

Marriage (Same Sex Couples) Bill

Commons Second Reading briefing from the Church of England

Summary

The Church of England cannot support the Bill, because of its concern for the uncertain and unforeseen consequences for wider society and the common good when marriage is redefined in gender-neutral terms.

This reshaping and unnecessary politicising of a fundamental social institution, which predates church and state, did not feature in party manifestos, was not included in the last Queen's Speech and has no mandate from the Government's own consultation exercise. The legislation has also been prepared at great haste and as a result relies on an unacceptably wide use of secondary legislation.

We do not doubt the Government's good intentions in seeking to leave each church and faith to reach its own view on same sex marriage and including provisions in the Bill to protect them from discrimination challenges. If the Bill proceeds into law it is essential that the various 'locks' in the Bill are preserved as drafted. The Church of England, whose clergy solemnize around a quarter of all marriages in England, has sought no more safeguards in substance than those provided for other Churches and faiths.

The Church of England recognises the evident growth in openness to and understanding of same sex relations in wider society. Within the membership of the Church there are a variety of views about the ethics of such relations, with a new appreciation of the need for and value of faithful and committed lifelong relationships recognised by civil partnerships.

Civil partnerships have proved themselves as an important way to address past inequalities faced by LGBT people and already confer the same rights as marriage. To apply uniformity of treatment to objectively different sorts of relationship – as illustrated by the remaining unanswered questions about consummation and adultery – is an unwise way of promoting LGBT equality.

The continuing uncertainty about teachers, the position of others holding traditional views of marriage working in public service delivery, and the risk of challenges to churches in the European courts despite the protections provided, suggest that if the legislation becomes law it will be the focus for a series of continued legal disputes for years to come.

This paper was produced by the Parliamentary Unit, Mission and Public Affairs Division and Legal Office of the Church of England, at Church House, Westminster. It draws on the formal position on same sex marriage as set out in the official Church of England submission to the Government's consultation of June 2012, which was agreed by the Archbishops of Canterbury and York, the House of Bishops and the Archbishops' Council.

The Church and Marriage

The Church of England holds, as a matter of doctrine and in accordance with the teaching of Christ, that marriage is a union of one man with one woman. That doctrine is enshrined within its Canons and its authorised liturgy, including the Book of Common Prayer and the *Common Worship* marriage service. Canon B30 of the Canons of the Church of England states: *The Church of England affirms, according to our Lord's teaching, that marriage is in its nature a union, permanent and lifelong, for better for worse, till death them do part, of one man with one woman, to the exclusion of all others on either side.*"

Marriage is a social institution that predates both church and state and is the glue that has bound countless successive societies together. It benefits society in many ways, by promoting mutuality and fidelity, and by acknowledging an underlying biological complementarity that includes, for many couples, the possibility of children. While marriage has evolved as an institution in many other ways these aspects have remained constant.

Children and Complementarity

Civil partnerships have already provided a framework within which same sex couples can celebrate and embody the crucial social virtues of mutuality and fidelity. However, the uniqueness of marriage is that it embodies the underlying, objective, distinctiveness of men and women. This is seen most explicitly in the biological union of man and woman, which potentially brings the possibility of children. Even if not every marriage results in the birth of children (for reasons of age, biology or choice), *marriage as an institution* is nevertheless directed towards procreation. The distinctiveness of male and female is part of what gives marriage its unique social meaning.

We are also not convinced that the understanding of equality that is behind this Bill is well thought through. Redefining marriage amounts to a legislative assertion that both heterosexual and homosexual relationships are socially identical. This is not how we talk of some other aspects of equality. Not every aspect of gender equality, or equality for disabled people, is embraced by denying difference. Equality does not necessarily mean uniformity.

The Unique Position of the Established Church

As the established Church, the Church of England's Canon law is part of the law of the land. Church of England clergy are under a common law duty to marry any qualifying couple who lives in the parish. Around a quarter of marriages solemnized in England are solemnized by the clergy of the Church of England. For the Church of England to enjoy the same freedom of self determination on this issue as other Churches and religious groups it requires legislative provisions that are different from those of other Churches. The Government has worked constructively with Church of England officials to ensure that the drafting of provisions for the established Church are right.

We welcome these ‘quadruple lock’ provisions and believe that as drafted they do what they are intended to. We would not wish to see them weakened or removed.

Religious Freedoms

We have continuing anxieties that the Bill as drafted will not offer adequate protection of the religious freedom of Christians (including but not limited to teachers, chaplains or those otherwise involved in public service delivery) who hold the view that marriage can only be between a man and a woman. Whilst some fears about freedom of expression may have been exaggerated, we doubt the ability of the government to make the legislation watertight against challenge in the European courts or against a ‘chilling effect’ in public discourse. We retain serious doubts about whether the proffered legal protection for churches and faiths from discrimination claims would prove durable. Too much emphasis, we believe, is being placed on the personal assurances of Ministers.

Adultery and Non-Consummation

The Bill proceeds on the basis that marriage should be ‘equal’ and that gender is irrelevant, yet inevitably has to recognise that this logic breaks down e.g. in relation to non-consummation and adultery, both of which are to remain grounds for the ending of marriages between opposite sex couples. This illustrates the fallacy of seeking to equate equality with uniformity and to redefine as identical those things that are intrinsically and objectively distinctive.

Other concerns

We question the logic of the Government removing the concept of gender from marriage whilst leaving it in place for civil partnerships. We believe this would be unlikely to prove legally sustainable under Article 14 of the European Convention on Human Rights.

We are concerned that far too much detail is being left to secondary legislation, largely as a consequence of the speed at which the Bill is being progressed. For legislation that has a questionable mandate and concerns issues of profound social importance, we believe this to be irresponsible and unlikely to produce good law.

More details about the specific implications of the Bill for the Church of England are covered in the attached Q&A.

Q&A

If churches will not be compelled to perform same sex marriages why should they be concerned?

The concerns of the Church of England are not confined to the potential impact of the policy on its own doctrine or practices, but are in large part about what we believe to be its detrimental societal impact.

The established Church of England's unique position in relation to the solemnization of marriages in English law also means that the proposals could potentially have a significant impact on our ability to serve the people of the nation as we have always done.

Everyone who lives in England resides in a parish. All those who reside in a parish, whether members of the Church of England or not, have rights under common law to marry in the parish church and the marriage solemnized by the minister of the parish. Unlike other denominations and faiths, all clergy of the established Church in England are automatically legally authorised to solemnize marriages and the Church is responsible for the legal preliminaries, such as publishing banns of marriage.

The Church of England's teaching on marriage is embodied in Canon law. The Canons of the Church of England are part of the law of England and Canons are subject to statutory provisions that provide that they do not have effect if they are contrary to the customs, laws or statutes of the realm.

Legislation that creates a new statutory definition of marriage therefore needs exceptionally careful drafting to ensure it does not undermine the Canon law of the established Church or extend existing common law duties in a manner that is contrary to its doctrine.

Will the 'quadruple locks' protect the Church of England and those denominations and faiths that do not wish to offer same sex marriages from successful legal challenge in the domestic and European Courts?

It is not possible to say with certainty. Whilst the Government has worked hard to draft clauses that have a reasonable chance of safeguarding the freedom of each denomination to decide for itself whether to perform same sex marriages, it is impossible to predict whether those provisions will prove robust enough to resist challenge in the courts, particularly at Strasbourg.

Following the decision of the European Court of Human Rights in the 2010 case of *Schalk v Austria*, if the UK parliament passes legislation providing for same sex marriage, article 12 of the ECHR (the right to marry) would be capable of applying both to opposite sex and to same sex couples. The possibility of a successful claim against the United Kingdom under the Human Rights Convention, on the basis that

the ‘locks’ contained in the legislation discriminate unjustifiably against same sex couples, cannot be ruled out. The Church of England is uniquely exposed in this regard because in conducting its own marriage preliminaries (banns and licences) and having a legal duty to solemnize the marriage of all resident parishioners, it is carrying out functions of a governmental nature. It might therefore be held to be acting on behalf of the state rather than in a purely religious capacity. Whether, as some have claimed, article 9 (freedom of religion) would supersede any claims brought under articles 12 (right to marry) and 14 (freedom from discrimination) therefore remains uncertain.

Is the Church of England likely to be forced to conduct same sex marriages against its will?

We do not believe that this is realistic or likely. Our primary concern is the possibility of a decision by a court (whether a domestic court or the European Court of Human Rights) which held that the ‘locks’ contained in the legislation infringed provisions of the Human Rights Convention. Such a scenario would inevitably lead to questions over whether the Church’s establishment role in relation to the duty to marry all in the parish could continue.

Do the ‘quadruple locks’ give special extra protections to the Church of England not provided for other denominations and faiths?

No. The Bill puts the Church of England in the same position as other denominations and faiths. If the Bill is passed any decision whether or not to opt-in to same sex marriages would be one for the Church of England itself to take, as it would be for any other denomination. But the way of achieving that in the legislation is necessarily different in the case of the Church of England.

As paragraph 5 of the Explanatory Notes to the Bill explains: The position of the Church of England is different from that of other religious organisations primarily for three reasons:

- as the established Church, its Canons (church laws) form part of the law of the land;
- as the established Church, it can amend or repeal primary legislation through a Measure passed by its Synod, provided the Measure is subsequently approved by both Houses of Parliament and receives Royal Assent;
- their clergy are under a common law duty to marry a parishioner in their parish church. The Church in Wales has a similar duty by virtue of it previously being established (it became disestablished in 1920).

Does the Bill make it illegal for the Church of England to opt-in to performing same sex marriages in future, if it changes its mind? How could it go about opting-in, should it ever wish to?

There has been much confusion about a so-called “ban” on the Church of England ever performing marriage services for same-sex partners. The quadruple locks do not constitute a “ban” or any other restriction imposed on the Church of England’s freedom of action. They simply make clear that the legislation leaves marriage according to the rites of the Church of England unchanged.

If ever the Church of England wished to make changes to its doctrine and practice of marriage it would require legislation by the Church's General Synod. In addition to an Amending Canon that redefined the nature of marriage, such a legislative package would also involve the General Synod passing a Measure (the General Synod's equivalent of an Act of Parliament) that altered both the statute law concerning marriage according to the rites of the Church of England and the marriage service in the Book of Common Prayer.

All Synod Measures require parliamentary consent. The process of parliamentary scrutiny for legislation submitted by the Church is that it goes first to the Ecclesiastical Committee and then has a single debate in each House before the Measure goes for Royal Assent. As the General Synod's devolved legislative powers include the ability to amend Westminster legislation it would not require separate, additional legislation on the part of Parliament to enact any change to the Church's practice on marriage. Talk of additional 'barriers to opt-in' for the Church of England is therefore misplaced.

Why can't it be left to individual clergy to decide what to do?

It has been suggested that the discretion that is allowed to individual clergy in relation to the marriage of those who are divorced with a former spouse still living provides a precedent for allowing them a similar discretion in relation to the marriage of same sex couples. However, the comparison is a misleading one.

Unlike the doctrine of marriage itself, the Church of England’s position on divorce and re-marriage is not embodied in its Canon law. The clergy were exhorted not to use the marriage service in the case of anyone who had a former spouse still living,¹ even though Parliament had made it legally possible for clergy to do so in the nineteenth century (in the days when Parliament still legislated directly for the Church of England before it gained its own legislature under the 1919 Enabling Act).

In 2002 the General Synod passed a resolution, which stated that while marriage was always to be undertaken as a life-long covenant, some marriages did fail and that there were exceptional circumstances in which a divorced person might be married in church during the lifetime of a former spouse. It was accordingly left to the member of the clergy concerned to decide whether to solemnize such a marriage, taking into

¹ See the Regulations Concerning Marriage and Divorce passed by the Convocation of Canterbury on 1 October 1957, restating resolutions originally passed in 1938 .

account advice issued by the House of Bishops. Leaving the matter to the discretion of individual members of the clergy reflected the changed position of the Church of England that had been declared in the Synod's resolution.

There has been no such change to the Church's position, as set out in its Canon law, that marriage is in its nature a union of one man with one woman. There is therefore no basis for leaving it to the discretion of individual members of the clergy to decide whether to solemnize the marriage of a same sex couple.

That does not mean that individual members of the Church of England may not hold different views on the subject and it is open to individual clergy and laity to argue that the Church's doctrine should develop in a particular way. But where the Church of England has a clear doctrine, embodied in the law of the Church, that doctrine must be a determining factor in what the clergy of the Church of England may or may not do. It cannot be left to individual members of the clergy to choose to act in a way that is contrary to that doctrine or to the Canons of the Church.

Isn't the Church of England divided on this issue, as on all issues of sexuality?

The arguments set out in this paper, and in the Church of England's submission to the Government consultation in June represent the position of the Archbishops of Canterbury and York, the House of Bishops and the Archbishops' Council. They also reflect the long-established doctrine and practice of the Church of England.

There is a continuing debate within the Church of England about its declared view of sexually active homosexual relationships. Our position on the question of same sex marriage does not prejudge the outcome of that continuing theological and ethical debate. There are many who favour a more liberal view on same sex relations who nevertheless cannot support a change to the doctrine of marriage.

We have supported various legal changes in recent years to remove unjustified discrimination and create greater legal rights for same sex couples and we welcome the fact that previous legal and material inequities between heterosexual and same-sex partnerships have now been satisfactorily addressed. Our opposition to this Bill is rooted not in homophobia, but in a deep seated concern for the common good value of the traditional understanding of marriage, respect for the doctrine and practice of the Church, and genuine concern for the advancement of an equality agenda that is not narrowly limited in scope to applying principles of uniformity in all cases.

The results of the Government's own consultation, when the petition as well as the online responses are taken into account, suggest no mandate from the population of England and Wales for the principle of "equal marriage". We recognise that the country is divided on this. It is not surprising that not all Christians agree either.

What will be the impact of redefining marriage on the practice of teaching about marriage and relationships in Church of England schools?

The Secretary of State issues statutory guidance on Sex and Relationships Education (SRE), which includes the need to teach about the nature of marriage. The way the subject is taught will be determined locally by the headteacher, within the overall SRE Policy set by the Governing Body. In a Church of England school this is within the overall context of the religious foundation of the school.

Teachers are used to dealing with controversial issues in sensitive and appropriate ways and they would be expected to explain the nature of marriage and its definition in law, as well as the different views within society about it. In Church of England schools the foundation requires the school to adhere to Church teaching and so the Church's teaching on marriage will always form part of the SRE curriculum.

We welcome the Department for Education's assurances that the Secretary of State would not issue specific guidance on teaching about a newly defined understanding of marriage, and that the DfE would not issue particular materials which must be adhered to, but there is no guarantee that future Secretaries of State would take the same view, thus causing conflict with the school's religious foundation.

Surely this is just an extension of the existing institution of marriage to same sex couples, not a wholesale redefinition?

The language of an 'extension' in the Bill is misleading, as is the assertion that 'religious marriage' will be unaffected by the proposals. At present there is one single institution and legal definition of marriage, entered into via a civil or religious ceremony. Talk of 'civil' and 'religious' marriages is erroneous and mistakes the wedding ceremony for the institution.

The effect of the proposals would be that everyone who wished to marry – irrespective of the form or ceremony by which their marriage was solemnized – would be required to enter into the same new statutory institution of marriage. That institution would be one that was defined gender-neutrally as the voluntary union for life of any two persons. English law would as a result cease to provide or recognise a legal institution that represented the traditional understanding of marriage as the voluntary union for life of one man with one woman.

Moreover, the place of children as the issue of a biological union between husband and wife would necessarily have to disappear from the social understanding of marriage. The established institution of marriage, as currently defined and recognised in English law, would in effect have been abolished and replaced by a new statutory concept that many inside and outside religious organisations would struggle to recognise as amounting to marriage at all. A man and a woman who wished to enter into the traditional institution of marriage would no longer have the opportunity to do so.