

## **Response from Ekklesia to the Scottish Government's Consultation on the Marriage and Civil Partnership (Scotland) Bill**

*Preliminary:* Ekklesia ([www.ekkleisia.co.uk](http://www.ekkleisia.co.uk)) is a Christian think-tank which examines the impact of beliefs and values on society and politics in an era of global change. It collaborates with diverse civic, religious and academic bodies and individuals, and advocates transformative, innovative and theologically inspired approaches to issues of social and economic justice, peacemaking and ethical living across a wide range of concerns.

### ***1. Comments on Business and Regulatory Impact Assessment and for the Equality Impact Assessment.***

Ekklesia is content that adequate overall provision has been made by the Scottish Government for the Business and Regulatory Impact Assessment and for the Equality Impact Assessment. Our comments below related to the Equality Impact Assessment.

First, it is our view that the proposed legislation will improve sexual orientation and gender equality.

Second, as a Christian think-tank which has done significant research on marriage and partnership issues in the run up to, and following, the publication of our 2006 paper 'What Future for Marriage?' it is also our view that what is proposed in this Bill will both protect and extend freedom of religion and belief by giving religious and belief groups the right to choose to solemnise same sex marriages; a right which they do not currently enjoy. At the same time there is, rightly, no compulsion upon them to do so.

In relation to point 13 on the EQIA ("There may be an effect on people who believe that marriage should not be available to same sex couples"), we do not believe that such persons or organisations will be seriously negatively impacted, since they are not being compelled to recognise, conduct or bless same sex marriages. Their sense of disadvantage lies in not being able to prohibit others who, in good conscience informed by core principles of religion, wish to solemnise same sex marriages from doing so. Such a veto, expressed as opposition to this legislation, would clearly infringe the rights of others, including those of many people of faith. We do not believe that those religious or belief communities who object to marriage equality should be able to impose their views in a prohibitive way on others.

In relation to 14. and 15., we note with approval that the legislation will not be introduced or enforced without appropriate protections for religious and belief celebrants who do not wish to carry out such ceremonies, while ensuring that those who wish to take part in these solemnizations are able to do so and not restricted by exemptions.

The one serious inadequacy of the EQIA, in our view, is that it does not stress the negative equality and rights impact of the failure of the Bill to allow for mixed sex civil partnership. The absence of this provision is clearly discriminatory against mixed sex couples who do not wish to marry but who would wish to enter a civil partnership arrangement.

***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?***

We agree with the draft Bill's removal of references to "approved places" from the existing legislation.

***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?***

In our view it clearly makes no sense for the law to call humanist marriages 'religious' when they are not.

If a double designation is going to be employed, 'civil' and 'religious or belief' might in principle be better than three categories. It could also be argued that non-religious belief ceremonies are effectively civil ones. However, since the Humanist Society of Scotland wishes this change, and since it conducts a significant number of ceremonies, we have no overriding objection to such a separate designation. Also, we appreciate that there are some non-religious people who would object to any category that contained a religious reference.

Our overall conviction, however, is that it would be preferable simply to have civil marriage authorised by the public authorities, and to leave the matter of religious or humanist blessing and solemnizations (of whatever kind) as a non-legal matter entirely beholden to voluntary associations outwith the state (that is, religious or belief groups with their own commitments, institutions and practices). This would be the best way of avoiding confusion and contention.

We made the case for this more fundamental reform, on both civic and theological grounds, in our paper 'What Future for Marriage?' (Ekklesia, 2006).

Our response to this draft Bill is framed within its own terms of reference, but we would still urge the Scottish government, in the future, to look at a more fundamental (and simpler) reform along these lines.

***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?***

We understand that this provision for Church of Scotland deacons is to ensure that the Kirk has enough marriage celebrants. We have no objection to this change, within the context of the Bill's designations of 'civil marriage' and 'religious marriage' - though as we have explained above (in relation to question 3) our deeper wish would be for 'religious marriage' to be outwith the regulation of the state, which should be responsible only for civil marriage and civil partnerships, leaving religious or belief bodies free to decide how they do or do not wish to bless these.

***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?***

Again, we refer to our preference for religious blessings and solemnizations to be considered a matter for those bodies, and therefore separate from civil marriage. In those terms, there would be no need for special provision for the Church of Scotland [as in section 8 of the Marriage (Scotland) Act 1977 at present], or for authorisation of any kind of religion or belief body.

However, given the provenance of the current draft Bill, which we approve because of its extension of civil and religious freedom for same-sex and trans couples, we agree that some protective, regulative provisions, drafted after due consultation, would be required.

We have no objection to the notion that: (1) The religious or belief body and their celebrants would not be allowed to solemnise marriages or register civil partnerships for profit or gain; (2) The religious or belief body would have to show that their celebrants were trained in areas such as tackling forced marriages. (3) The religious or belief body would have to show that their celebrants were available to discuss the forthcoming marriage or civil partnership with the couple concerned; and (4) that the religious or belief body should be able to demonstrate that their celebrants are able to carry out relevant ceremonies.

***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 but it transpired after one of them died that the marriage was not valid?***

For the sake of clarity, it would make sense for the Scottish government to complete the process of abolishing the concept of marriage by cohabitation with habit and repute, in order to avoid subsequent injustices to the couples involved. Such marriages which began before 4 May 2006 will, we understand, be preserved in order not to occasion unfairness as a result of retroactive legal change.

If the rule on marriage by cohabitation with habit and repute is not abolished, however, it should apply to same sex marriage as well as mixed sex marriage, for reasons of equality.

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

Ekklesia agrees with permitting same sex marriage in civil, religious and belief ceremonies. Religious and belief bodies should be permitted, but never compelled, to conduct same sex marriages and civil partnerships. We agree with the principle of an 'opt-in' system for religious and belief organisations under the draft Bill.

We agree that religious and belief bodies and celebrants should be separately approved for carrying out each of mixed-sex marriage and same sex marriage, so that a religious or belief body can, if it so chooses, solemnize either or both, according to its own principles or doctrines.

We agree that before a religious or belief celebrant can conduct same sex marriages the individual celebrant must opt to do so, and that the Registrar General for Scotland should then authorise them to do so.

We do not agree that a particular religious body should be able to prohibit a celebrant from conducting a same-sex marriage, but we agree that such a body should be able to withhold its premises and official recognition for such a purpose.

We agree with the explicit and inviolable requirement in the draft bill that there should be compulsion (that is, no duty by law) imposed upon any religious or belief body or on any individual religious or belief celebrant to conduct same sex or mixed sex marriages.

Ekklesia agrees with the proposed amendment to the Equality Act 2010, which clarifies that an individual religious or belief celebrant does not breach equality law if they refuse to conduct a same-sex marriage, for reasons of religious or philosophical belief, in addition to doctrine or convictions.

Along with all the main equalities and human rights organisations, we consider that it would breach the European Convention on Human Rights (ECHR) for any person or body to try to force a religious or belief body, or a religious or belief celebrant, to conduct same-sex marriages against their will.

It is our view that allowing religious and belief bodies to decide for themselves whether or not to solemnise same-sex marriages protects and extends freedom of religion and belief within the context of the draft Bill and in relation to the existence of civil and religious marriage. (Again, we need to refer to our deeper preference for religious blessings and solemnizations to be

considered a matter for those bodies only, and therefore separate from civil marriage or partnerships authorised by the state, in the longer term.)

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

We do not see it as necessary or desirable to provide special opt outs for civil registrars who do not wish to solemnise same sex marriages that would in any way endanger the possibility of couples securing a ceremony in a timely fashion. We note that the Association of Registrars of Scotland has not called for an opt-out. The European Court of Human Rights has recently confirmed the legality of a policy that does not include opt-outs in its judgement on *Eweida and Others v the United Kingdom* (2013). We note that for an individual celebrant acting in civil marriage or partnership on the part of the state, there is, rightly, no need or requirement to assign religion or belief designation or approval on the authorisation of the relationship by the law of the land.

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

Ekklesia strongly agrees with the guarantee in section 12 of the draft Bill which makes clear that nothing in the section of the Bill that introduces same sex marriage affects a person's rights to freedom of religion or belief, or freedom of speech and expression. We note that those advocating marriage equality have consistently upheld freedom of speech and action for those who disagree with it.

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

Ekklesia believes that all schooling funded by the taxpayer should be inclusive and welcoming to all pupils regardless of their sexual orientation, gender, identity, family situation, ethnic origin, ability/disability, or religion/belief. We have co-founded the Accord Coalition of religious and civic groups to further this aim, especially in relation to religious foundation schools (popularly known as 'faith' or 'denominational' schools).

We strongly wish that Annex C of the consultation paper, in particular the section on "Balance and respect for pupils" (paragraphs 31 to 35), should be strengthened to ensure that there is no stigmatisation and discrimination against pupils, parents or families from LGBT backgrounds. All homophobia and transphobia, in addition to unwarranted prejudice and discrimination against people on grounds of religion or belief, is unacceptable and should be seen to be so throughout the education system in Scotland. We believe that constructive educational engagement rather than opt-outs are what is required where there are disagreements over issues of gender, sexuality, marriage and partnerships.

We would wish for Sex, Personal, Health and Relationships Education to be provided without stigmatisation or discrimination across all schools in Scotland, together with good quality education about the range of beliefs and values that shape people's personal and communal decision making in these areas.

We do not believe that any new legislation is required in relation to education as a result of same sex marriage being introduced in Scotland.

***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?***

We believe that both same sex and mixed sex couples should be treated equally and fairly in relation to adoption, fostering and human fertilisation and embryology legislation. Services should be provided in a positive and non-discriminatory way by practitioners who are willing and able to treat all couples with fairness and equanimity, giving special priority to the needs of children and the vulnerable.

***12. Are you aware of any 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 marriages or spouses?***

Ekklesia is not aware of any legislation where there is a need to make it clear that references to marriage or spouse should not extend to both mixed sex and same sex marriages or spouses.

***13. Do you have any comments on the proposed approach to the law on adultery?***

We do not see the need for a change in the law here. It would be desirable if all forms of sexual infidelity, whether mixed sex or same sex, were covered by the unreasonable behaviour ground for divorce, and hope that this change can be brought in at some early opportunity in the future.

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

We have no reason to disagree with the proposed approach in the draft Bill.

***15. Do you have any comments on the proposed approach to the law on bigamy?***

We have no reason to disagree with the proposed approach in the draft Bill.

***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?***

Ekklesia agrees with the proposed approach in the draft Bill to ensuring that religious and belief bodies and celebrants do not have to register civil partnerships.

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

Ekklesia agrees with the main proposals. We disagree with the proposed charge of £125 for a same sex couples to change their civil partnership to a same sex marriage, since when they paid for their partnerships the marriage option was not available. It would be discriminatory to so charge.

We strongly disagree with the Scottish Government's proposal to continue to prohibit mixed sex couples from registering a civil partnership. This is clearly and unacceptably discriminatory.

***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 so wish, when obtaining the full Gender Recognition Certificate?***

We would refer the Scottish Government to the submission on this matter from the Equality Network in Scotland (<http://www.equality-network.org/>), with which Ekklesia concurs on the basis of discussion with those effected. This says:

*"We strongly agree with the Scottish Government's aim of revising the gender recognition process so that people who are married or in a civil partnership can obtain gender recognition without having to divorce or dissolve their civil partnership if they and their partner wish to continue it, and that such couples do not lose any benefits and rights that their marriage or civil partnership has accrued.*

*"The revised gender recognition process should be simple and user friendly, of no greater cost to the applicant than the current process, and effective for applicants who are married or in a civil partnership, whether registered within or outwith Scotland. The Scottish Government's preferred approach does not meet these criteria – it is complex and unwieldy and is unfairly different for different applicants.*

*"We strongly disagree with the requirement to have a second marriage ceremony. It undermines the whole purpose of the change to the law, which is that the marriage simply continues when gender recognition is granted. It is an onerous, distressing and unnecessary requirement which will be experienced as undermining the couple's original marriage or civil partnership, which is long-standing and continuing.*

*The fee required for the ceremony will also greatly increase the costs of gender recognition. Instead, a new marriage certificate should be issued administratively, in the same way as a new birth certificate is issued, following gender recognition.*

*“Other parts of the Scottish Government proposals are complex and confusing, and continue to present significant barriers to some people obtaining gender recognition, particularly those who entered into a civil partnership outwith Scotland. The proposals should be significantly streamlined, and the Scottish Government should continue to work with key stakeholders to make improvements as these proposals are turned into legislation.*

*“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, proposed pension rules would mean that one spouse would lose a large part of their survivor’s pension entitlement overnight, because the pension rules will be different for mixed-sex and same-sex marriage. Most pension regulation is reserved to the UK Government, but the Scottish Government controls pensions in the devolved public sector. The Scottish legislation should ensure that, in those pension schemes, there is no reduction in survivor’s pension entitlement of either spouse when gender recognition is granted.*

*“The bill should provide gender neutral partnership rights, to ensure that all people, regardless of their gender identity or whether they are intersex, are able to access legal recognition of their relationship without fear that it may later be open to challenge.”*

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**Submitted on behalf of Ekklesia by Simon Barrow, co-director, on 20 March 2013.**