. Please note that a small number of duplicate responses was received⁴. Where a clear duplicate or duplicates were submitted, the last response submitted by that respondent was

⁴ Most of the duplicate responses received were of the campaign type.

retained⁵. There was also a small number of responses for which only a Respondent Information Form⁶ was received (or only respondent information was entered into an online submission), without responses to any of the consultation questions. These responses have not been counted as analysable responses.

- 2.7 The figures presented in Table 1 below represent the total number of responses that underwent analysis⁷.
- 2.8 The total number of analysable responses was 15,064. The majority of responses (73%) were campaign responses containing the suggested text only. A further 16% were amended campaign responses, in which the suggested text had been amended or a further comment had been made; 10% were submitted on the standard Scottish Government response form; and the remaining 1% were responses that did not use the standard response form and were not campaign responses.

Table 1: Number of responses by type of response	
Type of response	Number
Standard Scottish Government response form – total	1536
<i>(Standard Scottish Government response form – online)</i>	<i>(1366)</i>
<i>(Standard Scottish Government response form – hard copy or email)</i>	<i>(170)</i>
Non-standard⁸ – hard copy or email	116
CARE for Scotland campaign – total	213
<i>(CARE for Scotland campaign - suggested text only)</i>	<i>(122)</i>
<i>(CARE for Scotland campaign – amended)</i>	<i>(91)</i>
Equality Network campaign – total	10828
<i>(Equality Network campaign – suggested text only)</i>	<i>(8972)</i>
<i>(Equality Network campaign – amended)</i>	<i>(1856)</i>
Scotland for Marriage campaign – total	2371
<i>(Scotland for Marriage campaign - suggested text only)</i>	<i>(1955)</i>
<i>(Scotland for Marriage campaign – amended)</i>	<i>(416)</i>
TOTAL RESPONSES	15064

⁵ All but a very few contained identical content in each response of the duplicate or multiple responses made by the same respondent.

⁶ The Respondent Information Form gathers name and contact information and also asks respondents whether they would like their response to be published.

⁷ A breakdown of all responses received, number of responses removed and final number of responses that were analysed is set out in Annex B to this report.

⁸ 'Non-standard' responses were those that did not use the standard Scottish Government response form and were not campaign responses.

- 2.9 All but 128 (or <1%) of responses were submitted by individual members of the public. A breakdown of the 128 group responses by type of group is set out in Table 2 below and a full list of all group respondents is included at Annex C to this report.

Table 2: Number of responses by type of group	
Type of group	Total
Religious or belief bodies	16
Individual religious institutions or groups of individual institutions	27
Religious or faith-based organisations	17
Political groups and unions	16
Local authorities	11
Other groups or organisations	41
TOTAL GROUP RESPONSES	128

- 2.10 Group respondents included 16 of the religious or belief bodies that currently solemnise marriages in Scotland, and 11 of the 32 Scottish local authorities that deliver the civil registrar function and employ Scotland’s civil registrars.
- 2.11 The ‘Other groups or organisations’ category is made up of a diverse range of organisations, including professional bodies and associations, think tanks and independent statutory bodies. Responses were also received from a number of groups and organisations working in the third sector, some of which had clear religious affiliations. A number of Lesbian, Gay, Bisexual and Transgender (LGBT) and equality-focused campaign or support groups also submitted a response⁹ and overall around 25 group respondents had clear connections with the LGBT community.

⁹ Within the ‘Political groups and unions’ and ‘Religious or faith-based organisations’ categories (as well as the ‘Other groups or organisations’ category), a number of respondents had clear affiliations with the LGBT community.

3 IMPACT ASSESSMENTS

- 3.1 Part 1 of the consultation document included information on the two impact assessments the Scottish Government has prepared in relation to the proposed legislation.
- 3.2 The Scottish Government's Equality Impact Assessment (EQIA) and Business and Regulatory Impact Assessment (BRIA) are included within the as annexes to the consultation document. The BRIA concludes that the cost implications of the changes proposed are modest. However, the consultation document notes that the proposed changes have a considerable impact in relation to equalities.

Question 1: Do you have any comments on the impact assessments prepared in relation to the proposed legislation?

- 3.3 Around 1,150 respondents made a comment about the impact assessments. Some respondents made short, supportive statements and referred to the assessments as being comprehensive, competent and coherent, for example.
- 3.4 The principal issue raised by respondents who had concerns about the assessments, and the EQIA in particular, was that they make little or no mention of the probable negative effects of the proposed legislation on those whose religious or other beliefs lead them to disagree with same sex marriage. The failure to recognise that religious beliefs apply to the whole of life and not simply the formal structures according to which any religious body organises itself was often seen as being the root cause of this omission. However, others interpreted the omission as symptomatic of a wider agenda to secularise Scottish society and marginalise religious bodies and those of faith.
- 3.5 Many of the other comments made focused on freedom of speech, education and employment. Many of these issues were also raised in responses to Questions 9 and 10 and are discussed in greater detail in the analysis associated with these questions set out later in this report. However, in summary, the key issues of most relevance here were that:
- There are potentially unquantifiable costs associated with the possibility of legal actions being taken against celebrants and/or religious bodies.
 - No account is taken of the highly divisive impact on a religious community if one celebrant chooses to dissent from the majority decision to solemnise same sex marriage, thus disenfranchising the whole organisation.
 - There is a particular failure to recognise the impact of the proposed legislation on those already working in the public sector or who might wish to work in the public sector in the future. Those who already are or who

want to be civil registrars, teachers or social workers will be amongst those most obviously affected.

- The Muslim community, which already has low mainstream employment rates relative to the whole community, may be particularly adversely affected by the limiting of employment prospects for those opposed to same sex marriage.
- No mention is made of the possible negative implications for churches or religious charities in terms of charitable status or being able to work in partnership or receive funding from public bodies.

3.6 Some respondents also noted that the assessments do not consider the impact any changes would have on those who are already married or on intersex people. There were also concerns about the coverage of gender reassignment. In particular, it was suggested that the EQIA appeared, in their opinion, to imply that gender transition is associated with having a sex change operation¹⁰. It was noted that a significant number of transsexual people do not have surgery and that surgery is not a requirement to make an application to the Gender Recognition Panel under the Gender Recognition Act 2004¹¹.

3.7 Another area which some respondents wished to see receiving greater consideration within the EQIA was the impact on children. Suggestions included:

- The production of a Child Rights Impact Assessment (of the type the Scottish Government committed to developing in their progress report on children's rights in Scotland, Do the Right Thing)¹².
- The assessments should consider the benefits that strong, traditional marriage brings for children, families and the wider society.

3.8 Other respondents noted some quite specific omissions or raised some specific issues, including that:

- The assessments do not appear to take account of the additional administrative costs likely to be incurred by religious denominations as a result of some of the changes. This is likely to be particularly the case for denominations that wish to solemnise same sex marriage or undertake religious registration of civil partnerships, and which will incur costs in compiling and maintaining the necessary registers, for example.
- The consultation document suggests there will be additional training and related costs associated with the tests that a religious or belief body must meet before its celebrants can be authorised to solemnise marriage or

¹⁰ This was not the intention.

¹¹ This point is mentioned in the Gender Recognition Panel's Frequently Asked Questions guidance: <http://www.justice.gov.uk/tribunals/gender-recognition-panel/faqs>

¹² Available at: <http://www.scotland.gov.uk/Resource/0039/00392997.pdf>

register a civil partnership¹³. These costs have not been recognised with these assessments.

- Finally, the assessments fail to consider the impact of not making civil partnerships available to opposite sex couples.

¹³ This issue is the subject of Question 5 and is discussed in greater depth later in this report.

4 GENERAL CHANGES TO MARRIAGE LAW

- 4.1 The draft Marriage and Civil Partnership (Scotland) Bill includes a number of proposed changes to marriage law over and above the introduction of same sex marriage and the religious registration of civil partnerships. Part 2 of the consultation document set out these changes and sought respondents' views on five specific areas. This section of the report presents the range of views expressed on these issues.

Permitted locations for opposite sex and same sex civil marriages

- 4.2 Under the current legislation:
- Civil marriage ceremonies can take place at a registrar's office or at premises approved by the local authority.
 - Civil partnership ceremonies can take place at a registrar's office or at any place agreed by the registrar and the couple, so long as not on religious premises.
- 4.3 The draft Bill removes references to approved places from the legislation and would make it possible in Scotland to have a civil marriage ceremony at any place agreed by the registrar and the couple. It would still not be possible to have a civil marriage ceremony in religious premises.

Question 2: Do you have any comments on allowing opposite sex and same sex civil marriage ceremonies to take place anywhere agreed between the registrar and the couple, other than religious premises?

- 4.4 Around 1,200 respondents made a comment at this question. Many respondents simply expressed their broad support or disagreement with the proposals as set out in the consultation document. There were also some comments which: related to religious rather than civil marriage ceremonies; commented on holding civil or religious same sex marriage ceremonies on religious premises; or suggested that the current arrangements already reflected those proposed.
- 4.5 Respondents who agreed with the proposals tended to make only brief further comments, which focused on the changes seeming sensible and reasonable, creating equivalent arrangements for opposite and same sex ceremonies and broadening out the choices available to couples. Some respondents also stated their support for civil ceremonies not being held on religious premises.
- 4.6 Other general points made about any future arrangements included that:
- The tradition has long been that marriages should be conducted in public and be easily accessible to witnesses. By weakening the link between marriage ceremonies and designated places there may be a risk that

these precautions – which were in place for a good reason, namely to prevent secret marriages – would be less effective. There were associated concerns that this could undermine the Scottish Government’s objective of preventing forced or sham marriages.

- The dignity and solemnity of marriage ceremonies must be maintained and the current requirements contained in the Marriage (Approval of Places) (Scotland) Regulations stating the place will not compromise the solemnity and dignity of civil marriage, should be retained for all marriages.
- Couples could be saved time and cost by the removal of the ‘approved places’ regulations.

4.7 Other respondents suggested a range of changes or clarifications they would wish to see included in any final Bill. These included:

- Clarifying (or, if required, extending) the exclusions relating to religious premises to include all premises owned or occupied principally by any religious or belief body that does not wish to solemnise same sex marriages. Examples given included any premises that a religious body rents as its place of worship, church halls, and halls or spaces that are available for rent within mosques or Islamic centres.
- No-one should be required to allow premises (religious or otherwise) which they own to be used for civil marriage ceremonies. Some, but not all, respondents making this comment connected this ‘right to refuse’ specifically with same sex marriage ceremonies.

4.8 Some respondents, including a number of groups that either employ or represent registrars, raised specific and practical issues that would need to be considered in taking these proposals forward. Comments made included that, under current arrangements, health and safety issues are reviewed in consultation with services, such as the Police, Fire and Rescue Services and local authority planning, building control and environmental health services. Some form of risk assessment would still be required before a ceremony could be carried out in premises not covered by a licence under other legislation, such as the Licensing (Scotland) Act 2005. To do otherwise would place the registrar and those attending the ceremony at possible risk or could result in a ceremony to being cancelled or abandoned – for example if a health and safety risk became evident just prior to, or during, a ceremony.

4.9 Other issues raised included that: guidance may be required for situations where a couple and the registrar do not agree about the appropriateness of a location for a marriage ceremony; and if an outdoor venue is chosen, there should be a requirement for an alternative indoor venue to be available in the event of inclement weather.

Belief ceremonies

- 4.10 At present there are two types of marriage ceremony in Scotland, religious and civil. Since 2005, Humanist Society Scotland celebrants have been authorised, on a temporary basis, to solemnise marriage. Although such marriages have been classed as religious under marriage law, the beliefs of organisations such as the Humanists are non-religious.
- 4.11 The draft Bill proposes the establishment of a third category of marriage ceremony in Scotland, which would be known as a belief ceremony. The arrangements for authorising belief celebrants would be along the same lines as those for authorising religious celebrants.

Question 3: Do you have any comments on establishing belief ceremonies as a third type of ceremony, alongside religious and civil, for getting married in Scotland?

- 4.12 Around 1,200 respondents made a comment at this question.
- 4.13 Those that agreed with the introduction of a third type of ceremony gave a range of reasons for doing so. These included that the proposal simply seemed sensible, would reflect the reality of the range of ceremonies already available and would remove the anomaly of belief ceremonies being mis-labelled as religious in nature. Some respondents also noted that the change would allow for an appropriate and fair level of recognition to be given to belief bodies that undertake marriage ceremonies.
- 4.14 However, a number of other respondents disagreed, with some suggesting that this proposal is indicative of a wider secularist agenda and a determination to undermine the role of religion and religious groups in Scottish society. Other reasons given for disagreeing with the introduction of a third type of marriage ceremony included:
- The proposals, and the arrangements that would result, seem unduly complicated and are likely to be confusing for the general public.
 - The proposals create a false dichotomy between religion and belief, not least because there is no clear-cut difference between the two concepts. If this third category were created, it would be necessary to define the difference between 'religion' and 'belief', and also to distinguish between 'belief', 'ideology' and 'world view'.
 - The need for those who do not hold religious beliefs to have a particular and distinct type of ceremony is not clear. A civil ceremony seems to be both appropriate and sufficient.
 - The very wide potential definition of 'belief' could lead to a considerable range of less-than-serious organisations being authorised as belief

bodies, with the ceremonies that could result undermining the sanctity of marriage.

4.15 Other points raised by those agreeing or disagreeing with the proposals, included:

- A double designation of 'civil' and 'religious or belief' might in principle be better than having three categories. It could also be argued that non-religious belief ceremonies are effectively civil ones.
- The third type of ceremonies might be better described as something other than 'belief' ceremonies.
- Will it be necessary to ensure that belief ceremonies are 'religion free'?
- A fourth category of 'distinctly different' ceremonies should be considered.
- Is there sufficient demand for belief ceremonies to warrant these apparently quite complicated changes?
- The same standards should be applied to belief ceremonies as to civil and religious ceremonies. For example, celebrants or bodies authorised to solemnise belief marriages should be subject to regulatory standards issued and managed by National Records of Scotland.

4.16 Finally, a number of respondents raised what was to become a recurrent theme throughout this consultation – namely that marriage should be a civil function, undertaken through a civil ceremony, with any subsequent ceremonies between the couple and the religious or belief body and of no interest to the state. In this case, it was suggested that it would be preferable to have civil marriage authorised by the public authorities, and to leave religious or belief ceremonies as non-legal matters for religious or belief groups to perform according to their own commitments, institutions and practices.

Church of Scotland deacons

4.17 The Marriage (Scotland) Act 1977 provides that opposite sex marriages may be solemnised by ministers of the Church of Scotland. Church of Scotland deacons have been given temporary authorisation to solemnise marriage since March 2006. The draft Bill would amend the 1977 Act, so that Church of Scotland deacons, like ministers, would be authorised automatically to solemnise opposite sex marriage.

Question 4: Do you have any comments on amending section 8 of the Marriage (Scotland) Act 1977 so that Church of Scotland deacons are authorised automatically to solemnise opposite sex marriage?

- 4.18 Fewer respondents (around 1,050) commented at this question than at many others within the consultation. Even amongst those who did comment, many simply stated that this is a decision either for the Church of Scotland alone, or for the Church of Scotland and the Scottish Government and otherwise declined to comment further. The Church of Scotland welcomed the provision in its response to this consultation.
- 4.19 Amongst those others who did comment, a common view was that Church of Scotland ministers and other officials should simply be governed by the same rules as any other religious body. This was sometimes coupled with a comment about the particular role and status afforded to the Church of Scotland within Scottish society and occasionally with a statement of opposition to the concept of an established church.
- 4.20 Other comments made included that:
- Within the Christian faith, marriages should only be solemnised by ministers and hence Church of Scotland deacons should not be authorised to solemnise marriage.
 - The proposals demonstrate the Scottish Government's lack of understanding of the roles and responsibilities of office holders within the Church of Scotland. If any other group were to be automatically authorised to undertake opposite sex marriages, Church elders would be the more appropriate.
 - The proposal seems reasonable as long as deacons receive the appropriate training to carry out the function.
 - Only those deacons also willing to solemnise same sex marriage should be automatically authorised to solemnise opposite sex marriage.

Establishing tests

- 4.21 To ensure the continued reputation of Scottish marriage ceremonies, the draft Bill proposes the introduction of tests which a religious or belief body would have to meet before the body's celebrants could be authorised to solemnise a marriage or register a civil partnership. The tests would apply to all religious and belief bodies: prescribed by regulations to solemnise marriage or register a civil partnership; which put forward celebrants to the Registrar General to be authorised; or which put forward celebrants to be authorised on a temporary basis. They would not apply to the Church of Scotland since their ministers are automatically authorised to solemnise opposite sex marriage under the Marriage (Scotland) Act 1977.
- 4.22 The test would be laid down by regulations, with the draft Bill giving the powers for the regulations to be made. Although further consultation would be undertaken in developing the tests, the type of tests which might be laid down are:

- The religious or belief body and their celebrants would not be allowed to solemnise marriages or register civil partnerships for profit or gain.
- The religious or belief body would have to show that their celebrants were trained in areas such as tackling forced marriage and sham marriage.
- The religious or belief body would have to show that their celebrants discuss the forthcoming marriage or civil partnership with the couple.
- The religious or belief body would have to show that their celebrants have a track record in carrying out relevant ceremonies, such as marriages recognised by the state, marriages or blessings not recognised by the state, funerals and baptisms.

Question 5: Do you have any comments on establishing tests that a religious or belief body must meet before its celebrants can be authorised to solemnise marriage or religious civil partnership?

- 4.23 Around 1,200 respondents commented at this question, including those respondents who submitted a standard response or who drew on the suggested text provided by one of the campaigns. Some respondents noted that they look forward to receiving more detail about the proposed tests or felt unable to make substantive comment until they had seen more detail.
- 4.24 Respondents who broadly agreed with the proposals tended to make only limited comments, which focused on the introduction of tests seeming to be reasonable and sensible. Those who made more substantive comments often gave their particular support for any contributions that could be made to tackling forced or sham marriages. Other areas in which respondents suggested tests could make a positive contribution included ensuring that all celebrants:
- Carry out marriage preparation with couples.
 - Have undergone and, if appropriate, continue to undergo, the training that allows them to carry out their role to a high standard. Again, some respondents made specific reference to training around forced and sham marriages.
- 4.25 Although a number of respondents welcomed the emphasis being placed on celebrants receiving awareness training around sham and forced marriages, there were also some concerns that this should not impose overly onerous training obligations on bodies, some of which already have the relevant guidance in place, or for which forced or sham marriage may be less of an issue. One suggestion was that religious or belief bodies could be given access to the same materials that are already used for training registrars, and that registrars could actually carry out such training and examination as the Registrar General requires.

4.26 Another concern was the suggested requirement for a track record in carrying out ceremonies. Respondents suggested that a range of bodies could be unreasonably excluded by such a provision. Examples given included bodies that have not until now, but would now wish, to solemnise marriage or undertake civil partnership ceremonies. The impact on smaller religious or belief bodies, including those that may currently operate in other parts of the UK but are hoping to increase their presence in Scotland, was also raised. The particular issue here was whether a track record of carrying out ceremonies in other jurisdictions would be recognised in Scotland. Other points or queries raised about the track record test included the kind of evidence which would be required to demonstrate a track record in carrying out ceremonies.

4.27 Further views expressed by those with concerns about the proposals included the following:

- The tests should not impose requirements beyond the current position or be too restrictive or onerous.
- The tests should be left to each religious or belief body to decide.
- The Church of Scotland should not be exempted from the tests.
- Bodies which are currently prescribed under regulations should not have to reapply and meet the new tests.
- The tests should only apply to new religions or groups and not to any of the established world religions.
- It will be important that the tests are not in any way framed to discriminate against bodies that do not wish to solemnise same sex marriages.
- It is not the business of the state to dictate the type and level of pastoral care religious or belief bodies should provide to couples.
- It is unreasonable to exclude the possibility of celebrants or their bodies being paid in order to conduct ceremonies.

4.28 On this latter point, some respondents sought further clarification from the Scottish Government as to what is meant by celebrants not being able to solemnise marriages or register civil partnerships for 'profit or gain'. Further points raised included the following:

- It is standard practice for a celebrant to charge a professional fee for officiating at a marriage ceremony and also for charges to be made for using the premises in which the ceremony is held. To forbid such fees would be unreasonable. An alternative might be that the celebrant must publicise their charges for wedding ceremonies, with the taking of additional financial or other incentives being subject to legal penalties.

- The religious, professional or belief body to which a celebrant belongs should be a not-for-profit group, although charitable status should not be a requirement.
- Celebrants should not be a direct employee of a commercial organisation or third party. Ensuring that third party commercial interests are removed would reduce the risk of marriages being promoted or undertaken solely “for profit or gain”. This rule would ensure that the professional, belief or religious bodies would be in a position to monitor directly the quality and standards of its celebrants’ work without any influence from third parties.
- Conducting marriage or civil partnership ceremonies could be a vital source of income for some celebrants. If they were unable to receive some remuneration they might be unable to carry on in that role. A small number of those raising this issue identified themselves as being celebrants.
- Celebrants may spend significant time, over and above conducting the ceremony itself, in carrying out work associated with the ceremony. An example might be writing the ceremony for bodies with no set liturgy. It would not be unreasonable for them to be able to make some charge for their time.
- It is common practice in some religious cultures for couples to make a donation to the funds of the church or other religious group of the celebrant who is solemnising their marriage. Any tests should not prohibit this practice.
- In any case, monitoring compliance with a test such as this is likely to be difficult, if not impossible.

4.29 Finally, respondents suggested other areas that might be covered by tests or other activities that would be required to support any tests that are introduced. Suggestions included:

- National guidance may be required to ensure consistency in the application of the tests across Scotland.
- The tests could include requirements for a body to reinvest a portion of any revenues earned from carrying out ceremonies in the development of professional training and standards, have a proper programme of celebrant recruitment, training and registration, and have complaints procedures in place.
- Tests for Islamic ceremonies, which have their own unique terms and conditions, should be developed in consultation with well established, recognised and reputable mosques and imams.

Marriage by cohabitation with habit and repute

- 4.30 As the consultation document notes, Scotland has a long tradition of ‘irregular’ marriages – irregular marriages being those not formally solemnised by a registrar or a celebrant but which could still be registered following a court order. The only type of irregular marriage that remains in Scotland is that of marriage by cohabitation with habit and repute. The only remaining marriages by cohabitation with habit and repute are those that started before May 2006 or those where a couple believe themselves to have been married overseas but it transpires, after one of them dies, that the marriage was not valid.
- 4.31 There are no plans to make any changes to the arrangements applying to pre-2006 marriages. However, the draft Bill would repeal those sections of the Family Law (Scotland) Act 2006 which allowed for marriage by cohabitation with habit and repute when a couple erroneously believed themselves to be married overseas. Section 29 of the Act allows applications for financial provision to be made to the courts by the survivor of a cohabiting relationship where one of the cohabitants dies without leaving a will.

Question 6: Do you have any comments on abolishing the concept of marriage by cohabitation with habit and repute where a couple erroneously believed themselves to be married overseas but it transpired after one of them died that the marriage was not valid?

- 4.32 Only around 750 respondents commented at this question, with some of these respondents having no particular view other than that any changes that are made should apply equally to opposite and same sex marriages. Other general comments made included support for the principle of ‘tidying up’ out of date legislation and making the arrangements going forward as clear and straightforward as possible.
- 4.33 Those who disagreed with the proposals sometimes gave no further explanation of their position. Those who did provide further detail often saw the proposals as harsh and as having the potential to cause considerable upset. In particular, some respondents felt that ‘re-writing’ someone’s history and telling them that they had not been married after all just as they had lost the partner they thought to be their spouse would be unnecessary and inhumane.
- 4.34 In addition, some respondents felt that putting a bereaved spouse in a situation where they had to apply to the courts in order to receive payment from their partner’s estate would introduce further stress and anxiety at what is likely to be one of the most distressing periods of anyone’s life. It was also noted that rights under section 29 are not automatic, so whether an award is made, and the amount of that award, is at the discretion of the court – in other words it lacks the certainty of the surviving spouse’s rights in intestacy.

- 4.35 Other concerns about relying on the section 29 provisions included:
- As any award is discretionary, it can make it harder for a surviving cohabitant to make a claim when that claim is in competition with the rights of children. Based on current legislation, a claim under section 29 where the marriage is invalid would not have any priority over legal rights of surviving children.
 - The provisions are particularly ill-suited to addressing difficulties in cases with an overseas aspect as section 29 has just been held to be inapplicable to heritable property held outside Scotland.
 - A claim under section 29 must be brought within 6 months of a death and there is no possibility of extending that period. By the time a person realises that their marriage is not valid, the 6 months may well have expired. This already presents difficulties in cases when confirmation of an executor has been delayed, or when there has been a late challenge to a will, potentially defeating a valid right to claim.
- 4.36 Whilst some respondents who supported the change saw it as a probably overdue rationalisation of Scotland's marriage legislation, others suggested that, far from being an anachronism, this legislation could be increasingly important given the numbers of couples who currently go abroad to get married. This led to concerns that more couples than anticipated could be affected by these changes.
- 4.37 An alternative point of view was that, should the Scottish Government introduce same sex marriage, many Christians may refuse to be registered and have any part in marriage as re-defined by the state. Rather, they would enter into a biblical marriage as solemnised, recognised and registered by the Church, with Church courts providing certificates of marriage. Given this scenario, the concept of marriage by cohabitation with habit and repute would be the best way for the state to recognise the validity of such biblical marriages, and hence its retention would seem sensible.
- 4.38 Finally, a number of respondents suggested that this issue highlights the need to educate the wider public about marriage and civil partnership law more generally, and the relationship between law and practice in other countries and that of Scotland in particular. Specific suggestions made included providing information to migrants about which marriages are, and are not, recognised in Scots Law and countering the popular misconception that common law marriage is a legally accepted arrangement in Scotland.

5 SAME SEX MARRIAGE

- 5.1 Part 3 of the consultation document sets out the Government's plans to introduce same sex marriage in Scotland. Specific areas covered include authorising religious and belief celebrants to solemnise same sex marriage, whether there should be legislative opt-outs for civil registrars, plans to protect freedom of speech and proposals relating to same sex marriage and the education system.

Authorising religious and belief celebrants to solemnise same sex marriage

- 5.2 The proposals for authorising religious and belief celebrants to solemnise same sex marriage include that:
- Religious and belief bodies and their celebrants will have to opt in to solemnise same sex marriage.
 - Some religious and belief bodies may be prescribed by regulations. This means that all of their celebrants would be authorised to solemnise same sex marriage.
 - In other cases, religious and belief bodies could nominate celebrants who wish to solemnise same sex marriage to the Registrar General.
 - A celebrant who wishes to solemnise same sex marriage, but is in a body which has decided against opting in, could not solemnise same sex marriage.
 - There is no obligation on a body or celebrant to seek authorisation to solemnise same sex marriage.
- 5.3 The consultation document also notes that the Scottish Government has asked the UK Government for an amendment to the Equality Act 2010 to protect an individual celebrant who is opposed to same sex marriage, even though the celebrant's religious or belief body has chosen to solemnise same sex marriage.

Question 7: Do you have any comments on the proposals for authorising religious and belief celebrants who wish to solemnise same sex marriage?

- 5.4 Around 14,700 respondents made a comment at this question, which was one of those for which suggested text was available from all three campaign organisations.
- 5.5 Some respondents stated their broad support for the proposals for authorising religious and belief celebrants who wish to solemnise same sex marriage. Respondents who agreed with the proposed arrangements generally made

only limited further comments; these comments tended to focus on the reasonableness of a system which would allow, but not require, religious or belief bodies to undertake same sex marriage ceremonies. Many of these respondents also noted their agreement with the Scottish Government's plans to request an amendment to the Equality Act 2010.

- 5.6 Other respondents noted that, whilst not necessarily supporting the introduction of same sex marriage, they were broadly in agreement with the proposal for an opt-in system if the Scottish Government goes ahead with its plans. A small number of respondents stated that, although they might have preferred to see an opt-out system, they could understand the reasoning behind the opt-in approach and were happy to concur with the Government's proposal.
- 5.7 Other respondents disagreed with the proposals. Some simply stated their opposition to the introduction of same sex marriage at all, rather than commenting on the specific proposals. Others also made it clear that they did not support the introduction of same sex marriage, but still went on to raise specific concerns about the arrangements proposed. There were also some respondents who stated their support for the introduction of same sex marriage but expressed their opposition to some of the specific arrangements set out within the consultation document.
- 5.8 There were two main and, for many respondents, connected issues raised by those who disagreed with all or some aspect of the proposals: first, the protection of freedom of speech in general and of religious freedoms in particular; and secondly, concerns about the workability of the opting-in system as set out in the Bill.

Protecting freedom of belief and speech

- 5.9 The principal concern of many opposed to the proposals was that, even under the opt-in arrangements proposed, those bodies and celebrants that did not wish to solemnise same sex marriage could still find themselves subject to litigation. Some respondents acknowledged the Scottish Government's efforts to put protections in place, but made it clear that these had not allayed their considerable concerns. In particular, respondents suggested that:
- The Scottish Government has asked the UK Government for an amendment to the Equality Act 2010, but this amendment is not yet in place and cannot be guaranteed. Some respondents raising this issue suggested that, at the very least, same sex marriage should not be introduced until this amendment has been passed.
 - Even if the Equality Act 2010 is amended as currently proposed, there remains the possibility that claims of sex discrimination could be made. The probable basis of any resulting legal case would be that a body or celebrant unwilling to solemnise a same sex marriage would have been willing to consider solemnising the marriage if one of the parties had been of a different gender. Some respondents pointed out that this possibility has been recognised by the UK Government, which plans to amend the

Equality Act 2010 to prevent sex discrimination cases being pursued on these grounds in England and Wales. There were calls for the Scottish Government to ensure the same protections are put in place in Scotland.

- Irrespective of any changes to the Equality Act 2010, or any other domestic legislation, the possibility of a challenge in the European Court of Human Rights (ECtHR) cannot be ruled out. The Scottish Government cannot guarantee the outcome of any such case and the ECtHR could rule that if same sex marriage is available in any contexts it must be available to all on an equal basis. Any legislation or guidance could also be subject to repeal and revocation.

5.10 Another frequent concern was that, having been designed to afford protections to religious and belief bodies, the proposed opt-in system places too much emphasis on these bodies and fails to give necessary consideration to the position of individual celebrants. Celebrants from non-prescribed bodies which had decided to solemnise same sex marriage were seen as particularly vulnerable by some respondents. The concern was that, once no longer protected by a body-wide decision not to solemnise same sex marriage, any celebrants who did not wish to be named as willing to solemnise same sex marriage could be 'targeted' by campaign groups that support the change.

5.11 There were also concerns about the protections being offered to a range of other individuals - such as Church or Mosque Elders, and Church organists – who could be involved or affected if a same sex marriage took place in a premises or congregation with which they were associated. The impact on all members of a religious body's congregation was also raised and it was suggested that any protections need to extend to all who might reasonably be expected to participate in, or facilitate, the solemnisation of a marriage.

5.12 Similarly, some respondents expressed concerns about the possible impact of the changes on those who have control over places of worship and other religious buildings in which opposite sex marriages are currently, or could be, solemnised. One example given was of a celebrant from another congregation asking to use a building that they had previously been permitted to use to solemnise an opposite sex marriage, in order to solemnise a same sex marriage. The extent of the protections for any of the leaders or decision-making groups from any congregation that did not wish their premises to be used for the solemnisation of same sex marriage was questioned.

5.13 Other specific issues raised around religious freedoms and freedom of speech included:

- Religious or belief bodies may offer a number of marriage-related services, such as pre-marriage counselling, marriage support services, marriage enrichment courses and pastoral care in marriage crisis situations or situations of marital breakdown. It is unclear at this stage whether celebrants would be protected by their exemption from delivering these activities to same sex couples.

- The proposed amendments to the Equality Act 2010 restrict the circumstances in which a celebrant may lawfully refuse to solemnise a same sex marriage, and only permit refusal if to do so '*would conflict with the approved celebrant's religious or philosophical beliefs*'. This is too narrow and excludes, for example, the possibility that a religious celebrant may refuse to solemnise a same sex marriage in order to preserve the peace of his or her congregation.
- The draft Bill does not make it clear that a religious or belief body may only nominate one of its celebrants to solemnise same sex marriage with the agreement of that celebrant. The Bill also does not specify that there is no duty on any celebrant to allow themselves to be nominated and/or remain registered.

5.14 Although most of the freedom of belief and speech related comments were made by those concerned about the position of those not wishing to solemnise same sex marriage, some respondents commented on the equivalent right to freedom of belief and conscience of those celebrants who did wish to solemnise same sex marriage. The principal concern was that celebrants of non-opting in bodies are being offered no route through which they would be able to act according to their own beliefs by solemnising a same sex marriage if asked to do so. This issue was sometimes raised as part of a wider view that the focus of the proposals is very much on protecting those opposed to the introduction of same sex marriage and that equivalent attention has not been given to protecting the rights of those who support the change.

Practical issues with the proposed opt-in system

- 5.15 Respondents had a range of concerns about various aspects of the opt-in system as set out within the consultation document. Those raising issues included some respondents who agreed that the overall opt-in approach was the right way forward, but who were concerned about whether the arrangements as proposed would be workable.
- 5.16 Issues raised included that the proposals effectively impose decision-making standards, for example that all of their celebrants must be in support before the body can be prescribed, on those religious and belief bodies that might wish to solemnise same sex marriage. A number of respondents were clear that it is not for the Scottish Government to dictate how an autonomous religious or belief body chooses to come to its decisions. In particular, a religious body should be able to (and indeed will have already) decided whether it requires decisions to be unanimous or based on the majority view.
- 5.17 Beyond this point of principle, respondents also pointed out that the *actual* decision-making requirements as laid out in the consultation document are not compatible with the existing and well-established practices of a number of religious bodies; any plans taken forward would need to respect the diverse range of current arrangements. These would be likely to include those religious bodies that make collective decisions based on majority opinion but

do not require unanimity. The absence of centralised decision-making structures in some bodies also needs to be taken into account.

- 5.18 Moving on to consider specific arrangements proposed, some respondents questioned the practicality and/or fairness of requiring all celebrants to be willing to solemnise same sex marriage before a body can be prescribed in regulations to solemnise same sex marriage or register civil partnerships. The principal objection was to an approach which would mean that the dissent of a single celebrant could disenfranchise the celebrants of an entire body.
- 5.19 The appropriateness of a religious body which had made the decision to be prescribed being removed from the list because only one of its celebrants had a change of mind, or because a newly appointed celebrant did not wish to solemnise same sex marriage, was also questioned. Concerns about these issues led some respondents to favour the 'list of celebrants' option to the 'prescribed in regulations' option.
- 5.20 Other issues raised about the system as currently proposed included the following:
- To be prescribed, a religious or belief body must assure the Registrar General in writing that all of their celebrants are content to carry out same sex marriage ceremonies. It is not clear how this will work in practice. For example, it will be difficult for the leadership of a large body to really know what all their celebrants believe on this issue and it will be difficult to test whether any written assurances provided by the body are comprehensive. Given these challenges, along with the potential for individuals to feel compelled to conform to a majority position, there must be a mechanism for the individual celebrants themselves to inform the Government that they do not wish to be authorised to marry same-sex couples.
 - The proposals appear to suggest that to be a celebrant someone has to belong to a recognised religious or faith body. This may discriminate against minority religious or belief bodies, which might have only one active minister and potential celebrant. There also does not appear to be any provision for the approval and/or authorisation of independent celebrants, such as Independent Interfaith Ministers or Independent Rabbis.
 - The proposals suggest that the Registrar General would not authorise celebrants 'if there is any doubt' that the religious or belief body to which they belong has decided that some or all of their celebrants may, if they wish, solemnise same sex marriage. To avoid the possibility of doubt, and in particular the possibility of any doubt being cast on the validity of any marriages that have taken place, it would be important to establish what kind of evidence the Registrar General would require to inform this decision.
 - There was some support for the arrangements to allow the temporary authorisation of celebrants for a specific ceremony or period. However, it was suggested that, as is currently the case under the equivalent

arrangements for opposite sex marriages, it would be important for the Registrar General to take steps to confirm that the relevant person is a *bona fide* celebrant and is authorised to undertake marriages by their religious or belief body.

- Although unlikely, it might still be possible for a celebrant to solemnise a same sex marriage in opposition to the views of his or her religious or belief body. For example, with a celebrant's permission the celebrant might be nominated to solemnise same sex marriage by a different branch of the religious or belief body which employs them. The respondent raising this possibility suggested that this should be an internal disciplinary matter for the body concerned, but that any marriage that may have been solemnised should remain valid.
- It is not clear how the proposals relate to armed forces' chaplains.

Alternatives to the proposed opt-in system

5.21 The alternative approaches favoured by those who did not support, or had significant concerns about, the opt-in system were varied and included:

- An approach which is permissive rather than prescriptive, with individual celebrants, including those who are members of prescribed bodies and those who are not, able to choose to opt-in or opt-out.
- Anyone currently authorised to solemnise opposite sex marriage should automatically be authorised to solemnise same sex marriage. If a celebrant solemnises a same sex marriage against the wishes of their religious or belief body, that should be an internal disciplinary matter for the religious or belief body.
- Individual celebrants from opting-in bodies should be given the option to opt-out. These comments generally appeared to refer to celebrants from bodies which had stated that they wished to be prescribed in regulations, rather than those sending a list of celebrants who wished to solemnise same sex marriage to the Registrar General¹⁴. One of the concerns raised was that celebrants who did not wish to solemnise same sex marriage might otherwise have no option but to leave their religious or belief body.
- Any legislation should make it clear that a religious or belief body may only nominate a celebrant to be registered to solemnise same sex marriage with the express agreement of that celebrant.
- It should be an opt-out rather than an opt-in system, with the assumption that bodies would be willing to solemnise same sex marriage unless they expressly stated to the contrary. Those that favoured this approach sometimes suggested that once it becomes legal, willingness to solemnise same sex marriage should simply be the default position.

¹⁴ These comments did not make clear how the respondent anticipated this situation i.e. a body being prescribed when one of its celebrants did not wish to solemnise same sex marriage, could arise.

- Within opting-in bodies, all celebrants should also have to actively opt-in as individuals. This approach appeared to be favoured as offering some additional 'layer of protection' to individual celebrants within prescribed bodies in particular¹⁵.
- No religious or belief bodies and/or celebrants should be allowed to opt-out from solemnising what would be a legal and state-sanctioned arrangement. Some of those advocating this position suggested that allowing bodies to opt-out is tantamount to the state sanctioning discrimination.
- No religious body with a public and, in some ways state-sanctioned role, should be able to opt out of solemnising same sex marriage. Although not in all cases, some respondents making this comment referred explicitly to the Church of Scotland.
- Only those who became celebrants prior to same sex marriage being introduced should be allowed to opt out. Anyone who becomes a celebrant subsequent to the change would do so knowing that solemnising same sex marriage could be part of their role and they should be willing to undertake that role to the full.
- The relationship between the state, religious and belief bodies and marriage should undergo a fundamental change. Most of those raising this issue suggested that marriage should become a civil arrangement (as widely practised in other European countries) and that those who chose and were able to do so could also have a religious or belief ceremony. It was also suggested that, if the Government does not maintain the present definition of marriage, the state should effectively withdraw and offer civil partnerships to all, with the option for religious or belief bodies to bless those unions which their conscience allowed.

Impact on other areas

5.22 Finally, a number of respondents made comments about how the introduction of religious same sex marriage could impact on other areas of interest to religious or belief bodies. The particular concern of a number of respondents was that unwillingness to conduct same sex marriage (on the part of either bodies or individual celebrants) should not affect their authorisation to solemnise opposite sex marriages in any way. Although some respondents noted the reassurances from the Scottish Government that this will not be the case, they also voiced concerns that these reassurances - in the form of the planned changes to the Equality Act 2010 discussed above - may be insufficient and unsustainable.

5.23 More specifically, some respondents were concerned that local authorities might suggest the public sector equality duty (as set out in the Equalities Act 2010) would not be satisfied if they authorised bodies/celebrants opting out of solemnising same sex marriages to solemnise opposite sex marriages. Whilst

¹⁵ Ibid.

this was a common concern, there were also some respondents who took the contrary position and suggested that bodies and celebrants should only be authorised to solemnise opposite sex marriage if they were willing to solemnise all marriages.

- 5.24 Another issue about which respondents expressed contrasting views was around charitable status or funding. Most of those raising this issue were clear that the charitable status of religious or belief bodies, or of organisations which they run, should not be threatened by their not agreeing to solemnise same sex marriage. Similarly, the funding or other support for services delivered by religious or belief bodies on behalf of central or local government should not be withdrawn simply because they decide not to solemnise same sex marriage. However, others suggested that bodies which are not prepared to undertake a legal, state-supported ceremony such as same sex marriage should not expect to receive the benefits associated with charitable status or public sector funding.

Civil registrars

- 5.25 The draft Bill does not include any legislative opt-outs for civil registrars. The Scottish Government does not agree with legislative opt-outs for a number of reasons, including that civil registrars are carrying out a civil rather than religious function and that providing for a legislative opt-out would cut across the relationship civil registrars have with their local authority employers.

Question 8: Do you have any comments on opt-outs for civil registrars who do not wish to solemnise same sex marriage?

- 5.26 Around 14,750 respondents commented at this question, including those responding through all of the three campaigns.
- 5.27 Those that agreed with the Scottish Government that civil registrars should not be able to opt-out of performing same sex marriages frequently pointed out that registrars are performing a public function, on behalf of a public body, and should be expected to carry out a full range of registration duties – this would include solemnising same sex marriages. Some respondents also noted that registrars would not be allowed to decline to provide a service to people based on any other equality characteristics, such as race or gender, and the same basic principles should apply here. Respondents also pointed out that registrars do not currently have the option to opt-out of officiating at civil partnership ceremonies and that this system seems to work well. It was also suggested that registrars themselves (either as individuals, through their professional organisations or through their trade unions) have not been demanding that any such provisions should be put in place.
- 5.28 Some of those who did not agree with an opt-out system suggested that any problems a civil registrar might have with conducting a same sex marriage ceremony would be best dealt with through discussions with their employer,

on a case-by-case basis, and in accordance with employment legislation. This view was sometimes accompanied by a statement in support of the Scottish Government's position that it is not their role to regulate the employer/employee relationship between registrars and local authorities.

- 5.29 The recent guidance from the Equality and Human Rights Commission on religion or belief in the workplace, which suggests that employers should consider requests from an employee to opt out of part of their job based on religious or belief objections, was also cited¹⁶. Responses from some local authority respondents suggested this would indeed be their starting point, not least because the quality of service could be affected if a registrar was clearly uncomfortable in the role they were performing. However, the need to provide continuity of service, and to be fair to and not overburden other members of staff, was also seen as important.
- 5.30 Other respondents took a strongly contrasting view. A commonly expressed position was that registrars should have the same protections as religious or belief celebrants, and that the failure to include a conscience clause for registrars who have a conscientious objection to solemnising same sex marriages ignores the fact that those of faith aim to live their whole lives - including their work lives - according to the tenets of that faith. A number of respondents also pointed out that a precedent exists, since the law allows doctors and other health professionals to have an opt-out if they have a conscientious objection to participating in abortions¹⁷.
- 5.31 Many respondents were concerned about the likely repercussions for some registrars if a conscience clause is not introduced. Most obviously, it was suggested registrars who have a conscientious objection to solemnising same sex marriages may be forced out of their jobs, with the Lillian Ladele¹⁸ case frequently cited in support of this assertion. It was also suggested that those who might otherwise have wished to become registrars would be unable to consider applying for such a position and that registrars' chances of career advancement could be affected by their objecting to solemnising same sex marriages.
- 5.32 On this theme, some of those who did not support the introduction of an across the board opt-out did differentiate between those currently employed as registrars and those who might apply to be a registrar once any legislation has been passed. Respondents making this distinction generally felt that anyone applying to be a registrar in the future would be doing so in the knowledge that solemnising same sex marriages would be part of the role, and hence they should not have any facility to opt-out. However, those who had become registrars before the legalisation of same sex marriage were not aware that they

¹⁶ Available at: <http://www.equalityhumanrights.com/advice-and-guidance/guidance-for-employers/religion-or-belief-new-guidance-february-2013/>

¹⁷ See <http://www.legislation.gov.uk/ukpga/1967/87/section/4> for the relevant provisions of the Abortion Act 1967

¹⁸ Lillian Ladele worked as a marriage registrar for Islington Borough Council in London. Miss Ladele claimed that Islington Council discriminated against her by requiring her to perform civil partnerships despite this being against her religious beliefs. The European Court of Human Rights held that there had been no violation of the European Convention on Human Rights in this case: [http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-115881#{"itemid":\["001-115881"\]}](http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-115881#{)

would be called upon to solemnise same sex marriage, and hence their objections should be accommodated if possible.

- 5.33 Other points raised by those calling for civil registrars to be able to opt-out of solemnising same sex marriage included the following:
- An obligation could be placed on local authorities to ensure that an alternative means to deliver the service is available in order to ensure no discrimination against a same sex couple;
 - Existing and trainee registrars should be given the opportunity to opt-in to solemnising same sex marriages, as is proposed for religious or belief celebrants.

Freedom of speech

- 5.34 As the consultation document acknowledges, protecting freedom of speech and belief emerged as a key concern of many respondents to the previous consultation on the proposed introduction of same sex marriage and the religious registration of civil partnerships. Having considered the implications of the introduction of same sex marriage for freedom of speech, the Scottish Government has included a provision (at section 12 of the draft Bill) making it clear that the introduction of same sex marriage does not affect existing rights under the European Convention on Human Rights and elsewhere to freedom of thought, conscience, religion and expression.
- 5.35 The consultation document also reports that the Lord Advocate intends to publish prosecutorial guidelines on allegations of breach of the peace and threatening or abusive behaviour arising out of opposition to same sex marriage.

<p>Question 9: Do you have any comments on the proposed approach in relation to freedom of speech?</p>

- 5.36 Around 14,500 respondents made a comment at this question, with suggested text available from all three of the main campaigns, and with a number of respondents clearly feeling very strongly about this issue.
- 5.37 For many respondents, the Scottish Government's plan to protect freedom of speech was welcomed and seen as sufficient. However, other respondents had concerns that essential safeguards to protect freedom of speech and of conscience, are lacking from the proposals.
- 5.38 Those who felt the proposed protections to be insufficient frequently cited recent examples of people who have been penalised – through loss of paid employment, being unable to work in a voluntary capacity or hold a position on a board of management – for having expressed their opposition to same sex marriage. A similar concern was that new entrants to a range of

essentially public sector professions (teaching, social work or the registrar service) may find it difficult to find a post if they are, or have been, vocal in their opposition to same sex marriage. Some respondents suggested that the draft Bill makes no provisions that will protect people in these types of employment-related situations.

- 5.39 In terms of the actions required to mitigate these risks, the following were suggested:
- Employment discrimination law should be amended to bar employers from taking action against employees who hold to the traditional view of marriage.
 - Particular protections are likely to be required for public sector employees.
 - The Scottish Government must ensure that the Equality Act 2010 is amended to specifically include beliefs about marriage under the protected characteristic of religion or belief.
 - A clause protecting freedom of speech should be written into the text of the Bill and not just referred to in footnotes or appendices.
- 5.40 Another frequently raised concern related to the effect of public order legislation on freedom of speech. In particular, section 12 of the draft Bill was often dismissed as virtually worthless, with the specific concern that it only applies to part 1 of the draft Bill, covering technical changes to the law of marriage. However, some respondents reported that their concerns are not with marriage law directly, but with the impact of the redefinition of marriage on how other existing laws, and particularly public order law, will be applied. The suggestion was that new protections will be needed within public order legislation and these changes will need to acknowledge that there are various and deeply-held views about what marriage should mean in Scottish society.
- 5.41 Continuing on the public order theme, some respondents were concerned that an issue as important as whether expressing opposition to same sex marriage leads someone to be committing an offence is only to be dealt with through the production of prosecutorial guidelines. Specific issues raised about any prosecutorial guidelines developed included that they:
- Must not stigmatise or discriminate against LGBT people.
 - May be open to reinterpretation over time.
 - Should be made available in draft form for comment before being introduced.
- 5.42 Finally, there was a group of respondents who disagreed with the Scottish Government's plans, but who came at the issue from a very different standpoint. These respondents tended to suggest that there is simply no need to attach specific provisions relating to freedom of speech to this legislation since existing legislation, such as the Equality Act 2010, would apply. There were concerns that same sex marriage is being 'singled-out' as in some way

exceptional and different to other legal arrangements and that this in itself could contribute to a perception that it is acceptable to discriminate against LGBT people.

Education

- 5.43 Similarly to freedom of speech, many respondents to the previous consultation were concerned about the impact of the introduction of same sex marriage on children and the Scottish education system in particular. Annex C of the consultation document details the Scottish Government's proposed approach which includes that:
- Parents will continue to have the right to withdraw their child from religious education as per the existing provision in section 9 of the Education (Scotland) Act 1980.
 - Parents will also continue to have the right to withdraw their child from programmes of sexual health education.
 - There are no plans to allow parents to opt children out of any class which might happen to mention same sex marriage or civil partnership.
- 5.44 The consultation document also notes that the Scottish Government does not consider that employment law should be amended to provide specific protections for teachers as existing employment law covers matters such as unfair dismissal. The consultation document also notes the Scottish Government's continuing support for denominational education.

Question 10: Do you have any comments on the proposals in relation to education and same sex marriage?

- 5.45 This was another question at which the considerable majority of all respondents (around 14,700), including those responding through one of the three campaigns, made a comment.
- 5.46 While some respondents stated their broad support for the Scottish Government's plans, this topic was unusual in that many of those who appear to support the introduction of same sex marriage, as well as many of those who do not, had concerns about the intended approach. These concerns tended to crystallise into one of two broad positions, each of which will be set out in turn below.
- 5.47 Some respondents (many of whom also made their support for the introduction of same sex marriage clear at this question or elsewhere within their response) raised the following points or concerns:

- Research has shown that prejudice, discrimination and bullying against LGBT people are significant problems in Scotland's schools¹⁹.
- All levels of education in Scotland should be fully inclusive of LGBT people; no school or teacher should stigmatise or discriminate against LGBT people. Rather, they should be welcoming of all pupils, regardless of their sexual orientation, gender identity or family circumstances. Scotland's schools should be places that promote equality and tackle discrimination against LGBT people.
- Young LGBT people, and young people with LGBT parents, have a right to an education which addresses their needs and reflects their lives. These rights are set out within the United Nations Convention on the Rights of the Child 1989, which has been ratified by the UK Government.
- The focus of these proposals should be on the needs of these young people, rather than on the impact any changes will have on those opposed to same sex marriage. However the consultation document, and Annex C in particular, mostly focuses on protecting religious freedoms and gives inadequate consideration to protecting young LGBT people, or young people with LGBT parents, from discrimination.
- Parents should not be able to withdraw their child from classes that mention LGBT people, same sex relationships or same sex marriage. Such an opt-out would impact adversely on a child's right to receive an education and access key information. Some respondents stated explicitly that this should also apply to sex education classes, and that allowing such an opt-out could have serious repercussions for a young person's health in the future. However, others did agree that parents should be able to withdraw their child from sex education or religious education classes if they so choose.
- Teachers should be required to teach the school curriculum. If their personal position on same sex marriage is at odds with the curriculum, as it may also be in other areas, this is a personal matter which should not intrude into their work life.
- It is appropriate for religious education classes to inform pupils about the range of views held, including on the subject of marriage. However, teaching children that same sex relationships are harmful and dangerous is not acceptable.
- Despite voicing some of these reservations, some respondents did note their agreement that no new legislation is required in relation to education as a result of same sex marriage being introduced. This included there being no need to amend employment law or the Equality Act 2010 to provide specific protections for teachers.

¹⁹ The frequently cited research, *Life in Scotland for LGBT Young People: Education Report* (2012) can be accessed at:
https://www.lgbtyouth.org.uk/files/documents/Life_in_Scotland_for_LGBT_Young_People_-_Education_Report_NEW.pdf

5.48 The alternate position, frequently taken by respondents who made their opposition to the introduction of same sex marriage clear at this question or elsewhere within their response, concentrated on the following issues:

- The fundamental principle of freedom of conscience with respect to same sex marriage should be extended to the education system.
- While most head teachers and local authorities are reasonably-minded when it comes to interpreting government guidance, there may be occasions where this is not the case. In such a scenario, there is very little protection for teachers who have a conscientious objection to teaching about aspects of same sex marriage. UK employment law does not, or may not, give adequate protection to teachers and others involved in education. Teachers should have both their conscience and human rights respected if they have concerns about same sex marriage and the use of teaching materials which are inconsistent with their religious beliefs.
- Particular care needs to be taken to ensure that denominational schools are able to teach children according to the values and beliefs of their religion, including on the benefits of the traditional concept of marriage.
- A number of religious member organisations are actively involved in Scottish schools and wider Scottish education work – often providing much-appreciated services such as lunchtime and after school clubs, mentoring services, religious observance and assemblies and chaplaincy services. Without an explicit clause affirming that opposition to same sex marriage should not be discriminated against, many of these organisations could be excluded from working within the Scottish education system as a result of the public sector equality duty.
- Given these and other concerns, a freedom of conscience clause will need to be clearly spelled out within any legislation that goes forward. Some respondents also suggested an amendment to the Equality Act 2010 would be required.
- Any guidance issued should include the present understanding of marriage as distinct from any new definition of marriage that may be taught. There should be the opportunity for people to express the Christian or other religious viewpoint so that children hear the range of views and can make informed decisions on these matters.
- The proposals do not allow for parents or guardians to withdraw a child from any lessons covering same sex marriage. The consultation document states that this is not to be introduced because the Government does not wish to infringe a child's right to education. However, the European Convention on Human Rights states that the State shall respect the right of parents to ensure education and teaching is in conformity with their own religious and philosophical convictions²⁰.

²⁰ See page 32 of the Convention: http://www.echr.coe.int/Documents/Convention_ENG.pdf

- Some children would themselves have a conscientious objection to being required to participate in classes promoting a view of marriage which they consider wrong.
- There must be changes to the law to put a duty on schools to give parents advance notice of lessons that will deal with the definition of marriage. Some respondents also suggested that parents should have the right to have sight of any teaching materials to be used.
- Same sex marriage could be particularly confusing if raised with younger children and this should not be an issue that is covered within the primary school curriculum.

5.49 Finally, a number of group respondents, including those taking both of the positions outlined above, noted that they would hope to be consulted on any changes to Educations Circular 2/2001 (on the conduct of sex education in schools) or to any other relevant guidance.

Other consequentialials as a result of same sex marriage

5.50 The consultation document notes the Scottish Government’s intention that, where possible, opposite sex and same sex marriage should be treated in the same way.

5.51 Since 1999, Acts of the Scottish Parliament have, where possible, avoided using gender-specific pronouns and nouns and there has been a move to gender-neutral drafting with the use of the term “spouse”, rather than “husband and wife”. In considering the impact of the introduction of same sex marriage on existing legislation and on private arrangements – such as wills and contracts – the Government has borne in mind that there will be exceptions. For example, to protect religious and belief bodies and celebrants who do not wish to solemnise same sex marriage, the provisions in the draft Bill on the solemnisation of marriage draw a clear distinction between same sex marriage and opposite sex marriage.

5.52 The Government will conduct a search to identify any references in legislation to which the general provision that references to spouses and marriage should mean both opposite sex and same sex marriage and spouses is not to apply. Questions 11 and 12 sought comments on the impact of the same sex marriage legislation on common law or private arrangements and asked for examples of legislation where there is a need to make it clear that references to marriage or spouse should not extend to both opposite sex and same sex marriage or spouses.

Question 11: Do you have any comments on the Government’s proposals on the impact of same sex marriage on legislation, the common law or on private arrangements?

Question 12: Are you aware of legislation where there is a need to make

it clear that references to marriage or spouse should not extend to both opposite sex and same sex marriage or spouses? If you are, please give details of the legislation and explain why it should not be extended in this way.

- 5.53 Around 14,300 respondents made a comment at Question 11, although only around 450 commented at Question 12.
- 5.54 Whilst some respondents applauded the gender-neutral approach, others suggested this issue exemplified just how profound the effect of the changes will be on the whole of society. Others suggested that the use of gender-neutral terminology is yet one more example of the extent to which the institution of marriage is being undermined. It was also suggested that there are laws and constitutional obligations which include definitions of marriage and which the Scottish Government is unable to overturn as a devolved administration.
- 5.55 A further suggestion was that, rather than redefining the long-established meaning of existing words (such as marriage, husband and wife), the Scottish Government should consider the use of alternative, new terminology to apply to same sex unions and the partners within those unions. Some respondents also expressed their personal objection to no longer being referred to as their partner's husband or wife, but rather as their spouse.
- 5.56 Many of the comments made at Question 11 related to fostering and adoption²¹ and this issue was also covered in the suggested text at Question 11 provided by all three campaign groups. Many respondents felt that foster care should be welcoming and inclusive for children whatever their actual or potential sexual orientation or gender identity, or family background. This led to concerns that guidance might be amended to state that a would-be foster carer or someone wanting to adopt should not be rejected because of his or her views on same sex marriage. Respondents taking this view urged the Government to give careful thought to the possible implications of such an amendment on a young person who is being fostered or adopted and who comes to realise that they are, or may be, LGBT.
- 5.57 However, other respondents took a contrasting position and were concerned that those with a conscientious objection to same sex marriage should not suffer discrimination in the adoption and fostering processes. Frequent references were made to a Glasgow adoption agency facing the loss of its charitable status because of its belief in traditional marriage. Respondents suggested that examples such as these demonstrate that, contrary to their assurances, the Scottish Government has not put in place the necessary protections to preserve the freedom of conscience of those opposed to same sex marriage. Again, there were calls for the Equality Act 2010 to be amended.

²¹ This issue was covered within paragraphs 3.14-3.18 of the consultation document, immediately prior to the section on other consequential as a result of same sex marriage.

- 5.58 More specifically, there were calls for the Scottish Government to amend the Adoption and Children (Scotland) Act 2007 to make it clear that opposition to same sex marriage and same sex relationships cannot be taken into consideration in the fostering and adoption approval processes. Other respondents suggested that a range of legislative protections will be required to ensure that those who believe in traditional marriage: do not suffer any discrimination in the workplace; are not denied access to public services; and are not disallowed from fostering or adopting children. It was also suggested that consideration should be given to additional Islamic marriage concepts in legislation, common law and private arrangements.
- 5.59 Few respondents went on to give specific examples of legislation that would need to be amended, although some did comment on the scale of the task and questioned whether such work should be a priority of Government. Suggestions that were made included:
- The Charities and Trustee Investment (Scotland) Act 2005 – to remove the potential for opposition to same sex marriage being seen as ‘dis-benefit’.
 - The Family Law (Scotland) Act 2006 - this was cited as an example of the complexity and potential for confusion in relation to status, in this case of a cohabitant, should the Bill become law.

Adultery

- 5.60 The meaning of adultery in Scots common law relates to heterosexual conduct only and the Scottish Government does not plan to change this. This would mean that:
- A spouse seeking a divorce in an opposite sex or same sex marriage could still establish that the marriage has irretrievably broken down by providing proof that his or her spouse has committed heterosexual adultery.
 - It will remain possible for a spouse to seek a divorce if the other spouse behaves unreasonably. ‘Unreasonable behaviour’ can include sexual conduct that falls outwith the scope of adultery.

Question 13: Do you have any comments on the proposed approach to the law on adultery?

- 5.61 Around 950 comments were made at Question 13. As at other questions, some respondents simply stated that they either agreed or disagreed with the approach proposed. It was also noted that the proposed approach with regard to same sex marriage is the same as that which has been in place since the introduction of civil partnerships and that no significant issues have arisen.

- 5.62 However, a number of respondents made it clear that they would prefer to see all the laws regulating marriage apply equally to opposite and same sex marriages. Not only did these respondents consider this approach would meet the basic standards of equality, but also that it would help guard against any suggestions that partners within same sex marriages would not expect to be held to the same standards as their opposite sex counterparts.
- 5.63 Others took the view that the very fact that the same approach is not being taken is symptomatic of a lack of consistency and clarity in the Scottish Government's thinking and that, whilst claiming the proposed changes are designed to ensure that everyone is treated the same, the Government is then choosing to treat people differently when this suits or is easier. In this case, it was suggested that the intention to keep same sex marriage obligations at the same level as those for a civil partnership brings the logic of redefining marriage to include same sex relationships into question. It was also suggested that the apparent difficulty in providing a suitable definition of adultery in same sex marriage simply highlights that opposite and same sex marriage are different entities.
- 5.64 Other issues raised by respondents included:
- Irrespective of the Scottish Government's intentions or wishes, a challenge under the Equality Act 2010 could result in the courts redefining adultery under common law.
 - There may be a case for abolishing adultery as the basis for a divorce – particularly given that it is rarely used.
 - One alternative would be to replace the concept of adultery with that of sexual infidelity.
 - It is unclear how the concept of adultery will apply for those who are bisexual and in a relationship with two others of different genders.

Permanent and incurable impotency

- 5.65 In Scotland, a marriage is voidable if, at the time of the marriage, one of the spouses is permanently and incurably impotent in relation to the other spouse. In its report on family law in 1992, the Scottish Law Commission recommended that marriage should not be voidable on the grounds of impotency. However, this recommendation has not been implemented.

Question 14: Do you have any comments on the proposed approach to the law on permanent and incurable impotency?

- 5.66 Only 550 respondents made a comment at Question 14, with the main issues raised very similar to those at the previous question: that any laws and arrangements should apply equally to opposite and same sex marriages; and

that the lack of equivalence highlights the problems associated with proceeding with the introduction of same sex marriage.

5.67 Other comments made included that:

- The idea that impotency (or any other medical condition) should be grounds for voiding a marriage is archaic and cruel – it should be abolished as grounds for voiding opposite sex marriages and should not be introduced for same sex marriages.
- The concept of ‘voidable’ marriages can have some advantages, particularly for those who might wish to enter another marriage but would not be able to do so if they were divorced.

Bigamy

5.68 The final question in Part 3 of the consultation document asked for views on the Scottish Government’s proposed approach in relation to bigamy. In Scotland, bigamy is currently a common law offence. The current proposals include that:

- Entering into a same sex marriage when you are already married (whether to someone of the same sex or opposite sex) should be an offence.
- It should also be an offence to enter into an opposite sex or same sex marriage when you are already in a civil partnership with someone else.
- It should continue to be an offence to enter into a civil partnership when you are already married or in a civil partnership.
- Bigamy would become a statutory offence.

Question 15: Do you have any comments on the proposed approach to the law on bigamy?

5.69 Around 550 respondents made a comment at this question. Some of those who voiced their support welcomed the Scottish Government’s clear commitment that neither bigamy nor polygamy will be legalised in Scotland. Amongst other issues raised by those respondents who supported the Government’s proposals were the following:

- It is appropriate and commendable that equivalent arrangements and penalties are being suggested for those in opposite and same sex marriages, as well as those in civil partnerships.
- Making bigamy a statutory offence is a sensible approach.

- The current maximum penalty of life imprisonment seems excessive. Some respondents suggested that imprisonment is not an appropriate penalty and that alternatives, such as community service, would be more in keeping with the nature of the offence. However, others considered that the maximum penalties being proposed (of a prison term not exceeding two years and/or a fine) do not reflect the seriousness of the offence and should be reconsidered.

5.70 Those that disagreed with the proposals included some respondents who suggested that – assuming all parties are aware of the arrangements – polygamous and polyandrous marriages should be permitted and bigamy should not be an offence. Others suggested that, despite any reassurances given, redefining marriage will lead to calls for further redefinition in the future, including allowing more than two people to be party to a marriage.

5.71 Finally, a number of respondents wanted to make it clear that there is no relationship between bigamy, polygamy and same sex marriage and that it was unfortunate that these issues have been included as part of the same set of proposals.

Recognition of same sex marriage overseas

5.72 A number of respondents noted that they considered it important for same sex marriages and civil partnerships solemnised or registered in Scotland to be recognised in other parts of the UK and overseas²². It was suggested that the Scottish Government should work with the UK Government to this end.

Survivor benefits in pensions

5.73 A further issue that some respondents commented on at Question 15 was survivor benefits in pensions²³. The primary concern was that the UK Government²⁴ has announced that pensions law will treat same sex marriages in the same way as civil partnerships are currently treated. This would mean that bereaved same sex spouses could get much smaller pensions than their opposite sex counterparts. Some respondents went on to call for the Scottish Government to make approaches to the UK Government and press for more equitable arrangements to be put in place.

²² This issue is not connected with bigamy, but the coverage in the consultation document was soon after Question 15 and the issue was not covered in a dedicated question.

²³ Ibid.

²⁴ Most pensions law is reserved to the UK Government.

6 CIVIL PARTNERSHIP

- 6.1 Part 4 of the consultation document set out the Scottish Government's intentions to proceed to allow civil partnerships to be registered through religious and belief ceremonies.
- 6.2 The intention is that the arrangements for authorising religious and belief bodies and their celebrants to register civil partnerships will be along the same lines as for solemnising same sex marriage (and as already discussed in section 5 of this report). Key elements of the arrangements are that:
- Some religious and belief bodies may wish to opt in and seek to be prescribed by regulations, so that all of their celebrants are authorised to register civil partnerships.
 - Other religious and belief bodies may wish to nominate specific celebrants so that they can be authorised by the Registrar General to register civil partnerships.
 - Religious and belief bodies who have opted in may wish to nominate temporary celebrants so that they can be authorised by the Registrar General.
 - There would be no obligation to opt in.
 - The protections would be similar to those for religious and belief bodies and celebrants in relation to the solemnisation of same sex marriage.

Question 16: Do you have any comments on the proposed approach to ensuring that religious and belief bodies and celebrants do not have to register civil partnerships?

- 6.3 Around 900 respondents made a comment at this question.
- 6.4 In the same way that many of the proposed arrangements reflect those planned for same sex marriage (and as discussed in the analysis of comments at Question 7), so many of the comments made at Question 16 were similar in their emphasis and focus. A small number of respondents suggested that their position at Question 16 could be taken as the same as that for Question 7.
- 6.5 Some respondents simply stated their support for the Government's plans or made only limited further comments in support of the proposals. Other respondents noted that, whilst not necessarily supporting the introduction of the religious registration of civil partnerships, they were broadly in agreement with the proposal for an opt-in system should Government proceed.

- 6.6 Other respondents disagreed with the proposals and, as with the same sex marriage proposals, raised a number of concerns with the primary one being about protecting the freedom of speech and of conscience of those who did not wish to be involved in the religious registration of civil partnerships. In summary, the issues were that:
- The amendment to the Equality Act 2010 is not yet in place and cannot be guaranteed.
 - Even if the Equality Act 2010 is amended, there remains the possibility that claims could be made on the grounds of discrimination.
 - The possibility of challenge in the European Court of Human Rights cannot be ruled out.
 - The focus of the protections that are being put in place is very much on religious and belief bodies, rather than individual celebrants.
- 6.7 Some respondents also had concerns about aspects of the opt-in system as set out within the consultation document. As with the opt-in proposals around same sex marriage, some respondents suggested that the proposed system seeks to impose decision-making standards on religious and belief bodies. As before, it was of concern that the Scottish Government appears to wish to dictate how an autonomous religious or belief body chooses to come to its decisions. In particular, a religious body should be able to (and indeed will have already) decided whether it requires decisions to be unanimous or based on the majority view. There were also concerns about the practicality and/or fairness of requiring all celebrants to be willing to carry out religious registration of civil partnership before a body can either be prescribed in regulations or submit a list of celebrants who they wish to be authorised to register civil partnerships.
- 6.8 One of the few areas of comment specifically about the proposed arrangements for religious registration of civil partnerships (as distinct from the proposals relating to solemnising of same sex marriages) related to the terminology being used. For example, is it appropriate to call a function being carried out by a religious or belief celebrant (in other words, not by a representative of the state) a *civil* partnership? The use of 'registration' rather than 'solemnisation' within the proposals was also questioned, and it was pointed out that registrars register all events, including civil partnerships.
- 6.9 The second consultation question asking specifically about civil partnership sought views on the Scottish Government's plans around allowing those who wish to do so to change their civil partnership into a marriage. Key aspects of the proposals are that:
- The status of civil partnerships remains the same and existing civil partners will remain as civil partners unless they choose to change status.
 - Only civil partnerships registered in Scotland can be changed into a same sex marriage in Scotland.

- A couple seeking to change their civil partnership to a marriage would have to attend a marriage ceremony in Scotland.
- A civil marriage ceremony, to which a £125 fee currently applies, will be available to couples seeking to change their civil partnership to a marriage.
- Alternatively, the couple could change their civil partnership to a marriage through a religious or belief ceremony carried out by an authorised celebrant for same sex marriage, following the legal preliminaries with the registrar.

Question 17: Do you have any comments on the proposals for changing civil partnerships to a marriage?

- 6.10 Around 11,650 respondents made a comment at this question. This included a number of respondents who commented on the lack of any plans to allow opposite sex couples to enter into a civil partnership.
- 6.11 Many of those who disagreed with the proposals commented on the principle of changing a civil partnership into a marriage, and suggested that civil partnerships are, and should remain, a civil, secular arrangement.
- 6.12 Others expressed their broad support for giving couples the option to change their partnership into a marriage, but frequently went on to raise issues about some of the specific arrangements. Issues raised included:
- There should not be any requirement to ‘dissolve’ or ‘undo’ the civil partnership; rather the couple should simply be able to switch from being in a partnership to being married.
 - The date of the marriage should be recorded as that on which the civil partnership was entered into. This date should be used on any paperwork and, where possible, any rights associated with being married should be back-dated to the date on which the civil partnership was registered.
 - There should be an option, rather than a requirement, to have a second ceremony. Some couples, for example those living elsewhere in the UK or abroad, could incur significant costs if they had to travel to Scotland to have their partnership changed to a marriage. This seems unfair, particularly given that the option to get married was not available to them when they entered into their civil partnership. In any case, many couples in a civil partnership already think of themselves as ‘married’ and some may see this change as nothing more than a legal technicality.
 - Similarly, it is not fair to charge a fee for changing a civil partnership into a marriage. Couples have already paid for their civil partnership ceremony and did not have the option of a marriage ceremony at that time. An alternative suggestion was that those in a civil partnership would have two

years to convert their partnership into a marriage at no charge, or at a much lower charge, and without the need for a ceremony.

- It would be worthwhile to at least explore options for allowing those whose civil partnership was entered into under other jurisdictions (particularly in other parts of the UK) to have their partnership changed into a marriage in Scotland.

- 6.13 As noted above, a number of respondents (including those responding through one of the campaigns) made a comment about opposite sex civil partnerships at this question. The analysis presented here also covers comments about opposite sex civil partnerships made at other questions or in additional comments.
- 6.14 Some respondents simply stated that civil partnerships should also be available to opposite sex couples. Other comments focused on the inequity of having non-equivalent arrangements for opposite and same sex couples. While some respondents wished to highlight the importance of the same options being available to all couples, others suggested that the current plans are a reflection of the confused and inconsistent approach being adopted by the Scottish Government. The potentially negative consequences of introducing opposite sex civil partnerships, particularly in terms of the cost to the taxpayer, was also highlighted by some.
- 6.15 Finally, some respondents questioned the need to retain civil partnerships once marriage is available to same sex couples, and suggested that the easiest and most rational approach would be to either abolish them altogether or not allow any more to be registered.

7 TRANSGENDER PEOPLE

- 7.1 The final part of the consultation considered marriage-related issues affecting transgender people and, specifically, whether married transgender people should need to divorce before obtaining a full Gender Recognition Certificate (GRC). Under the current provisions, a transgender person faces a choice between staying in his or her marriage and obtaining a full legal recognition in his or her acquired gender. The proposed changes would enable a transgender person to stay in the relationship, if that is what both parties to the marriage wanted.

Question 18: Do you have any comments on the detailed proposals for allowing transgender people in a relationship to stay together, if they and their partner wish so, when obtaining the full Gender Recognition Certificate?

- 7.2 Around 11,500 respondents made a comment at this final question. Many of these respondents gave support to the Scottish Government's intended approach, which was sometimes referred to as compassionate, caring and thoughtful.
- 7.3 In practical terms, it was suggested that the revised gender recognition process as proposed is not, but should be, simple, user-friendly and incur no greater costs to the applicant than under the current process. One of the primary concerns raised was the intended requirement for a second marriage ceremony. Some respondents suggested that to require such a ceremony effectively undermines the whole purpose of the legislative change, namely that legal recognition of the relationship simply continues when gender recognition is granted. The cost implications for the couple of requiring a second ceremony was also a cause for concern. Alternatives suggested included the following outline approach:
- When the applicant applies to the Gender Recognition Panel (GRP), both the applicant and their partner submit a statutory declaration stating that they wish to remain married.
 - Following approval by the GRP, full gender recognition is awarded and the GRP contacts the National Records of Scotland (NRS) to inform them of the successful application.
 - NRS then makes a new marriage certificate available at the same time as the applicant's new birth certificate is issued.
- 7.4 Another issue raised was the need for the process to be effective for those who are resident in Scotland, but who were married or entered into a civil partnership outwith Scotland. As well as including provisions to ensure the continuity in Scotland of a post gender recognition marriage from outside the UK, it was suggested that particular provisions may be required for applicants

who have a civil partnership registered outwith Scotland. One proposed approach (assuming that opposite sex civil partnership is not being introduced) allows for the civil partnership to be converted to a marriage as part of the application to the GRP.

7.5 Other issues raised or suggestions made included that:

- Some work may be required to ensure that neither partner in a marriage where one party has transgendered loses any pension rights. In particular, it was suggested that the Scottish Government should ensure that the principle of non-regression applies to public sector pension schemes for which it is responsible. This would ensure that there is no loss of accrued pension benefits when a married person obtains gender recognition.
- Currently, applicants who receive an interim GRC because they are married or in a civil partnership have only six months to initiate divorce or dissolution proceedings in order to obtain a full GRC. Otherwise, the interim GRC expires and the application process must be started again from the beginning. The interim GRC validity period should be extended to two years, in order to allow more time for either party to initiate divorce proceedings or for the non-transitioning spouse to confirm that they wish to remain in the marriage or civil partnership. This would dramatically reduce the pressure on couples during the gender recognition procedure and give them the best possible chance of maintaining their marriage or civil partnership.
- Some transgender people have dissolved their marriages in order to obtain gender recognition, although they and their partner would have preferred their marriage to continue. It is likely that people in that situation will have registered a civil partnership to replace their lost marriage. Changes proposed in the draft Bill will allow them to change the status of that civil partnership to a marriage, which will in effect be backdated to the date of their civil partnership. However, that will still leave them in a position where they have been married twice, with a brief unmarried gap during which they lost legal protections. This problem could be addressed if, when the civil partnership was then converted to a marriage, it was deemed to have started at the date of the original marriage.
- The implications of someone who has obtained a full Gender Recognition Certificate wanting the name on their marriage certificate to be changed to reflect their new gender will need to be considered.

ANNEX A – CAMPAIGN SUGGESTED TEXT

CARE FOR SCOTLAND

Question 1 - Do you have any comments on the impact assessments prepared in relation to the proposed legislation?

I am concerned that the Equality Impact Assessment makes little or no mention of the probable negative implications of this legislation for people who hold to a religious belief or who have a conscientious objection to approving of same-sex marriage. The impact assessment fails to recognise that religious belief applies to the whole of life and conduct and limits the potential negative implications of the legislation solely to the matter of religious celebrants. It does not consider the implications of this legislation for Christians and others working across the breadth of the public sector. Many people may find themselves being placed in the position of having to choose between following their conscience or disobeying their employer and losing their job. In future many may find that certain career choices are no longer open to them if they disagree with same-sex marriage. Those wishing careers as civil registrars, teachers and social workers are likely to be affected, but also anyone wishing a career in the public sector. In addition, no mention is made of the possible negative implications for churches and religious charities, either in relation to the implications of the public sector equality duty for partnership working between public bodies and faith groups or on the charitable status of charities which do not support same-sex marriage.

Question 5 - Do you have any comments on establishing tests that a religious or belief body must meet before its celebrants can be authorised to solemnise marriage or register civil partnership?

This proposal poses a potential problem for new churches and faith groups which have only recently established a presence in Scotland. Any such system of tests would need to take into consideration the changing face of the Christian Church and other religious groups in the UK. In particular, a mechanism to recognise and facilitate newer denominations to conduct marriage ceremonies would need to be incorporated into the system of tests.

Question 7 - Do you have any comments on the proposals for authorising religious and belief celebrants who wish to solemnise same sex marriage?

There is a real danger of cases of discrimination being taken against religious celebrants and churches which refuse to marry same-sex couples. These claims could be based either on the grounds of sex or sexual orientation. The proposal to amend the Equality Act is welcome, but this may not be sufficient to stop a church or a minister being sued for refusing to marry a same-sex couple. In the immediate future it is likely that a claim of sex discrimination might be made and the Scottish government is proposing no protection in the Equality Act to ensure that this does not occur. In the longer term human rights laws could be used to force churches and religious celebrants to 'marry' same-sex couples on the ground of non-discrimination.

The only way to guarantee that the civil liberties of religious celebrants and churches are not infringed is not to allow religious same-sex marriage.

Question 8 - Do you have any comments on the opt-outs for civil registrars who do not wish to solemnise same sex marriage?

I have grave concerns about the implications of introducing same-sex 'marriage' for civil registrars. Those who have a conscientious objection to solemnising same-sex 'marriages' may either be forced out of their jobs or, in the future, be unable to obtain employment as registrars. This is unfair discrimination against people of religious faith. The Scottish Government should include a conscience clause in its legislation which allows civil registrars to opt out of performing same-sex 'marriages'. An obligation could be placed on local authorities to ensure that an alternative means to deliver the service is available in order to ensure no discrimination against a same-sex couple. The precedent for this was set in the Abortion Act 1967 which allows doctors with a conscientious objection to opt out of performing abortions. Similarly the marriage issue is of fundamental importance to many people who have religious faith. It is essential that the Equality Act 2010 is amended to incorporate a requirement that employers take steps to reasonably accommodate the religious, philosophical and other beliefs of their employees which give rise to instances of conscientious objection. Until a commitment to amend the Equality Act in this way is obtained from the UK Government, the Scottish Government should refrain from pursuing the introduction of same-sex 'marriage'. The Scottish Government should include in its own legislation a condition which requires individual civil registrars to opt-in along the lines of that proposed for religion and belief celebrants and ask for the Equality Act to be amended to give legal protection to such registrars. Moreover, the Scottish Government should await the outcome of any appeal to the Grand Chamber of the European Court of Human Rights in the case of Lillian Ladele before rushing to legislate in this area.

Question 9 - Do you have any comments on the proposed approach in relation to freedom of speech?

I am very concerned that freedom of speech may be restricted if the Scottish Government presses ahead with its plans to legalise same-sex 'marriage'. It is difficult to comment on the proposed prosecutorial guidelines without seeing their content. Moreover, the guidelines may be open to reinterpretation over time. It is essential, therefore, that a clause protecting freedom of speech is included on the face to the Bill. There is a real danger that public sector employees who speak out against same-sex 'marriage' will lose their jobs. Already there has been a newspaper report of a police chaplain allegedly being forced out of job because of his views on same-sex 'marriage'. At the very least, new entrants to public sector professions (e.g. registrars, teachers and social workers) may find it difficult to get a job if they oppose same-sex 'marriage' and articulate this view during an interview. Indeed questions on this issue might be asked during interviews as a means to weed out those who oppose same-sex 'marriage' from the public sector. Similarly churches which teach that marriage is between a man and a woman may well be unable to hire school halls and could even lose their charitable status. Prospective foster

parents may be discriminated against if they state opposition to same-sex 'marriage' during the approval process.

Question 10 - Do you have any comments on the proposals in relation to education and same sex marriage?

I am concerned that children will be taught in school sexual health education that marriage can be between two people of the same sex. The institution of marriage will be reduced to little more than a subjective expression of affection between two individuals. Its objective purpose, the procreation of children within a stable and secure environment consisting of the complementarity of male and female parents, will be removed from education. This is contrary to the guidance issued when Section 28 was repealed. Many parents will be alarmed that their children may be taught something in school which runs contrary to their right to have their children educated in accordance with their religious and philosophical beliefs. Children should be taught about the benefits of marriage (defined as being between one man and one woman with the intent for life) for society and for families in sexual health and religious and moral education. Moreover, it is important to ensure that robust arrangements are in place to ensure that parents can exercise their right to withdraw their children from these aspects of the curriculum and that schools are inspected with regard to these arrangements. This right should be extended to other areas of the curriculum where same-sex marriage and same-sex relationships are discussed. I am very concerned that a range of books which discuss same-sex relationships are already being promoted by Stonewall for use in primary schools, including for very young children. If same-sex 'marriage' is legalised, schools will come under huge pressure to use these resources. Many parents will be unaware what their children are being taught. The Scottish Government should ensure that these books are not used in schools and that if they are being used that parents are made aware of their content. It is imperative that teachers should not be forced to conduct same-sex 'marriage' lessons if they have a conscientious objection to doing so.

Question 11 - Do you have any comments on the Government's proposals on the impact of same sex marriage on legislation, the common law or on private arrangements?

There is a very real danger that people with a conscientious objection to same-sex 'marriage' or the encouragement of homosexual relationships will suffer discrimination in the adoption and fostering processes. It is important, therefore, that fostering and adoption guidelines are not amended to encourage discrimination against people who disagree with same-sex 'marriage' or homosexual relationships. The Scottish Government should amend the Adoption and Children (Scotland) Act 2007 to make clear that opposition to same-sex 'marriage' and same-sex relationships cannot be taken into consideration in the adoption and fostering approval processes.

Question 13 - Do you have any comments on the proposed approach to the law on adultery?

The Scottish Government is proposing a two-tier system of marriage where the commitment requirements are not equal between opposite sex marriage and same-sex 'marriage'. Given that there is no proposal that same-sex couples should meet the basic faithfulness commitment requirement of marriage vis-a-vis adultery, the Marriage and Civil Partnerships (Scotland) Bill effectively keeps same sex relationship obligations at the level of civil partnership obligations. Had the Bill actually brought same sex relationships and subjected them to the same standards of commitment as marriage then there would have been some logical basis on which to argue for redefining marriage to include same sex relationships. In truth, however, all the Bill does is in creating the illogical arrangement whereby same-sex couples are held to civil partnership obligations regarding faithfulness, even whilst they are located in the context of the definition of marriage (which continues to embrace different sex couples subject to the actual marriage definitions of faithfulness and consummation), is to highlight the problem with the entire project. In failing to draw same-sex relationships into the same relational framework as marriage, the Bill makes the case for maintaining provision for same-sex relationships entirely through civil partnerships. It is completely wrong to place same-sex relationships with the levels of obligation proposed in this Bill in the same category of marriage with its quite different levels of obligation.

Question 16 - Do you have any comments on the proposed approach to ensuring that religious and belief bodies and celebrants do not have to register civil partnerships?

It is imperative that where a religious body has opted in and an individual celebrant has a conscientious objection that the Equality Act 2010 is amended in order to protect the religious celebrant concerned from being sued should he/she refuse to register a civil partnership.

EQUALITY NETWORK

I welcome Scottish Government plans to lift the ban on same-sex marriage and hope legislation will be passed soon to give LGBT people equal marriage rights in Scotland.

Question 7: Religious & belief marriage

I agree with the proposals for authorising religious and belief celebrants who wish to solemnise same-sex marriage. These proposals will protect and extend religious freedom by allowing religious and belief bodies to conduct same-sex marriages if they wish to do so.

Question 8: Civil Registrars

I agree that there should be no specific opt-out in the bill saying that civil registrars do not have to conduct same-sex marriages. Unlike religious celebrants, civil

registrars are carrying out a civil function on behalf of the state and therefore an opt-out on grounds of their personal belief is not appropriate and would set a dangerous precedent.

Question 9: Freedom of speech

I agree with the freedom of speech guarantee in the bill, and that there is no need for additional new legislation to protect freedom of speech. I call on the Scottish Government to ensure that any new guidance issued does not stigmatise or discriminate against LGBT people.

Question 10: Education

I believe that education should be inclusive and welcoming to all regardless of sexual orientation, gender identity, or family situation. All levels of education should be fully inclusive of LGBT people. I believe no school should stigmatise or discriminate against LGBT people. Teachers should not teach that same-sex relationships or same-sex marriage are wrong. Same-sex marriage should not be treated as a controversial issue in schools. Parents should not have a right to opt children out of lessons that mention same-sex relationships or same-sex marriage. Primary schools should not be discouraged from mentioning same-sex relationships or same-sex marriage. Education and employment law should not be changed to enable public servants to discriminate against LGBT people. Any changes to guidance such as Education Circular 2/2001 should seek to promote equality for LGBT people, not stigmatise or discriminate against them.

Question 11: Fostering

I have concerns about the proposal to amend fostering guidelines and call on the government to ensure that any changes focus on the needs of the child and do not risk placing children in an environment which would not be supportive of an LGBT young person.

Question 17: Civil Partnership

I disagree with the proposal to maintain the ban on mixed-sex civil partnership. I call on the Scottish Government to ensure full equality by giving mixed-sex couples the same right to have a civil partnership as same-sex couples. Existing civil partners who did not have the option of same-sex marriage should be able to convert their civil partnership to a marriage via a free administrative process if they wish.

Question 18: Transgender people

I support the aim of ending the requirement for transgender people to end their marriage or civil partnership in order to obtain full gender recognition. The procedure for gender recognition needs more consideration; it should be straightforward and with no additional costs. Existing pension rights should not be affected. Partnership rights should be entirely gender neutral and ensure that all people, regardless of their gender identity or whether they are intersex, can access equal recognition of their relationships.

SCOTLAND FOR MARRIAGE

Question 7: Do you have any comments on the proposals for authorising religious and belief celebrants who wish to solemnise same sex marriage?

The opt-in system has not been fully thought through. Too much emphasis is placed on the religious bodies, and not enough emphasis on the individual celebrants. The system also must make sure that conducting same-sex marriages does not become a condition for celebrants being authorised to conduct traditional marriages. The proposed amendment to the Equality Act to protect individual celebrants is too narrow. The amendment needs to provide an exception covering sex discrimination, not just sexual orientation discrimination. This is what the Westminster Government is doing.

Question 8: Do you have any comments on opt-outs for civil registrars who do not wish to solemnise same sex marriage?

The Scottish Government's inflexible approach leaves no room for conscience, which should be respected in a modern democracy. Doctors are allowed a conscientious objection for abortion, why are registrars not afforded the same accommodation for same-sex marriage? Reasonable accommodation should be made in the law for registrars, so that a registrar would be able to opt-out of solemnising same-sex marriages as long as the service provision was not unduly disrupted. At the very least, the Scottish Government should ensure through Codes of Practice that local councils take into account the conscientious objections of their employees.

Question 9: Do you have any comments on the proposed approach in relation to freedom of speech?

Section 12 of the Bill, the Scottish Government's attempt to protect free speech, is virtually worthless. It is drafted so narrowly that it only applies to Part 1 of the Bill itself, the technical changes to the law of marriage. But the free speech concerns are not with marriage law directly. The problem is the impact of the redefinition of marriage on how other existing laws, particularly public order law, will be applied. In a completely new situation where marriage has been redefined, new protections are needed within public order legislation, to reflect that there are various, deeply-held views in our society about what marriage should mean. If Alex Salmond is going to keep his promise to protect free speech, he has to do far more than is proposed. As a means of protecting free speech, as well as freedom of conscience, employment discrimination law must be amended to outlaw employers from punishing employees for their views on traditional marriage. The Scottish Government must ensure that the Equality Act 2010 is amended to specifically include beliefs about marriage under the protected characteristic of religion or belief so that such discrimination is unlawful. Already, a police chaplain has been removed from his post because he expressed his personal beliefs about marriage. There will be more cases like this if marriage is redefined.

Question 10: Do you have any comments on the proposals in relation to education and same sex marriage?

Guidance does not provide enough protection for the rights of parents. The Scottish Government must extend the right of withdrawal, which currently only applies to sex education and religious education, to cover all lessons which may endorse same-sex marriage. There should also be changes to the law to put a duty on schools to inform parents of lessons that will deal with the definition of marriage. The law must ensure that lessons dealing with same-sex marriage must treat it as a controversial issue on which there is no consensus in society, like abortion or a party-political matter. The Scottish Government must make explicit in law that belief in traditional marriage should be properly respected and that those expressing this view, whether pupils or parents, must not be disadvantaged within schools. To protect teachers, the Equality Act 2010 must be amended to ensure that belief in traditional marriage is one that is protected under employment discrimination law. Teachers should not be forced to endorse same-sex marriage in the classroom against their sincere beliefs, and there should be reasonable accommodation for teachers who believe in traditional marriage.

Question 11: Do you have any comments on the proposals on the impact of same sex marriage on legislation, the common law or on private arrangements?

I am concerned about the implications of redefining marriage for our everyday language. Well understood words like husband and wife are being removed from parts of the law and redefined in others. The law must be amended to guarantee protection for charities, like St Margaret's adoption agency in Glasgow, that believe marriage should only be between a man and a woman. Equality law must be amended to ensure that a local authority could not use the Public Sector Equality Duty as an excuse to prevent a church that only marries opposite-sex couples using a publicly-owned facility like a community centre. The Scottish Government's assurance that people who are against same-sex marriage will not be banned from being foster parents is welcome. However, this needs to be backed up by a provision within the Bill upholding the right of those who hold to the traditional definition of marriage to foster and adopt children.

ANNEX B - NUMBER OF RESPONSES RECEIVED

Type of response	Responses Submitted	Responses Removed	Final Analysable Responses
Standard Scottish Government response form – total	1580	44	1536
<i>(Standard Scottish Government response form – online)</i>	<i>(1409)</i>	<i>(43)</i>	<i>(1366)</i>
<i>(Standard Scottish Government response form – hard copy or email)</i>	<i>(171)</i>	<i>(1)</i>	<i>(170)</i>
Non-standard – hard copy or email	138	22	116
CARE for Scotland campaign – total	214	1	213
<i>(CARE for Scotland campaign - suggested text only)</i>	<i>(123)</i>	<i>(1)</i>	<i>(122)</i>
<i>(CARE for Scotland campaign – amended)</i>	<i>(91)</i>	<i>(0)</i>	<i>(91)</i>
Scotland for Marriage campaign– total	2371	0	2371
<i>(Scotland for Marriage campaign - suggested text only)</i>	<i>(1955)</i>	<i>(0)</i>	<i>(1955)</i>
<i>(Scotland for Marriage campaign – amended)</i>	<i>(416)</i>	<i>(0)</i>	<i>(416)</i>
Equality Network campaign – total	11213	385	10828
<i>(Equality Network campaign – suggested text only)</i>	<i>(9193)</i>	<i>(221)</i>	<i>(8972)</i>
<i>(Equality Network campaign – amended)</i>	<i>(2020)</i>	<i>(164)</i>	<i>(1856)</i>
TOTAL RESPONSES	15516	452	15064

ANNEX C – GROUP RESPONDENTS

Aberdeen Tfolk
Ab-Fab LGBT* Society
Amnesty International Scotland
ASLEF
Association of Registrars of Scotland (AROS)
Assynt and Stoer Parish Church of Scotland
Augustine United Church (URC)
Baptist Union of Scotland
BLOGS - Edinburgh University's LGBT+ Society
CARE for Scotland
Carnegie College Students Association
Catholic Bishops' Conference of Scotland
Catholic Education Commission
Catholic Head Teachers' Association of Scotland
Catholic Parliamentary Office
Catholic Truth
Centre for Excellence for Looked After Children in Scotland (CELCIS)
Changing Attitude Scotland
Children in Scotland
Christian Institute (The)
Church of Scotland (The)
Cumnock Christian Fellowship
Dalkeith Baptist Church
Destiny Church
Drumchapel United Free Church
Duncan Street Baptist Church
East Ayrshire Council
East Lothian Council
Edinburgh College Students Association
Edinburgh University Students' Association
Educational Institute of Scotland
Ekklesia think-tank
Enigma Club
Equality and Human Rights Commission
Equality Network
Evangelical Alliance Scotland
Faculty of Advocates
Falkirk and District Evangelical Leaders Forum
Family Education Trust
Fife Council Equalities Unit
Free Church of Scotland
Free Church of Scotland (Continuing), Public Questions, Religion & Morals
Committee
Free Church Perth
Free Presbyterian Church of Scotland
Gatehouse Community Church
Gay Men's Health
Gay Police Association Scotland

GCU LGBT Society
Glasgow Caledonian University Students' Association
Glasgow Central Mosque
Glasgow City Council
GMB SCOTLAND
Green Group in the Scottish Parliament
Heriot-Watt University Student Union
Highland Council (The)
HIV-AIDS Carers and Family Service Provider Scotland
Hope Christian Fellowship
Humanist Fellowship of Scotland
Humanist Society Scotland
Kelso Baptist Church
Kingdom Faith Churches UK
Kirk Session Cumbernauld:Condorrat Parish Church
Knights of St Columba
Law Society of Scotland
LGBT Group of St Mary's Cathedral, Glasgow (The)
LGBT Youth Scotland
LGBT+ Liberal Democrats
Liberal Party in Scotland
Lights, Cameras, Trans, Action!
Lochbroom and Coigach Free Church
Madly Gay
MADRASA TA'ALEEM UL ISLAM
Manchester Trans Ramblers
Maryburgh and Killearnan Free Church
Me & T Monthly
Metropolitan Community Church in Glasgow
Midlothian Council
MORF
Mothers' Union
Muslim Council of Scotland MCS
Muslim Welfare House
National Secular Society
North Ayrshire Council
NUS Scotland
One Spirit Interfaith Foundation
Our Lady Of Lourdes & St Bernadette's Catholic Church
Out for Independence
Pagan Federation (Scotland) (The)
Paisley Muslim Community Centre
Parental Involvement Working Group
Parents Enquiry Scotland
Perth Transgender Group
Peter Tatchell Foundation
Pillar
Pride Glasgow
Quaker General Meeting for Scotland (all Scottish Quakers)
respectme Scotland's anti-bullying service

River of Life Church (The)
Salvation Army (The)
Scotland for Marriage
Scottish Council of Jewish Communities
Scottish Episcopal Church, Faith and Order Board, General Synod of the
Scottish Independent Advocacy Alliance
Scottish Independent Celebrants' Association
Scottish Trades Union Congress (The)
Scottish Transgender Alliance
Scottish Youth Parliament
Secular Scotland
South Edinburgh Meeting of the Religious Society of Friends (Quakers)
South Lanarkshire Council
South Lanarkshire Muslim Welfare Society
St Bernadette's Catholic Parish
St Mary's Episcopal Cathedral Glasgow Vestry
St Michael Church Prayer Group
Stewarton John Knox Church of Scotland Kirk Session
Stirling Council
Stonewall Scotland
Strathaven Evangelical Church
Tron Church, Glasgow (The)
T'Northern Camp
Trans Media Watch
UNISON Scotland
United Free Church of Scotland, Church & Society Committee of
United Reformed Church, National Synod of Scotland (Church & Society
Committee)
University of Edinburgh LGBT Staff Network
West Dunbartonshire Council
West Lothian Council Education Services
Zia-UI-Quran Trust (Scotland Based)

ANNEX D – DETAILED OR DRAFTING COMMENTS

RESPONDENT	COMMENT
QUESTION 1	
Glasgow City Council	Glasgow City Council would question the apparent disparity in treatment between men and women, and women and civil partnerships in regards to contracted-out pension schemes highlighted in Annex J. Glasgow City Council would question the apparent disparity in treatment between men and women, and women and civil partnerships in regards to contracted-out pension schemes highlighted in Annex J.
QUESTION 2	
Individual	I welcome this proposal. But I think there may be a drafting error in cl. 19(10)(b) of the Bill, substituting a new CPA 2004 s.93 (1A). Between parts (a) and (b) of the definition of 'religious premises' there should surely be an 'or', not an 'and'?
Midlothian Council	Currently, the places where Civil Marriages are conducted in the presence of a Registrar outwith a Registration Office are regulated by the local authority and Approvals are granted either for a period of up to three years; or on a Temporary basis. In addition to fitness and properness of the applicant, Health and Safety Implications are taken into account, in consultation with the Police, Fire and Rescue Service and appropriate Officers of the Council e.g. Planning, Building Control, Environmental Health, etc. The process is funded by income from application fees. The experience in Midlothian over the past twelve on so years suggests that regulation has produced benefit in respect of the circumstances in which the Registrar conducts marriages i.e. there have been occasions in the past that suggest that some form of control is appropriate e.g. where premises required attention prior to the ceremony, where larger attendances had not been sanctioned, where there were real safety problems and dangerous conditions often identified at the eleventh hour, etc. which would have placed the Registrar and Guests at risk. Removal of the regulatory framework will deny the Registrar of that protection, may detrimentally affect the conduct of the marriage and render the ceremony invalid. Once the framework is removed, it will not be capable easily of reinstatement; and the local authorities will not be able to absorb the costs. Careful consideration therefore needs to be given to this aspect before it is too late.
South Lanarkshire Council	If the current procedures to enable places to apply for approval are abolished, there needs to be some form of risk assessment to be carried out by the registrar before agreeing to carry out ceremonies in premises/places which are not covered by a licence under other legislation, for example, the Licensing (Scotland) Act 2005.
QUESTION 3	
Scottish	“Independent ceremonies” would be a better description of the category.

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Independent Celebrants' Association	<p>Working independently of any unauthorised commercial organisation or third party would ensure that the individual Celebrants are responsible for the standards in the Registrar's Rules, particularly for ensuring that the Marriage performed is neither a sham marriage nor a forced marriage. Removal of any third party and or commercial interests would ensure that the Registrar's authorisation would be a personal obligation on the Celebrant to follow and be accountable for the Rules and Standards associated with the Registrar's authorisation. Each individual Celebrant's only association would be with their respective professional or belief body.</p> <p>The tests for authorising Groups would lie with the Registrar who would be at liberty to authorise belief bodies, such as the Humanists, as well as professional bodies of Celebrants, which meet the Registrar's tests.</p>
QUESTION 4	
Individual	<p>The Bill could alternatively provide the same flexibility for the Church of Scotland that bodies prescribed under regulations will enjoy. These will be able to 'recognise' persons other than ministers to solemnize 'on their behalf' at any time. If s.8(1)(a)(i) of the amended 1977 Act read 'a member of the Church of Scotland authorised by Act of the General Assembly to solemnise marriage between persons of different sexes on behalf of that Church' it would allow future alterations to patterns of ministry to be given effect without the need to return to the Scottish Ministers.</p>
Individual	<p>I assume that you are referring to members of the Church of Scotland Diaconate (Deacons and Deaconesses), and not members of a Deacons' Court in the congregations where such courts still exist.</p>
QUESTION 5	
Individual	<p>Ref 2.21. Although suggestions are acceptable, use of the word 'might' could allow for insertion of obligation to perform civil partnerships or same sex marriage.</p>
Humanist Society Scotland	<p>Suggested tests:</p> <ol style="list-style-type: none"> 1. That the organisation is not in the 'business' of making profit out of its ceremony 'operation'. 2. That the organisation reinvests a significant proportion of any revenue it does earn from ceremonies, in the development of professional training and standards for its Celebrants. 3. That such training does indeed cover awareness and appropriate action to be taken in cases of suspected forced, sham and any other illegitimate marriage. 4. That Celebrants follow a proper process of wedding planning with the couple - including pre-wedding meetings, script preparation and agreement, and on-the-day planning. 5. That the organisation has in place a proper programme of Celebrant recruitment, selection, training and

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	<p>registration; and that this includes mentoring, issue sharing between the organisation's Celebrants (so they can benefit mutually from their experience), and ongoing 'continuing professional development'</p> <p>6. That the organisation has in place a proper complaints procedure, so that if clients wish to make a complaint, they are able to do so, in the knowledge that the organisation will respond properly, prevent the problem re-occurring, and learn from such experience.</p> <p>7. That the organisation is indeed required to demonstrate a track record in carrying out ceremonies in general, before it is allowed to present Celebrants for authorisation to conduct legal weddings. We understand that in the Republic of Ireland, any such organisation must have been performing ceremonies for five years prior to application, and this seems a reasonable proposal for Scotland.</p>
QUESTION 6	
Faculty of Advocates	Section 29 of the Family Law (Scotland) Act 2006 will not provide an equivalent remedy to declarator of marriage. Section 29 is particularly ill-suited to address difficulties in cases with an overseas aspect as the section has just been held to be inapplicable to heritable property held outside Scotland (see Kerr v Mangan, 15 February 2013, Sheriff Principal Dunlop).
QUESTION 7	
Individual	<p>Paragraph 14 suggests that a unanimous decision of ministers is required and written satisfaction that all of the denomination's ministers would be content to carry out such ceremonies. However, the need for unanimity does not appear to be in the draft Bill. The draft Bill seems to state that to be prescribed, the body will require to meet "qualifying requirements" which will be set out by Scottish ministers.</p> <p>That is presumably a reference to secondary and subordinate legislation which has not been drafted, which will follow after the primary legislation has been enacted, and which may therefore not necessarily contain the need for unanimity, despite the stated intention in the consultation document. It could also be modified in the future.</p> <p>Accordingly, the requirement for unanimity on the decision above should be specified in the primary legislation itself.</p>
Individual	The proposed s.8(1D) of the 1977 Act falls into the same error as s.6A(3A) of the Civil Partnership Act 2004. Both provide that nothing in 'this Act' places an obligation or imposes a duty. But the possible obligation or duty would not flow from 'this Act' (i.e. the 1977 or 2004 Act): it would flow from Part 3 or Part 4 of the Equality Act 2010. Were it not for equality law, nobody would imagine that the possibility of requesting prescription or making a nomination

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	<p>implied an obligation to do so. It is therefore in equality law, and in equality law alone, that such fears must be addressed. I suggest it would be more sensible to remove these provisions 'for the avoidance of doubt', with the false sense of security that they give, and to concentrate on seeing that the Equality Act itself strikes the appropriate balance. I appreciate that is a matter for Westminster; but the Scottish proposals in this area as a whole are so much more sensible than the English that Westminster should welcome further Scottish guidance.</p> <p>The draft Bill contains modifications to s.12 of the 1977 Act which would considerably narrow its flexibility. At present 'any person' may be authorised, although it is no doubt common for these to be sponsored by a religious or humanist body. The amendments would require candidates to be a member of a religious or belief body and to solemnise only those marriages for which that body would nominate celebrants or seek prescription.</p> <p>The changes I would propose are: in subsection (1) restore the word 'person'; let subsection (1A) read '... if satisfied that the person seeking authorisation, or the religious or belief body of which he is a member, meets the qualifying requirements'; and omit subsection (1C). Subsection (1C) allows religious and belief bodies to impose a discipline on their lay members through the medium of Scots law: it is far more appropriate to leave this to internal religious rules alone.</p> <p>Lastly there is a general point arising out of s26(2) of the 1977 Act, which defines 'religious body' as 'an organised group of people meeting regularly for common religious worship'. The current regulations (SI 1977 No. 1670) appeared to have ignored this since none of the bodies prescribed in the Schedule 'meets regularly'. They are Scotland-wide, Britain-wide or supranational organisations, far too big for their members ever to meet. The Baptist and Congregational Unions are (or were) federations of local churches rather than 'groups of people'. What 'the Hebrew Congregation' is (or was) is anybody's guess: if it was meant to encompass the whole of Scottish Jewry of all traditions, then it certainly never met for common worship. It might be clearer, therefore, if this definition were amended to read "an organised group of people which meets, or whose constituent congregations meet, regularly for common religious worship".</p> <p>This would, admittedly, leave a possible doubt as to which organ of the body concerned should make an application under s.8(1C) or nominations under s.9. Should a Roman Catholic bishop, or the RC Bishops'</p>

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	<p>Conference, act? Can a local church of the United Reformed Church make a nomination if the National Synod of Scotland or the General Assembly does not? etc. But I strongly suggest that the Act does not attempt to resolve this doubt.</p> <p>In England & Wales, the amended 1995 Regulations already referred to attempted to do just that, and specific church authorities were listed in a Schedule. For other religious bodies, a definition of 'governing authority' was provided which depended on 'recognition by the members' of the body concerned. This is NOT a precedent to be followed. The Westminster Government listed church authorities on the basis of consultation responses: if a particular church organ said 'We should be the decision-makers' then it was prescribed as such. No attempt was made to check whether the assertion was warranted by the ecclesiology of the tradition concerned; nor would the Government have been well-placed to carry out such a check. The 'members' recognition' test is also fraught with problems: after all, no church put its mind to this particular question when it was founded. If this turns out to be controversial the courts will have to read the Regulations' definition against the history and constitution of a particular church in order to give it effect.</p> <p>Scotland should therefore avoid any attempt to identify competent church organs by legislation. This will allow religious bodies to identify these by internal consensus. If different organs, each claiming to represent one particular tradition, make contrary representations to the Scottish Ministers or the Registrar-General, the latter would at least be free to attempt a common-sense mediation of the dispute before the courts became involved.</p>
Christian Institute	<p>The concept of <i>associative</i> discrimination has been significantly developed since 2003 and now applies to all protected characteristics. This opens the door to a sex discrimination claim along the lines that a person, X, is found to have been discriminated against because of the sex of his intended or actual spouse, Y. Had the concept of associative discrimination been more developed in 2003, it is likely the outcome in the Macdonald case would have been different.</p> <p>No doubt the reason why there has not been any (to our knowledge) reported case on the issue since 2003 is that the Employment Equality (Sexual Orientation) Regulations were enacted that same year. The regulations put an end to the use of sex discrimination law in such cases by providing a more immediate remedy for homosexuals who have been discriminated against.</p>

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	<p>We note that the Equality Act 2010 makes provision for a claim based on <i>combined</i> characteristics. This would open the door to claims based on both sexual orientation and sex discrimination law, as claimants seek to pursue claims based on the <i>interaction</i> of the two.</p> <p>If a claim for discrimination based on sexual orientation is precluded because of particular exceptions, it is open to a claimant simply to pursue a claim for sex discrimination, whether separately or in combination with a sexual orientation claim. A male claimant, for example, would argue that had his intended spouse been a woman, there would have been no problem, and that the refusal of the marriage is only because he is intending to marry a man, putting the case in the territory of sex discrimination.</p> <p>It is necessary, therefore, that with regard to same-sex marriage, similar exceptions apply in relation to sex discrimination as apply in relation to sexual orientation. Otherwise the latter exceptions would be worthless. The Westminster Government’s intended amendment on this point is far preferable, and we suggest that the Scottish Government should consider a similar approach.</p> <p>Clause 2(5) of the Marriage (Same Sex Couples) Bill: (5) In Schedule 3 to the Equality Act 2010 (services and public functions: exceptions), after Part 6 insert— “PART 6A MARRIAGE OF SAME SEX COUPLES IN ENGLAND AND WALES <i>Marriage according to religious rites: no compulsion to solemnize etc</i> 25A (1) A person does not contravene section 29 only because the person— (a) does not conduct a relevant marriage, (b) is not present at, does not carry out, or does not otherwise participate in, a relevant marriage, or (c) does not consent to a relevant marriage being conducted, for the reason that the marriage is the marriage of a same sex couple. (2) Expressions used in this paragraph and in section 2 of the Marriage (Same Sex Couples) Act 2013 have the same meanings in this paragraph as in that section.”.</p>
Church of Scotland	<p>The wide definition of ‘approved celebrant’ in proposed paragraph 25A(3)(a) of the Equality Act 2010, Schedule 3 read together with the terms of paragraph 25A(2) and (3) appears to negate the two-level ‘opt-in’ proposed by the Scottish Government which would permit, but not require, a minister or deacon to apply to be eligible to solemnise</p>

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	<p>same sex marriages in the event that the Church of Scotland permits its ministers and deacons to do so. In paragraph 25A 'approved celebrant' includes all Church of Scotland ministers and deacons and permits them to refuse to solemnise a same sex marriage only in certainly limited circumstances. The Church is concerned that this may be construed as implying that, if the Church of Scotland decides to allow its ministers and deacons to solemnise same sex marriages, then all ministers and deacons must apply to become and remain eligible to do so unless they fall within the narrow exception provided for in paragraph 25A(2). For a minister or deacon not to do so would amount to a refusal to solemnise same sex marriages. As above, the Church does not wish a minister or deacon to be placed in a situation where he or she is unable to take account of material considerations beyond his or her own religious beliefs.</p> <p>The Church proposes that Scottish and UK legislation should be consistent in providing, without qualification, that an approved celebrant may refuse to solemnise a marriage if the parties to the marriage are of the same sex. This would match the equivalent provision in the Norwegian law of marriage and the terms of existing paragraph 25 (1) and proposed paragraph 25(3) of the Equality Act 2010, Schedule 3. Proposed paragraph 25A(2) should be removed or, if it is to be retained, the limited scope of permitted reasons for refusal should be extended beyond the religious beliefs of the approved celebrant.</p> <p>Section 8 of the Marriage (Scotland) Act 1977 (as proposed) should be amended to provide that no religious body may nominate one of its members so that he or she is registered as empowered to solemnise same sex marriages without the agreement of that member. Section 8 should also be amended to make clear that there is no duty on any member of a religious body to allow himself or herself to be so nominated. Section 8 should be further amended to provided that a religious body may not require any of its members to be or to remain so registered</p> <p>Paragraph 2 of the Equality Act 2010, Schedule 23 provides limited and inadequate protection to ministers and others who may have control over church buildings. For example, when faced with a request by another celebrant who might have been permitted to use the buildings to solemnise an opposite sex marriage, to use the buildings to solemnise a same sex marriage, it appears that a minister's own religious beliefs or his or her desire to preserve the peace of his or her congregation are irrelevant considerations. In so far as a Church court or committee might be involved, it is not clear what protection paragraph 2 offers them. Accordingly the Church proposes that Scottish and UK legislation should be consistent in providing, without qualification, that any person having control over or</p>

RESPONDENT	COMMENT
	responsibility for the use of church buildings may refuse to permit them to be used for the solemnisation of a same sex marriage.
Equality Network	We think that the detailed requirements set out in section 9(2)(f) and (g) of the draft bill, which amend section 9 of the Marriage (Scotland) Act 1977, are too prescriptive. Marriage celebrants conducting mixed-sex marriages should have the option of using the phrase “accept each other in marriage” and declaring that the parties are married, in the marriage ceremony, as an alternative to “accept each other as husband and wife” and declaring that the parties are husband and wife. That way, celebrants and couples who wish to use the traditional form of words may do so, while those wishing the alternative form may use that.
Law Society of Scotland	We note the ECHR decision in January 2013 in the case of <i>Eweida and others v United Kingdom</i> which held that, whilst enshrined in Art 9, freedom of thought, conscience and religion was one of the foundations of a 'democratic society' within the meaning of the Convention, the Court left the member states party to the Convention a certain margin of appreciation in deciding whether and to what extent an interference was necessary (see [79]-[84] of the judgment). The proposal would appear to be consistent with existing case law and the EU Charter of Fundamental Rights in particular Articles 7, 9 and 10 and 21.
Scotland for Marriage	<p>The amendment the Government proposes is not broad enough and it is essential that it covers both sexual orientation discrimination AND sex discrimination. The legislation for England and Wales, currently being considered by the Westminster Parliament, includes an equivalent clause that provides protection from discrimination claims across all protected characteristics. Clause 2(5) of the Marriage (Same Sex Couples) Bill states:</p> <p>(5) In Schedule 3 to the Equality Act 2010 (services and public functions: exceptions), after Part 6 insert—</p> <p>“PART 6A MARRIAGE OF SAME SEX COUPLES IN ENGLAND AND WALES <i>Marriage according to religious rites: no compulsion to solemnize etc</i> 25A (1) A person does not contravene section 29 only because the person—</p> <ul style="list-style-type: none"> (a) does not conduct a relevant marriage, (b) is not present at, does not carry out, or does not otherwise participate in, a relevant marriage, or (c) does not consent to a relevant marriage being conducted, for the reason that the marriage is the marriage of a same sex couple. <p>(2) Expressions used in this paragraph and in section 2 of the Marriage (Same Sex Couples) Act</p>

RESPONDENT	COMMENT
	<p>2013 have the same meanings in this paragraph as in that section.”.</p> <p>The approach taken at Westminster is clearly different from that being taken by the Scottish Government. The Scottish Government risks providing less protection under Scottish law than the law south of the border would provide. It must reconsider the amendment it is requesting, and ask the Westminster Government for an amendment directly parallel to the above.</p>
Scottish Council of Jewish Communities	<p>However, we would propose an amendment to section 25A (2) to read (proposed addition in italics): “Sub-paragraph (1) permits a refusal relating to sexual orientation only if it is made because to solemnise the marriage or, as the case may be, register the civil partnership would conflict with the approved celebrant’s religious or philosophical beliefs or those of the faith community to which the approved celebrant is affiliated.”</p>
QUESTION 9	
Individual	<p>My comments here relate to clause 12 of the Bill which covers freedom of religion as well as expression.</p> <p>I doubt that clause 12(c) achieves anything. I am not convinced there are rules of law outside the Convention that guarantee such freedom. In the common law of Scotland, as of England, one's basic freedom is to do anything one chooses to do unless the law restricts it, which includes saying what one wishes provided it is not defamatory, obscene, a threat to public order or the like. It also covers assembling for lawful worship provided one does not cause an obstruction or a nuisance, and following other harmless religious practices.</p> <p>Certainly there is sometimes a balance to be struck. If a Roman Catholic protester shouts at an inoffensive same-sex married couple that their marriage is a fraud and that they are sodomites bound for Hell, just as there is a balance to be struck if the couple respond that Roman Catholicism is an alien and bigoted superstition which should never have been allowed in Scotland, either utterance has the potential, in the right circumstances, to cause a breach of the peace, and respect for free expression can be weighed against the objects of public order law. But the law can strike that balance without the aid of clause 12(1)(c).</p> <p>As for Convention rights, there is no question of restricting the rights themselves, since an Act of the Scottish Parliament will be construed whenever possible as compatible with such rights (HRA 1998 s.3(1)) and will be struck down insofar as it remains incompatible. In that respect there is no 'doubt' to avoid.</p>

RESPONDENT	COMMENT
	<p>But the Convention rights to manifest religion and to free expression under Articles 9 and 10 are subject to restrictions 'prescribed by law' and necessary (inter alia) to protect the rights of others. Those 'rights of others' may themselves flow from the law. The Convention itself thus calls for a balance to be struck between the relevant right and the provisions of national law. Convention jurisprudence already indicates how that balance is to be struck; but weakening the effect of national legal provisions, for example by clauses 12(1)(a)-(b), inserted 'for the avoidance of doubt', may seriously disturb that balance. If the provisions of the Bill on same-sex marriage are not allowed to 'affect the exercise' of Convention rights in any way, it could be argued that this requires their effect to be disregarded altogether, or same-sex couples' rights and status to be treated as not 'prescribed by law'.</p> <p>I should be happier to see clause 12 omitted, or at least carefully considered with my concerns in mind.</p> <p>I have no problem with prosecutorial guidelines, provided the Lord Advocate remembers that same-sex couples provoked by what they see as insults to their orientation and relationship may understandably reply with what their critics see as insults to their religion. Both or neither could be subject to criminal sanctions, according to the circumstances; but it can never be just to protect one type of utterance and not the other.</p>
Catholic Parliamentary Office	<p>Insert subsection 10(4) Equality Act 2010: "For the avoidance of doubt the protected characteristic of religion or belief include beliefs regarding the definition of marriage".</p> <p>Insert subsection 149(10) Equality Act 2010: "Compliance with the duties in this section requires ensuring that a belief regarding the definition of marriage is respected and that no person should suffer any detriment in respect of the holding or the reasonable expression of such a belief".</p> <p>Insert paragraph 25A at schedule 3 Equality Act 2010: Same-sex marriage: Scotland "(1) It is not a contravention of section 29, so far as relating to sex discrimination or sexual orientation discrimination, for an approved celebrant to decline to marry a couple of the same sex. (2) An approved celebrant who declines to marry a couple of the same sex has no duty to make alternative arrangements by way of reasonable accommodation of any request to solemnise such a marriage. (3) In sub-paragraph (1) and (2) "approved celebrant" has the meaning given in section 8(2)(a) of the Marriage</p>

RESPONDENT	COMMENT
	<p>(Scotland) Act 1977 (persons who may solemnise marriage).”</p> <p>Insert subsection 1(c) to section 35 Ethical Standards in Public Life (Scotland) Act 2000: “the legitimacy and value in a pluralistic and tolerant society of the belief that marriage is the exclusive union of one man and one woman”.</p> <p>So that section 35(1) reads as follows: Councils’ duties to children (1) It is the duty of a council, in the performance of those of its functions which relate principally to children, to have regard to-</p> <ul style="list-style-type: none"> (a) the value of stable family life in a child’s development; (b) the need to ensure that the content of instruction provided in the performance of those functions is appropriate, having regard to each child’s age, understanding and stage of development; and (c) the legitimacy and value in a pluralistic and tolerant society of the belief that marriage is the exclusive union of one man and one woman”. <p>Insert subsection 2A to section 8 Charities and Trustees Investment (Scotland) Act 2005: “For the purposes of subsection 2 the provision of benefits on the basis of same-sex or opposite-sex marriage is not to be regarded as disbenefit”.</p> <p>Insert subsection 193(3) Equality Act 2010: “For the purposes of subsection (2) the provision of benefits on the basis of same-sex or opposite-sex marriage may be a legitimate aim if a person acts in pursuance of a religious purpose or vocation”.</p> <p>Insert subsection 2A into section 38 Criminal Justice and Licensing (Scotland) Act 2010: “For the avoidance of doubt nothing in subsection 1 prohibits or restricts any expression in itself of a belief regarding the definition of marriage as being between one man and one woman”.</p> <p>Insert subsection 7 to section 1 Offensive Behaviour at Football and Threatening Communications (Scotland) Act 2012: “For the avoidance of doubt nothing in subsection 1 prohibits or restricts any expression in itself of a belief</p>

RESPONDENT	COMMENT
Individual	<p>regarding the definition of marriage as being between one man and one woman”.</p> <p>The wording of section 12 is heavily caveated - and I am concerned it could be interpreted in such a way as to allow the legislation to affect the nature of these convention rights (in the manner covered by the convention) - as section 12 only protects the "exercise" of these rights, not what the rights actually are. I am concerned that the wording of s12 permits an interpretation that would in practice erode the rights of free speech and freedom of religion.</p> <p>I suggest that much tighter wording is required to protect these fundamental human rights. I would drop "For the avoidance of doubt", and would also drop some of the words in between; and refer to "Act" rather than "Part" as these words, in my view unduly limit the protection of these rights (if they are not intended to limit protection of these rights, they need not be there - if they are intended to limit the protection of these rights then it would have been reasonable to explain the intention behind including them in the consultation).</p> <p>How about</p> <p>"(1)Nothing in this Act affects the nature, extent, or exercise by any person of the following rights:-</p> <p>(a) -(c) as draft</p> <p>(2) as draft</p> <p>(3) It is specifically provided that holding and expressing a traditional view of marriage as between one man and one woman is not of itself considered to be homophobic or discriminatory</p> <p>(4) This section 12 applies not only to religious celebrants but to all individuals of any faith or none</p>
Scotland for Marriage	<p>The Scottish Government must ensure that the Equality Act 2010 is amended to specifically include beliefs about marriage under the protected characteristic of religion or belief so that such discrimination is unlawful:</p> <p>Insert subsection 10(4) Equality Act 2010: <i>“For the avoidance of doubt the protected characteristic of religion or belief include beliefs regarding the definition of marriage”.</i></p> <p>Public order law must also be amended to provide specific freedom of expression clauses for those expressing the belief that marriage should only be between a man and a woman.....</p>

RESPONDENT	COMMENT
	<p>In addition to the proposed section 12, specific amendments are needed 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.....: in order to protect free speech and debate, free speech clauses should be included in public order legislation. We suggest amendments along the following lines:</p> <p>Insert subsection 2A into section 38 Criminal Justice and Licensing (Scotland) Act 2010:</p> <p><i>“For the avoidance of doubt nothing in subsection 1 prohibits or restricts any expression in itself of a belief regarding the definition of marriage as being between one man and one woman”.</i></p> <p>Insert subsection 7 to section 1 Offensive Behaviour at Football and Threatening Communications (Scotland) Act 2012:</p> <p><i>“For the avoidance of doubt nothing in subsection 1 prohibits or restricts any expression in itself of a belief regarding the definition of marriage as being between one man and one woman”.</i></p>
Zia-UI-Quran Trust	<p>....the following statements should be clearly expressed in the Bill:</p> <p>The belief in opposite sex marriage is necessary to comply with the religious doctrine of many religions and relate to the strongly held religious convictions of a significant number of the religion’s followers. The Government entirely accepts that it is possible to be opposed to same sex marriage without being homophobic.</p> <p>The Government further accepts that freedom of speech means that it should remain fully possible to argue against same sex marriage.</p> <p>In any occasion where is doubt, similar statements should be introduced.</p>
Question 10	
Scotland for Marriage	<p>The Government must legislate on the above points, for example:</p> <p>Insert section 9A Education (Scotland) Act 1980:</p> <p><i>“Any pupil in a school to which section 9 applies may be withdrawn by his or her parents from any instruction where</i></p>

RESPONDENT	COMMENT
	<p>the notion of same-sex marriage is presented; and no pupil shall in any such school be placed at any disadvantage with respect to the instruction given therein by reason of his or her parents' opposition to same-sex marriage, or by reason of his or her being withdrawn from any instruction where such a notion is presented".</p> <p>Insert subsection 1(c) to section 35 Ethical Standards in Public Life (Scotland) Act 2000:</p> <p>"the legitimacy and value in a pluralistic and tolerant society of the belief that marriage is the exclusive union of one man and one woman".</p> <p>So that section 35(1) reads as follows:</p> <p>Councils' duties to children</p> <p>(1) It is the duty of a council, in the performance of those of its functions which relate principally to children, to have regard to-</p> <p>(a) the value of stable family life in a child's development;</p> <p>(b) the need to ensure that the content of instruction provided in the performance of those functions is appropriate, having regard to each child's age, understanding and stage of development; and</p> <p>(c) the legitimacy and value in a pluralistic and tolerant society of the belief that marriage is the exclusive union of one man and one woman".</p> <p>Insert section 56A Standards in Scotland's Schools etc Act 2000:</p> <p>"The Scottish Ministers must, in exercising their discretion under section 56, ensure that any guidance issued respects and gives proper regard to the validity of an exclusive belief in opposite-sex marriage".</p>
Catholic Education Commission	<p>Thus, we propose the following amendments to existing legislation:</p> <p>1. The Education (Scotland) Act 1980 is amended as follows:</p>

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	<p>Section 21 (Management of denominational schools):</p> <p>1.1 in sub-section (2), after "Subject to subsections (2A)" insert: ", (2AA)"</p> <p>1.2 after sub-section (2), insert: "(2AA) The faith aspects of the curriculum shall be determined by representatives of the church or denominational body in whose interest the school has been conducted."</p> <p>The Standards in Scotland's Schools etc. Act 2000 is amended as follows: After Section 56 (Guidance to education authorities as to manner of conducting sex education) insert: "Section 56A For the purposes of Section 56, no school shall be under any duty as a result of guidance issued, to promote or endorse an understanding of the nature of marriage that is contrary to the character and designation of the school or the church or denominational body in whose interest the school has been conducted."</p>
Faculty of Advocates	<p>Sex education is governed by the Standards in Scotland's Schools etc. Act 2000, section 56, which simply provides for guidance, to which education authorities should have regard. Parents have no statutory right to withdraw children from sex education. Withdrawal is permitted by guidance applying from time to time, and which is variable without the intervention of the Scottish Parliament. Parents may have limited rights to object, in terms of the European Convention on Human Rights, Protocol 1, article 2, if teaching is contrary to their religious and philosophical convictions but if knowledge is being conveyed objectively and without an aim of indoctrination, then it is not likely that such a claim would be sustained by the European Court of Human Rights (see Kjeldsen, Busk Madsen and Pedersen v Denmark (1976) 1 EHRR 711).</p>
Question 11	
Individual	<p>Re private documents, the Scottish Government does not appear to have considered the situation where a pre-existing document refers to a person's spouse or civil partner. If a Will or Trust Deed refers to "my son and his spouse or civil partner", it seems obvious that the granter would have included a same-sex spouse had this been a possibility at the time. But under the proposal, he would not be included: he is neither a "spouse" in the traditional sense, nor a "civil partner".</p>

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	<p>One solution would be to enact that “civil partner” in pre-existing documents includes a same-sex spouse.</p> <p>I also submit that any legislation about how private documents are interpreted should be qualified with “Unless the context requires otherwise”.</p>
Faculty of Advocates	<p>We consider that the implementation of the proposals for same sex marriage would raise a significant issue in relation to the definition of “cohabitant” for the purposes of the statutory scheme for financial provision for cohabitants in terms of sections 25 to 29 of the Family Law (Scotland) Act 2006.</p> <p>Section 25(1) of that Act provides that “cohabitant” means either member of a couple consisting of: (a) a man and a woman who are (or were) living together as if they were husband and wife; or (b) two persons of the same sex who are (or were) living together as if they were civil partners”</p> <p>The draft bill makes no consequential amendments to this provision. Without such consequential amendment the test for who qualified as a cohabitant would then be clearly different for opposite sex and same sex couples.</p> <p>Subject to the conclusion that the Scottish Government reaches as to the definition of marriage, consideration should be given as to whether the 2006 Act requires to be amended to: (1) redefine a same sex cohabiting couple as “if they were married” (that is same sex cohabitants should no longer be defined in terms of having a relationship akin to civil partners) (2) extend the definition to include a same sex cohabiting couple as “if they were married” (that is to include both types of arrangement as being capable of constituting cohabitation for the purposes of the 2006 Act)</p> <p>Both options have potential problems. Option (1) may require a qualitative distinction to be drawn between different types of same sex cohabitant arrangements. Option (2) may also require such a distinction should be drawn and may suggest discrimination between same sex couples who chose to live together (without any requirement of a sexual relationship which is implicit in the concept of marriage) and opposite sex couples who do not have the option of entering into a civil partnership arrangement.</p> <p>This is a particular difficulty that illustrates our general point about the complexity and potential for confusion in</p>

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	relation to status were the Bill to become law.
Scotland for Marriage	<p>The following amendments would go some way to backing up the ministerial assurances:</p> <p>Insert subsection 2A to section 8 Charities and Trustees Investment (Scotland) Act 2005:</p> <p>“For the purposes of subsection 2 the provision of benefits on the basis of same-sex or opposite-sex marriage is not to be regarded as disbenefit”.</p> <p>Insert subsection 193(3) Equality Act 2010:</p> <p>“For the purposes of subsection (2) the provision of benefits on the basis of same-sex or opposite-sex marriage may be a legitimate aim if a person acts in pursuance of a religious purpose or vocation”.</p> <p>The Public Sector Equality Duty (PSED) is a powerful part of the Equality Act 2010. It puts local authorities under a duty to eliminate discrimination, advance equality of opportunity and foster good relations. Local authorities must be mindful of this duty in everything they do. A problem could arise where a church that holds traditional views on marriage (and therefore refuses to have same-sex marriages) seeks to hire a publicly owned facility such as a community centre. The local authority could consider that such a church is ‘homophobic’ and allowing such a church to use its premises would conflict with its responsibilities under the PSED. The Equality Act should be amended to stop this happening. An amendment along the following lines should be considered:</p> <p>Insert subsection 149(10) Equality Act 2010:</p> <p>“Compliance with the duties in this section requires ensuring that a belief regarding the definition of marriage is respected and that no person should suffer any detriment in respect of the holding or the reasonable expression of such a belief”.</p>
QUESTION 12	
Individual	<p>"There are various legislative provisions in which it should be made clear that references to marriage or spouse DO extend to same-sex marriage, in case the context suggests otherwise.</p> <p>I recall that the Forced Marriages etc (Protection and Jurisdiction) (Scotland) Act 2011 contains a power to extend</p>

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	<p>the rules contained therein to civil partnership (a slightly odd provision, somewhat inconsistent with the amendments that Act made to s. 67 of the Children's Hearings (Scotland) Act 2011). If the thinking behind NOT immediately applying the Forced Marriages legislation to civil partnerships is that families will not force their young members into civil partnerships (which are always same-sex) then the same thinking might apply to same-sex marriages. I do not advocate making an exception but bring it the Government's attention for consideration.</p> <p>Also, there is an oddity in the Succession (Scotland) Act 1964 which treats marriages differently from civil partnerships, in relation to adopted children. With adoptions by married couples (or as s. 24(1)(a) of the 1964 Act says, "two spouses"), the child is treated as a brother or sister of the whole blood; but in any other case as a brother or sister of the half blood. This ought to have been amended by the Adoption and Children (Scotland) Act 2007 to include at least civil partners because there is no reason to treat the adopted child differently depending upon which type of "relevant couple" adopts the child. The Marriage and Civil Partnership Bill provides an opportunity to make the appropriate amendment to include all "relevant couples" - or at least, if the policy of the law is to distinguish between registered and unregistered relationships, to include civil partners. The draft section 4(1) of the Bill probably means that same-sex married couples will be covered by s. 24 of the 1964 Act, but it still leaves civil partners out of the picture.</p> <p>Relationships of affinity sometimes appear in statute and it might be a useful addition to the Bill to specify that relationships traced through marriage include relationships traced through marriages between same-sex couples. An example is s. 15(2) of the Adoption and Children (Scotland) Act 2007, which talks about adoption by "step-parents" and "relatives": the former is undefined and the latter is defined in s. 119.</p> <p>Another oddity that might usefully be cleared up in this bill is section 9(1)(c) of the Family Law (Scotland) Act 1985, as amended by the Human Fertilisation and Embryology Act 2008, which allows claims under s. 9(1)(c) in respect of a child of whom both parties are parents by virtue of sections 33 and 42 of the 2008 Act. This is an ill worded amendment and should read section 33 OR section 42, for otherwise marriage partners are treated more favourably (or worse, depending on whose side you are on) than civil partners - because they don't have to prove acceptance of the child as a child of the family.</p> <p>The 2008 Act will require some thought to ensure it is amended appropriately because it is presently based on the</p>

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	assumption that marriage is between an opposite sex couple. This is, of course, a reserved matter, but London did not deal with the Scottish provisions in 2008 as well as they dealt with the English provisions."
Scottish Council of Jewish Communities	<p>Section 15 of the Family Law (Scotland) Act 2006 inserted a new clause 3A into the Divorce (Scotland) Act 1976, relating to religious divorce. This provision, which was requested by the Jewish Community, comes into effect when:</p> <p>(2)(a) the applicant is prevented from entering into a religious marriage by virtue of a requirement of the religion of that marriage;</p> <p>and</p> <p>(2)(b) the other party can act so as to remove, or enable or contribute to the removal of, the impediment which prevents that marriage.</p> <p>Since the Orthodox Jewish Community will not under any circumstances, carry out same sex marriages, and since Liberal and Reform authorities do not require the consent of both parties in order to issue a religious divorce, this legislation does not require to be extended to same sex marriages.</p>
Question 13	
Individual	I take the point that adultery will applied equally to married couples whether they are same-sex or opposite-sex but of course it may be assumed that where a spouse in a marriage of the same-sex variety is unfaithful she or he is likely to be so with a person of the same-sex and therefore adultery would not be established. I think the difficulty relates to s2(2) of the Divorce (Sc) Act 1976 where spouses are allowed up to three month resumption of cohabitation without losing the opportunity of a divorce based on adultery. That opportunity to attempt reconciliation is denied to those seeking a divorce on the basis of unreasonable behaviour which is unfair. It is also unfair that adultery, and the opportunity to reconcile is unavailable to spouses at the moment where the sexual activity does not include sexual intercourse. The answer would be to abolish adultery as a fact which establishes irretrievable breakdown.
Faculty of Advocates	<p>There is no statutory definition of adultery in the Divorce (Scotland) Act 1976, and if this were to apply to same sex marriages by virtue of clauses 4 and 5 of the proposed Bill, a definition would be necessary to clarify that it is restricted to heterosexual adultery.</p> <p>This again raises the question of how the Scottish Government concludes to define marriage. If, for example, the Scottish Government concludes not to include an exclusive sexual relationship between spouses in the definition of</p>

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	marriage, simplicity would suggest that “adultery” is simply removed as a ground for divorce, and all married couples rely on any sexual impropriety of their spouse as behaviour meaning they cannot reasonably be expected to continue to cohabit.
Question 14	
Faculty of Advocates	It would be preferable to address the issue of whether impotency renders marriage voidable, in terms of the recommendations of the Scottish Law Commission, rather than to impose a different rule for same sex couples. Declarator of nullity is not required to protect the financial circumstances of spouses as financial provision is available on divorce in terms of the Family Law (Scotland) Act 1985.
Question 15	
Equality Network	Survivors’ Pensions: There is a further problem for married couples where one spouse obtains gender recognition, turning the marriage from a mixed-sex one into a same-sex one. In such a case, application of the 2005 or 1988 rule would mean that one spouse (the original wife) would lose a large part of their survivor’s pension entitlement overnight, because it would, before gender recognition, have been based on the 1978 rule. The legislation should ensure that there is no reduction in survivor’s pension entitlement when a person obtains gender recognition
UNISON	<p>We therefore welcome the recent ET judgment in Walker v Innospec Ltd [2012]. On his death, Mr Walker’s civil partner would receive an annual survivor’s pension of around £500. If Mr Walker was married to a woman, his widow would receive around £41,000. The judge found the exception in the Equality Act 2010 which limits the retrospectivity of the requirement to provide the same benefits to civil partners and married couple to be incompatible with the EU Framework Employment Equality Directive 200/78, as interpreted by the CJEU in Maruko [2008] and Roemer [2011].</p> <p>Rather than this wrong finally being righted, we are extremely concerned that the Marriage (Same Sex Couples) Bill would amend the Equality Act 2010 to extend the exception to married same-sex couples.</p> <p>This will have a particularly devastating impact on married couples where one spouse obtains gender recognition, turning their mixed sex marriage into a same sex marriage. The effect of the current Bill would be that one spouse would lose a large part of their survivor’s pension overnight.</p>
Question 16	
Church of Scotland	Firstly, in contrast with the Scottish Government’s intentions and in particular section 94A(3)(d), the proposed modifications to the Equality Act 2010 restrict the circumstances in which a minister or deacon may lawfully refuse

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	<p>to register a civil partnership. They only permit refusal to register a civil partnership if to do so 'would conflict with the approved celebrant's religious or philosophical beliefs'. This is too narrow and excludes, for example, the possibility that a minister may refuse to register a civil partnership in order to preserve the peace of his or her congregation.</p> <p>Secondly, it is not made clear in the draft Bill that a religious body may nominate one of its members so that he or she is registered as empowered to register civil partnerships only with the agreement of that member. Neither is it specified that there is no duty on any member of a religious body to allow himself or herself to be so nominated nor that a religious body may not require any of its members to be so nominated and, if registered, to remain so registered.</p> <p>Accordingly the Church proposes that Scottish and UK legislation should be consistent in providing, without qualification, that an approved celebrant may refuse to register a civil partnership. This would match the equivalent provision in the Norwegian law of marriage and the terms of existing paragraph 25(1) and proposed paragraph 25(3) of the Equality Act 2010, Schedule 3. Proposed paragraph 25A(2) should be removed or, if it is to be retained, the limited scope of permitted reasons for refusal should be extended beyond the religious beliefs of the approved celebrant.</p> <p>Furthermore, section 94A of the Civil Partnership (Scotland) Act 2004 (as proposed) should be amended to provide that no religious body may nominate one of its members so that he or she is registered as empowered to register civil partnerships without the agreement of that member. Section 94A should also be amended to make clear that there is no duty on any member of a religious body to allow himself or herself to be so nominated. Section 94A should be further amended to provided that a religious body may not require any of its members to be or to remain so registered.</p>
East Ayrshire Council	<p>Registration Staff note that consideration requires to be given to the terminology in this section. Partnerships can only be registered by a registrar but could be solemnised by the celebrants of religious and belief bodies.</p> <p>In addition, consideration should be given to the term 'civil' because this would not be a civil function if carried out by religious or belief celebrants.</p>

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Glasgow City Council	There is some clarification on the terminology required as the religious and belief bodies would not be 'registering' the civil partnership, as this would need to be done through the relevant Local Authority.
Scottish Council of Jewish Communities	<p>However, we would propose an amendment to section 25A (2) to read (proposed addition in italics):</p> <p style="padding-left: 40px;">“Sub-paragraph (1) permits a refusal relating to sexual orientation only if it is made because to solemnise the marriage or, as the case may be, register the civil partnership would conflict with the approved celebrant’s religious or philosophical beliefs <i>or those of the faith community to which the approved celebrant is affiliated.</i>”</p>
Question 17	
Individual	<p>The key provision of Chapter 2 of the Bill is surely clause 6(3)(a), which will prevent a qualifying civil partnership from being an impediment to marriage. But the intention is that it should not impede the partners' marriage to each other; and the Bill does not say this. As it stands, a civil partnership between X and Y will not impede the issue of a marriage schedule for a marriage between Y and Z, provided the conditions in s.5(6) of the 1977 Act are satisfied. This is inconsistent with s.24(A1) under which such a marriage is a criminal offence. If the new s.5(6) were to define a 'qualifying civil partnership' as 'a civil partnership between the parties to the intended marriage which has not been dissolved or annulled', that would meet my point. (There is no need for 'ended by death': a civil partnership ended by death cannot be converted into a marriage, whether it would otherwise be 'qualifying' or not.)</p> <p>My major reservation concerns the requirement in new s.5(6)(a) – and carried through various consequential provisions – that a qualifying civil partnership should have been registered in Scotland. This would mean, for example, that if couple X and Y enter a civil partnership in Scotland and later wish to marry in Scotland, they can do so without either the cost or the negative symbolism of dissolving their partnership first; but if couple A and B, having entered a civil partnership in Northern Ireland, move permanently to Scotland and acquired a Scottish domicile, wish to marry in Scotland they must go through the process of dissolution first.</p> <p>I see no rational ground for this distinction and the hardship it would cause couples who move to Scotland. If domicile is the deciding factor for capacity to marry in Scotland it should also be the deciding factor for capacity to 'convert'. If 'capacity to convert' were truly determined by the place of a partnership's registration, then a civil partnership entered into in Scotland should be capable of conversion in Northern Ireland - which, of course, it is not. Any idea that the Northern Irish legislators should permanently control the destiny of partnerships entered</p>

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	into there would be incompatible with reg. 4 of SI 2005 No. 629, under which Scottish courts can dissolve or annul a civil partnership (including one entered into in Northern Ireland) on the basis of Scottish domicile or habitual residence.
Highland Council	Some concerns are expressed by Registrars regarding the practical administration of retrospective changes to relationships being applied. E.g. we have registered babies with same sex parents and the date of civil partnership appears on the birth extract. If a civil partnership is “converted” to a marriage will the date remain or changed to the date of “conversion”.
Faculty of Advocates	With reference to paragraphs 4.16 to 4.19 of the consultation document, it is noted that the Faculty drew certain matters to the attention of the Scottish Government when responding to the consultation paper on Evidence in Civil Partnership and Divorce Actions (Scotland) Order 2012. The Faculty drew to the attention of the Government that the lacuna in relation to evidence for dissolution of civil partnerships prior to that measure left uncertain the status of persons whose civil partnerships had been dissolved on the evidence of one witness, contrary to law. The Faculty notes that this is now addressed in clause 22 of the Bill, but that the proposal is to pass legislation with wholly retrospective effect. The Faculty drew to the attention of the Government the difficulty inherent in retrospective legislation and suggested an alternative possibility that the problem was corrected by imposing a prospective measure, precluding future challenge to dissolution.
Question 18	

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<p>Scottish Transgender Alliance</p>	<p>The gender recognition process As the UK Marriage (Same Sex Couples) Bill does not provide a route to gender recognition for applicants who entered into a civil partnership outside the UK it is vital that the Scottish legislation provides for applicants who are in this position and resident in Scotland. However, the Scottish Government’s current proposals for such applicants (outlined in annex D, paragraph 18) are problematic. It is proposed that before applying for gender recognition, couples must first convert their civil partnership to a same-sex marriage in the country where it was registered. Once they have done that, they can obtain gender recognition and this will convert their marriage to a mixed-sex marriage. However, some countries with civil partnerships do not have same-sex marriage, so for people who registered a civil partnership there, conversion of the civil partnership to a same-sex marriage would not be possible. In such a case, the couple will still have to dissolve their civil partnership to obtain gender recognition, and the new law is completely ineffective.</p> <p>We suggest a system which is in some cases closer to the Scottish Government’s alternative proposals in paragraphs 23 to 33 of annex D.</p> <p>For applicants married in Scotland we recommend:</p> <ol style="list-style-type: none"> 1. When the applicant applies to the Gender Recognition Panel (GRP) both the applicant and their partner submit a statutory declaration stating that they wish to remain married. 2. Following approval by the panel, prior to which either party can withdraw their statutory declaration (in which case an interim certificate would be awarded, as per the current procedure), full gender recognition is awarded. 3. The GRP contact National Records of Scotland (NRS) and inform them of the successful application. 4. Using a similar system as is already used to provide successful applicants with a new birth certificate, NRS arrange for a new marriage certificate to be issued in the new name and gender at the same time as the new birth certificate is issued. <p>For applicants married outwith the UK we recommend: Assuming that the UK Marriage (Same Sex Couples) Bill passes, applicants living in Scotland who married outside the UK will be able to apply for gender recognition under the provisions outlined in the UK Government’s draft legislation. Under paragraph 9 of Schedule 5 to the UK bill, gender recognition will not affect the continuity, under the law of England and Wales, of a marriage from outside the UK. However, the Marriage and</p>

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	<p>Civil Partnership (Scotland) Bill will need provisions to ensure the continuity in Scotland of a post gender recognition marriage from outside the UK. We also suggest that couples should be able if they wish to undergo a second marriage ceremony as is currently provided for couples who were married outside the UK and are not, or are unable to prove that they are, validly married in Scots law (as provided for by section 20 of the Marriage (Scotland) Act 1977).</p> <p>For applicants who have a civil partnership registered in Scotland we recommend:</p> <ol style="list-style-type: none"> 1. When the applicant applies to the GRP both the applicant and their partner submit a statutory declaration stating that they wish to convert their civil partnership to a marriage. 2. Following approval by the panel, prior to which either party can withdraw their statutory declaration (in which case an interim certificate would be awarded, as per the current procedure), full gender recognition is awarded. 3. The GRP contact NRS and inform them of the successful application. 4. A marriage certificate is issued to the applicants at the same time as the new birth certificate is issued. The legal effects of the marriage are backdated to the start of the civil partnership. <p>Our preference however would be for the Marriage and Civil Partnership (Scotland) Bill to introduce mixed-sex civil partnership in Scotland. Then step 4 above would involve the issue of a new civil partnership certificate in the new name and gender, rather than a marriage certificate. This would provide equality between married couples and those in civil partnerships and enable their civil partnership to simply continue following gender recognition. Couples who wanted to convert their civil partnership to a marriage would do so separately, via the method set out in the new legislation.</p> <p>For applicants who have a civil partnership registered outwith Scotland we recommend: If mixed-sex civil partnership is not introduced:</p> <ol style="list-style-type: none"> 1. When the applicant applies to the GRP both the applicant and their partner submit a statutory declaration stating that they wish to convert their civil partnership to a marriage. 2. Following approval by the panel, prior to which either party can withdraw their statutory declaration (in which case an interim certificate would be awarded, as per the current procedure), full gender recognition is awarded. 3. The GRP contact NRS and inform them of the successful application.

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	<p>4. A marriage certificate is issued to the applicants at the same time as the new birth certificate is issued. The legal effects of the marriage are backdated to the start of the civil partnership.</p> <p>Our preference however would be for the Marriage and Civil Partnership (Scotland) Bill to introduce mixed-sex civil partnership in Scotland. Then steps 3 and 4 above could be replaced by: The couple either return to their original civil partnership jurisdiction to request changes to their civil partnership certificate to reflect the new name and gender, OR If their original civil partnership jurisdiction does not support mixed-sex civil partnership or does not recognise gender recognition, the couple obtain a new civil partnership certificate by undertaking a second civil partnership ceremony under a rule mirroring section 20 of the Marriage (Scotland) Act 1977.</p> <p>And as above, couples who wanted to convert their civil partnership to a marriage would do so separately, via the method set out in the new legislation.</p> <p>Applications by both civil partners: As is provided by the UK Marriage (Same Sex Couples) Bill (paragraph 5 of Schedule 5) we suggest that the Scottish Government's legislation includes a process for the continuation of a couple's civil partnership where both couples are awarded gender recognition. Although it may not be common, the Scottish Transgender Alliance are in contact with a couple in this situation, and are sure that there will be others to whom this applies. A simplified procedure would be beneficial to such couples and the gender recognition panel, enabling their civil partnerships to continue uninterrupted and reducing the amount of administration which would otherwise be involved.</p> <p>For applications by both civil partners we recommend:</p> <ol style="list-style-type: none"> 1. Both partners apply to the GRP and submit statutory declarations stating that they wish their civil partnership to continue. 2. Following approval of both applications by the panel, prior to which either party can withdraw their statutory declaration (in which case an interim certificate would be awarded, as per the current procedure), full gender recognition is awarded. 3. The GRP contact NRS and inform them of the successful applications. 4. A new civil partnership certificate is issued to the applicants at the same time as the new birth certificates

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	<p>are issued.</p> <p>Interim gender recognition certificates: Currently an applicant who receives an interim GRC because they are married or in a civil partnership only has 6 months to initiate divorce or dissolution proceedings in order to obtain a full GRC, otherwise the interim GRC expires and the application process must be started again from the beginning. We are of the opinion that this is an unreasonably short amount of time in which a couple must make an extremely difficult decision of great magnitude, and this will be even more the case under the new legislation because the partners will have an additional option available to them. We are of the opinion that the new legislation should extend the interim GRC validity period to two years, in order to allow more time for either party to initiate divorce proceedings or for the non-transitioning spouse to confirm that they wish to remain in the marriage or civil partnership. This would dramatically reduce the pressure on couples during the gender recognition procedure and give them the best possible chance of maintaining their marriage or civil partnership.</p> <p>The maintenance of pension rights There is a significant pensions issue, relating to pension schemes for married people who obtain gender recognition. We strongly believe that the Scottish Government should apply a principle of non-regression to public sector pension schemes for which it is responsible, so that there is no loss of accrued pension benefits when a married person obtains gender recognition. There will be no cost to the pension scheme in applying this principle, as their liability remains the same as if gender recognition had not been obtained.</p> <p>Survivor's pensions under public sector pension schemes work as follows. A married woman receives a survivor's pension when her husband dies, based on his pension contributions since 1978. A married man receives a survivor's pension when his wife dies, based on her pension contributions since 1988. For civil partnership the applicable date in public sector pension schemes is 1988 for both partners. The UK Government proposes that, generally speaking, public sector pensions for people in a same-sex marriage will work the same as for civil partners; that is, the date will be 1988 for both spouses.</p> <p>This means that where a couple are in a mixed-sex marriage, and one obtains gender recognition, with the marriage continuing as a same-sex marriage, one spouse (the original wife) will see an overnight drop in potential</p>

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	<p>survivor's pension, as the applicable date changes from 1978 to 1988. This could result in a loss of thousands of pounds of pension per year.</p> <p>We strongly believe that a principle of non-regression should apply, so that there is no loss of accrued pension benefits when a married person obtains gender recognition. This would mean continuing to apply the date of 1978 in such cases when calculating the survivor's pension for the original wife in the marriage.</p> <p>The Scottish Government should ensure that this principle of non-regression applies to public sector pension schemes for which it is responsible.</p> <p>Gender recognition for long term transitioned people</p> <p>We are concerned about the position of trans people who transitioned a long time ago, and who would therefore find it difficult to assemble the same level of medical evidence for the Gender Recognition Panel as a recently transitioned person. The Gender Recognition Act provided (in section 27) a two-year transitional arrangement for long-term transitioned people, defined as people who had lived in the acquired gender for at least six years. They were able to obtain gender recognition with only one medical report, rather than two, from a medical practitioner who did not have to be an expert gender specialist. The transitional arrangement also enabled applicants to apply based on evidence of having undergone treatment to modify sexual characteristics, as an alternative to providing evidence of a diagnosis of gender dysphoria. This was valuable because obtaining confirmation of a diagnosis of gender dysphoria can be extremely difficult after a long period of time. The transitional arrangement expired in 2007.</p> <p>However, there will be some trans people who transitioned a long time ago who were unable to take advantage of that transitional arrangement, because they did not want to dissolve their marriage. In our view, once same-sex marriage is possible and they can potentially obtain gender recognition without dissolving their marriage, they should have the opportunity of using the arrangements for gender recognition for long-term transitioned people that were originally available when the Gender Recognition Act was introduced.</p> <p>Furthermore, it has become clear that long-term transitioned people are still coming forward for gender recognition who had not previously heard about it. The longer a person has been transitioned, the less likely they are to have</p>

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	<p>heard about the availability of gender recognition, because the less likely they are to be in contact with trans organisations. We understand that this has caused an increase in workload for the Gender Recognition Panel and long delays in handling such applications, because it is harder for such people to obtain two medical reports. It also causes a great deal more difficulty for the applicant and may prevent them from obtaining gender recognition at all.</p> <p>We therefore consider that it would be in the interests of trans people and of the Gender Recognition Panel, if the original rules for allowing applications by people who have been transitioned for at least six years, with one medical report only and on the basis of having had treatment to modify sexual characteristics, could be reinstated on a permanent basis.</p> <p>Restoring the continuity of dissolved marriages and civil partnerships</p> <p>We are acutely aware of the injustice suffered by transgender people who have dissolved their marriages in order to obtain gender recognition, when they and their partner would have preferred their marriage to continue. It is likely that people in that situation will have registered a civil partnership to replace their lost marriage, after they received gender recognition. They will in future be able to change the status of that civil partnership to a marriage under section 6 of the bill and that marriage will in effect be backdated to the date they registered the civil partnership, under section 7. However, that will still leave them in a position where they have been married twice, with a brief unmarried gap between those marriages during which they lost legal protection.</p> <p>Section 7 already operates retrospectively, to allow the same-sex marriage resulting from a converted civil partnership to be treated as having started on the date of registration of the civil partnership (which of course may predate the commencement of the bill). We would hope therefore that section 7 could be amended to provide, where a couple dissolved their marriage to obtain gender recognition and subsequently registered a civil partnership, that on converting that civil partnership to a marriage, that marriage could be treated as having started at the start of their original marriage, in effect restoring its continuity.</p> <p>Ensuring gender neutral partnership rights</p> <p>The Scottish Transgender Alliance is strongly of the belief that both marriage and civil partnership should be opened up to all in a sex and gender neutral manner. This would ensure that everyone can access equal partnership rights, and is particularly necessary for intersex and nonbinary gender people. Some intersex people may currently be excluded from any legal recognition of their relationships, or fear that their marriage or civil</p>

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	<p>partnership may be open to challenge. The Gender Recognition Act inadvertently created a situation whereby intersex people registered at birth as a gender which they later do not identify as are currently less able to change their birth certificates than transsexual people. This makes it vital to open up both civil partnership and marriage in a sex/gender neutral manner ensuring that couples of any physical sex and gender identity combination can freely choose how they wish their relationship to be legally recognised.</p> <p>In order for religion and belief marriage ceremonies to be sex/gender neutral where the couple wishes, we are of the opinion that an amendment to the bill is required. Currently section 9(2)(f) states that where a marriage is between a legally mixed sex couple the ceremony must include a declaration that the parties “accept each other as husband and wife,” and a declaration by the celebrant that the parties are “husband and wife.” This is problematic as there may be couples who are legally of different sexes but who are not comfortable using the terms husband and wife. Section 9(2)(g) however alternatively provides that where a marriage is between a couple of the same legal sex the ceremony must include a declaration that the parties “accept each other in marriage,” and it is therefore gender neutral. We suggest that the bill be amended to accommodate mixed sex couples who would prefer to use this gender neutral wording, and provide that the ceremony for a mixed couple, be in one or other form. This would not impact on those celebrants and mixed sex couples who do want to use the terms husband and wife.</p> <p>At present, within the UK, nonbinary people are unable to receive legal gender recognition as neither male nor female. However, other countries have started to legally recognise this, such as Australia, New Zealand, Nepal, India, Pakistan and Canada, and there is the potential that some people living in Scotland may have 'X - Undefined' rather than 'Male' or 'Female' listed on their identity documents. Nonbinary people do not want to have to pretend to identify with a binary gender of either male or female in order to access legal recognition of their relationships. If both civil partnership and marriage were opened up in a sex/gender-neutral manner this would enable nonbinary people to access legal recognition of their relationships without compromising their identity. It would also prevent future difficulties for registrars as the number of people coming to the UK with their gender listed as 'X – Undefined' on their identity documents gradually increases.</p>

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