

LIBERTY

PROTECTING CIVIL LIBERTIES  
PROMOTING HUMAN RIGHTS

**Liberty's submission to the  
Government Equalities Office  
consultation on Equal Civil Marriage**

**June 2012**

## **About Liberty**

Liberty (The National Council for Civil Liberties) is one of the UK's leading civil liberties and human rights organisations. Liberty works to promote human rights and protect civil liberties through a combination of test case litigation, lobbying, campaigning and research.

## **Liberty Policy**

Liberty provides policy responses to Government consultations on all issues which have implications for human rights and civil liberties. We also submit evidence to Select Committees, Inquiries and other policy fora, and undertake independent, funded research.

Liberty's policy papers are available at

<http://www.liberty-human-rights.org.uk/publications/1-policy-papers/index.shtml>

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## Introduction

1. We warmly welcome the Government Equalities Office consultation *Equal Civil Marriage*,<sup>1</sup> which takes a historic step towards marriage equality. The consultation paper considers the best way to remove the current ban on same-sex civil marriages, acknowledging the equal value of the commitment made between two men or two women. We are delighted that the Government has fully committed to ensure that the legal rights and privileges which attach to marriage will be identical in the case of gay and straight couples.<sup>2</sup> A further welcome benefit of the proposals is that transgender people will no longer be forced to dissolve their marriage if they legally change their gender.

2. Liberty is pleased that the Government has acknowledged that the consequences of marriage and civil partnership do not fully coincide in a number of areas from courtesy titles to pension rights. The paper makes clear the Government's commitment to ensure that, once married, gay and straight couples are treated equally. Under the Government's plans civil partnerships will continue to be available to gay couples, but in addition to rather than instead of the option to marry in a civil ceremony. As is the case now, civil partnerships will be restricted to same-sex couples, with those who have already entered a civil partnership given the opportunity to convert their civil partnership into a marriage.

3. Under current proposals there will continue to be a prohibition on a civil marriage containing any religious elements such as hymns. The new rules will provide that a gay couple can marry in a registry office or another registered premises such as a hotel, they may then refer to their partner as their wife or husband and record their own status as "married" on a job application or wherever else the question may arise. Unfortunately the consultation stops short of allowing those religions which support gay marriage to host religious marriage ceremonies. The reason the Government gives for restricting the proposals to civil marriage ceremonies is a desire to ensure that "*no religious organisation, premises or leader would face a successful legal challenge for failing to perform a marriage for a same-sex couple*".<sup>3</sup>

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<sup>1</sup> (March 2012) available at <http://www.homeoffice.gov.uk/publications/about-us/consultations/equal-civil-marriage/consultation-document?view=Binary>.

<sup>2</sup> The Government's clearly expressed intention is to "enable all aspects of current marriage and divorce law to apply to same-sex couples", *Equal Civil Marriage*, paragraph 2.15.

<sup>3</sup> Paragraph 2.10.

4. Liberty agrees that no faith group or individual representative of such a group should face legal sanction for failing to conduct a religious ceremony, whether their reasons relate to a couple's religious beliefs, their past marital status or their sexuality, but as the legal opinion from leading QC Karon Monaghan (annexed to this response) clearly indicates, giving religious organisations the *option* to conduct same-sex marriages will not lead to successful legal challenges against those organisations which choose not to do so. The opinion makes clear, in particular, that:

*It is extremely difficult to see how interfering with the religious freedom of churches by requiring them to celebrate marriages that they not only consider to be doctrinally impossible but also not in fact to be marriages could be justified as proportionate having regard to the importance of rights under Article 9 and the case law from the ECtHR.<sup>4</sup>*

5. Under present arrangements faith groups are able to choose whether to host civil partnerships or not and this has not led to a flood of legal challenges. Faith groups already make numerous choices about who they wish to marry. For example many religious denominations require both members of a couple to be members of their religion before they will consent to conduct a marriage - similarly religious denominations have not faced successful challenges for refusing to marry atheists.

6. If the Government wants to include a cast iron provision ensuring that religious leaders or faith groups do not face legal consequences for declining to host same-sex marriages, it can make specific provision to this effect in primary legislation. This is how the devolved administration intend to deal with the issue in Scotland,<sup>5</sup> and this is how similar concerns around legislation allowing for civil partnerships to take place on religious premises were addressed in England and Wales. The attached opinion of Karon Monaghan QC clearly sets out the legislative steps which can be taken, for the avoidance of doubt, to ensure that faith groups are under no obligation to marry gay couples.<sup>6</sup>

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<sup>4</sup> The Government's Consultation on "Equal Civil Marriage"; Legal Opinion by Karon Monaghan QC, 12 June 2012, paragraph 40.

<sup>5</sup> <http://www.scotland.gov.uk/News/Releases/2011/09/02114626>.

<sup>6</sup> Legal Opinion of Karon Monaghan QC, paragraph 5.

7. Liberty believes in freedom of thought, conscience and religion and believes this should include the option for faith groups to choose whether or not to host same-sex marriages.

## **Part 1**

### **Towards equal treatment**

8. This year marks the 60<sup>th</sup> anniversary of the conviction of Alan Turing, Second World War hero and father of computer science, on the grounds of his sexuality. In 1952, Turing was sentenced to chemical castration; he took his own life two years later. In 2009 the then Prime Minister Gordon Brown apologised for this, most grotesque, of injustices. We have come a long way since the days when this kind of inhumane, homophobic mistreatment formed a part of our legal system. Over the past six decades the slow but steady march towards equal treatment has led us to a point where we are ready to remove the last vestiges of discrimination from our laws and our social structures.

9. The emergence of a drive to reform a criminal justice system which sanctioned people for their sexuality - imposing cruel and humiliating punishments - began in the 1950s following a series of much publicised prosecutions of individuals for homosexual activity in the UK. The Wolfenden Committee, appointed by Churchill's Conservative Government in 1954, concluded that the criminalisation of homosexuality was an unnecessary infringement of civil liberty and recommended the decriminalisation of private sexual activity between two men aged 21 or over.<sup>7</sup> Unfortunately the Committee also recommended harsher penalties when the same activities were carried out in public places.<sup>8</sup> Nevertheless, the Report marked a milestone in the history of gay rights – before its publication in 1957 there had been little public discussion of the criminalisation of men on the basis of their sexuality. Reform of our discriminatory criminal law, however, did not make its way on the political agenda until the mid-1960s. In 1965, Conservative whip Lord Arran advanced a motion in the House of Lords calling for the implementation of the Wolfenden Committee's recommendations and the following year Labour MP Leo

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<sup>7</sup> See analysis on the National Archives webpage: <http://www.nationalarchives.gov.uk/cabinetpapers/themes/before-after-wolfenden-report.htm>.

<sup>8</sup> See analysis on the Parliament website: Regulating sex and sexuality: the 20th century, available at: <http://www.parliament.uk/about/living-heritage/transformingsociety/private-lives/relationships/overview/sexuality20thcentury/>.

Abse sponsored a Private Members Bill which aimed to decriminalise private sexual activity between men aged 21 or over. The *Sexual Offences Act* received Royal Assent in 1967 with Harold Wilson's Labour Government allowing a free vote on the Bill. The legislation passed with significant support from the Labour benches, but also from a number of Tory MPs including future Prime Minister Margaret Thatcher.<sup>9</sup>

10. During the 1970s, Liberty (then the National Council for Civil Liberties) launched reports into institutionalised discrimination in our public services, with investigations into police harassment of gay men, reports on attitudes in the teaching profession and test case litigation to establish the right of a lesbian midwife to become a health visitor.<sup>10</sup> In 1981, following intensive lobbying by Liberty and others the *Criminal Justice (Scotland) Act 1980*, came into force, extending the decriminalisation provisions of the *Sexual Offences Act 1967* to Scotland. Parallel provision was made in Northern Ireland the next year following the decision of the European Court of Human Rights in *Dudgeon v United Kingdom* which found that continued criminalisation in Northern Ireland represented a violation of the right to respect for private and family life.<sup>11</sup> Civil liberties activists continued to push for an end to exemptions to decriminalisation in the military and in 1984 Liberty delivered a body blow to homophobic censorship when it successfully challenged the decision of Customs and Excise Officers to confiscate one third of the stock of 'Gay's the Word' bookshop in London.<sup>12</sup>

11. Whilst significant strides were made during the 1970s and the early 80s the situation for the gay community remained one of marginalisation and discrimination. In response to a backlash against the publication and availability of gay literature in libraries, section 28 of the *Local Government Act 1988* came into force. The section prohibited local authorities from '*promoting*' homosexuality or '*the acceptability of homosexuality as a pretended family relationship*'. In 1984 a modest proposal by the Criminal Law Revision Commission sought to equalise

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<sup>9</sup> See historic Hansard, Commons debate, 3<sup>rd</sup> July 1967. Available at: <http://hansard.millbanksystems.com/commons/1967/jul/03/clause-1-amendment-of-law-relating-to>.

<sup>10</sup> See Liberty's gay rights timeline, available at: <http://www.liberty-human-rights.org.uk/campaigns/a-decent-proposal/gay-rights-timeline.php>.

<sup>11</sup> (1981) 4 EHRR 149. The relevant legislation was an Order in Council, the *Homosexual Offences (Northern Ireland) Order 1982*, which came into force on 8 December, 1982.

<sup>12</sup> See Liberty's gay rights timeline, available at: <http://www.liberty-human-rights.org.uk/campaigns/a-decent-proposal/gay-rights-timeline.php>.

defences to the offence of buggery for homosexual and heterosexual offences.<sup>13</sup> In 1985 the Howard League for Penal Reform published an influential report recommending that provisions on consent for men and women be equalised.<sup>14</sup> Liberty and other civil liberties and equality groups continued to lobby for equality in the age of consent and a purging of remaining discriminatory offence from the statute book. In its draft Criminal Code published in 1989, the Law Commission added its voice to the debate recommending that the age of consent for gay men be lowered to 18.<sup>15</sup>

12. In 1994, under John Major's Conservative Government, the *Criminal Justice and Public Order Act* made its way through Parliament. Conservative MP Edwina Curry tabled amendments which would have equalised the age of consent at 16; sadly the amendments were narrowly defeated notwithstanding substantial cross-party support including from figures such as former Prime Minister Tony Blair, former leader of the Liberal Democrats Paddy Ashdown and current Foreign Secretary William Hague.<sup>16</sup> Following a free vote in the Commons a new age of consent of 18 was settled upon with support from the Prime Minister and most of the Cabinet. The 1994 Act also decriminalised homosexual acts in the armed forces or on merchant ships.<sup>17</sup> Two years later the European Commission of Human Rights ruled admissible the application of a 17-year old who sought to argue that continued inequality in the age of consent breached his right to respect for his private life and his right not to be discriminated against.<sup>18</sup>

13. The pace of change picked up with a New Labour Government, which secured many significant advances in equality. In 1998 the *Human Rights Act* (HRA) received Royal Assent, providing that all the rights and freedoms it protects be secured without discrimination.<sup>19</sup> The next year Liberty represented Graeme Grady and Jeanette Smith who were dismissed from the armed forces for their

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<sup>13</sup> House of Commons Research Paper 98/68, 19 June 1998: 'Age of Consent for Male Homosexual Acts', page 11.

<sup>14</sup> House of Commons Research Paper 98/68, 19 June 1998: 'Age of Consent for Male Homosexual Acts', page 11.

<sup>15</sup> House of Commons Research Paper 98/68, 19 June 1998: 'Age of Consent for Male Homosexual Acts', page 13.

<sup>16</sup> See historic Hansard, House of Commons, 21 February 1994, available at: <http://hansard.millbanksystems.com/commons/1994/feb/21/amendment-of-law-relating-to>.

<sup>17</sup> Section 146.

<sup>18</sup> Application of Euan Sutherland, see Liberty's Gay Rights timeline, available at: <http://www.liberty-human-rights.org.uk/campaigns/a-decent-proposal/gay-rights-timeline.php>.

<sup>19</sup> Article 14 of the European Convention on Human Rights as incorporated into UK Law by the Human Rights Act 1998.

sexual orientation. The European Court of Human Rights ruled that their dismissal together with the intrusive investigations conducted by the armed forces were unlawful.<sup>20</sup> As the HRA came into force in 2000, the Sexual Offences (Amendment) Act 2000 finally equalised the age of consent at 16, in the same year the European Court of Human Rights ruled that the very existence of legislation prohibiting consensual acts between more than two men in private was inconsistent with the UK's obligation to respect the right to private and family life.<sup>21</sup>

14. Progression towards equality continued apace. In 2002, the *Adoption and Children Act*, secured the right of gay couples to adopt a child, the following year brought the long overdue repeal of section 28 of the *Local Government Act 1988*, accompanied by the *Employment Equality (Sexual Orientation) Regulations 2003*, providing significant protection against discrimination in the work place. The following year in a Human Rights Act ruling, the House of Lords found that that the *Rent Act 1977* could be read compatibly with the protections enshrined in the Convention on Human Rights, ensuring that where one member of a same-sex couple dies, the remaining partner has the same rights as the surviving member of an opposite sex couple and would become a statutory tenant by succession.<sup>22</sup> 2004 also saw the *Civil Partnerships Act* receive Royal Assent and from 2005 gay couples, for the first time, were granted the right to formerly recognise and celebrate their relationship in the form of a civil union granting many - although not quite all - of the rights available to married couples. 2007 brought the *Equality Act (Sexual Orientation) Regulations* which, along with the 2003 Regulations, were ultimately placed on a statutory footing as the outbound Labour Government pushed through the *Equality Act 2010*. Under the 2010 Act it is illegal to discriminate on the grounds of sexual orientation in the provision of goods or services, in education, when selling or letting land, or when exercising public functions.<sup>23</sup> The Act also places an 'equality duty' on public bodies to proactively promote equality.<sup>24</sup> In 2009, Liberty successfully intervened in a case where the Court of Appeal ruled that Islington Council was right to expect employee Lillian

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<sup>20</sup> (1999) 29 EHRR 493.

<sup>21</sup> In the case of *ADT v UK* App. No. 35765/97, Judgment of 31 July 2000. The European Court of Human Rights found that the existence of legislation prohibiting consensual sexual acts between more than two men in private, and the applicant's consequent conviction for gross indecency, violated his right to respect for his privacy.

<sup>22</sup> *Antonio Mendoza v Ahmad Raja Ghaidan* [2004] UKHL 30.

<sup>23</sup> Section 29, Equality Act 2010 makes it unlawful to discriminate in the provision of services (s29(1), Equality Act 2010) and in the exercising of public functions (s29(6), Equality Act 2010).

<sup>24</sup> Section 149.

Ladele to perform same-sex civil partnerships as part of her role as registrar.<sup>25</sup>

Using new equality protections Liberty also took on the case of a gay couple turned away from a B&B because of their sexuality and late last year, following legal action brought by Liberty, a major multi-national company agreed to give the civil partners of its employees the same pensions benefits as spouses.<sup>26</sup>

15. The newly formed Coalition Government picked up the baton almost immediately, proving once again that respect for civil liberties and a rejection of discrimination has roots which run deeper than the ebb and flow of party politics. Liberty welcomed the Coalition's plans to bring into force a provision of the *Equality Act 2010* providing for civil partnerships to take place on religious premises<sup>27</sup> and briefed in favour of provisions of the *Protection of Freedoms Act 2012* providing for defunct and discriminatory records of offences between consenting men over 16 to be disregarded by potential employees and others.<sup>28</sup> Whilst Liberty lobbied for these records to be removed entirely as opposed to disregarded, these new provisions undoubtedly went some way towards addressing a grave historic injustice. Plans to lift the ban on same-sex civil marriage are further evidence that this Government is ready and willing to advance the course of equal treatment.

### *Comparative analysis*

16. The pursuit of gay equality here in the UK is part of a global process of change. It is not only our own Prime Minister who has made such a strong principled commitment to same-sex marriage. In an interview with ABC News on 9<sup>th</sup> May, President Obama ended months of speculation by confirming that he believed it was right that gay couples should be able to marry.<sup>29</sup> This development is further evidence that the tide has clearly and decisively turned in favour of equal marriage in many parts of the world. Disturbingly, in other parts of the world the clock is being put back on gay rights issues. In Uganda, for example, legislation is being

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<sup>25</sup> *Ladele v London Borough of Islington* [2009] IRLR 54.

<sup>26</sup> See Liberty's Press Release at: <http://www.liberty-human-rights.org.uk/media/press/2011/liberty-secures-pension-benefits-for-civil-partners.php>.

<sup>27</sup> Liberty's Response to the MOJ Consultation on Civil Partnerships on Religious Premises, available at: <http://www.liberty-human-rights.org.uk/pdfs/policy11/liberty-s-response-to-the-moj-consultation-on-civil-part.pdf>.

<sup>28</sup> See Liberty's Report Stage Briefing in the House of Lords, available at: <http://www.liberty-human-rights.org.uk/pdfs/policy12/liberty-s-report-stage-briefing-freedoms-bill-hol-jan-2012-.pdf>.

<sup>29</sup> <http://abcnews.go.com/blogs/extras/2012/05/09/nightline-daily-line-may-9-president-obama-interview-abc-exclusive/>.

considered to extend the criminalisation of homosexuality. Here and in countries from Sri Lanka to Saudi Arabia, Barbados to Belize gay people face unspeakable rights violations on a daily basis. Liberty believes that the UK, by eradicating the last vestiges of discrimination from our laws and institutions, sends a strong message to those states which prosecute and persecute gay people. The time has come for us to add our name to the list of democracies old and new committed to the equal treatment of loving and committed couples – gay or straight.

17. Many countries have followed a trajectory similar to ours over the past decade. Iceland, for example, legislated for ‘registered partnerships’ for same-sex couples in 1996, in 2008 provision was made for the Church of Iceland to bless registered partnerships. In June 2010 the Government passed a Bill to repeal the law around registered partnership and create the infrastructure for full marriage equality. This legislation made clear that whilst ministers were free to perform same-sex marriages if they so wished, there was no obligation for them to do so.<sup>30</sup> In Norway same-sex couples were given the right to marry, including in religious ceremonies, in 2009.<sup>31</sup> Couples had previously had the option of entering a registered partnership since 1993 and, as per the present proposals, those who had already entered a civil partnership had the right to convert this to a marriage. Under the present structure in Norway, Registered Partnerships are no longer available, with all couples simply having the option to marry. In the Netherlands, too, gay couples first received the right to enter into a civil union in 1998 with same-sex marriage legalised in 2001. Whilst local Governments are – in general – obliged to conduct same-sex marriages, the Protestant Church in the Netherlands permits individual congregations to decide whether or not to bless same-sex marriages.<sup>32</sup> In Belgium a Bill legalising same-sex marriage came into force on 1 June 2003 – the Bill amended the first paragraph of Article 143 of the Belgian Civil Code to read: *“Two persons of different sexes or of the same-sex may contract marriage”*.<sup>33</sup> Since 2003, more than 17,000 gay couples have married in that country.<sup>34</sup> In Sweden a Bill making marriage a gender-neutral institution came into force in 2009. This legislation allows gay couples to marry in both civil and religious ceremonies and followed on from the introduction of registered partnerships in

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<sup>30</sup> <http://www.reuters.com/article/2010/06/11/us-iceland-gaymarriage-idUSTRE65A3V020100611>.

<sup>31</sup> Following the publication of a gender neutral Marriage Act: <http://www.regjeringen.no/en/doc/Laws/Acts/The-Marriage-Act.html?id=448401>.

<sup>32</sup> <http://www.protestantchurch.nl/info.aspx?page=1649>.

<sup>33</sup> <https://same-sex.web.ined.fr/pdf/DocTrav125/05Doc125Belgium.pdf>.

<sup>34</sup> <http://www.thegaymarriageblog.com/2011/08/belgium/>.

1995. A 2009 poll conducted by Sveriges Television found that 68% of pastors in the Lutheran Church of Sweden said they would officiate at gay marriages in their Church.<sup>35</sup>

18. It is not only Northern Europe that is embracing marriage equality, in Spain - a predominantly Catholic country - both civil and religious marriages have been open to gay couples since 2005.<sup>36</sup> In Portugal same-sex marriage became legal on 5<sup>th</sup> June 2010.<sup>37</sup> Further, a number of predominantly Catholic South American countries have, to some extent, embraced equal marriage in recent years. In Argentina laws legalising same-sex marriage came into force in July 2010 – married same-sex couples now have all the rights and responsibilities of marriage, including the right to adopt children.<sup>38</sup> Same-sex civil unions have been available in Mexico City since March 2007, these same-sex unions known as ‘Civil Pacts of Solidarity’ had been legalised in Coahuila earlier that year in January 2007. In December 2009, the Legislative Assembly legalised gay marriage in Mexico City.<sup>39</sup> The law became effective in March 2010 and the country’s Supreme Court upheld the constitutionality of the law in a judgement handed down on 5<sup>th</sup> August 2010 – the Court later ruled that same-sex marriages conducted in Mexico City are valid throughout the country.<sup>40</sup>

19. Gay marriages are conducted in a number of US states, including the states of Washington and Maryland which passed laws in 2012 to begin granting same-sex marriage licenses. It is to be hoped that these will be endorsed by referendums to be held in both states later this year. In Canada same-sex marriage was legalised in July 2005, prior to this, Courts in 8 out of 10 Canadian provinces had ruled that restricting marriages to opposite-sex couples constituted discrimination on the grounds of sexual orientation and ran counter to the protections enshrined in the Canadian Charter of Rights and Freedoms.<sup>41</sup>

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<sup>35</sup> [http://current.com/community/89757047\\_majority-of-swedish-pastors-support-gay-marriage.htm](http://current.com/community/89757047_majority-of-swedish-pastors-support-gay-marriage.htm).

<sup>36</sup> "Spain's new government to legalize gay marriage". *Reuters*, available at: <http://legacy.utsandiego.com/news/world/20040415-0750-spain-marriage.html>.

<sup>37</sup> Law N°9/2010, 31 May.

<sup>38</sup> Barrionuevo, Alexei (13 July 2010). "Argentina Senate to Vote on Gay Marriage". *The New York Times*. <http://www.nytimes.com/2010/07/14/world/americas/14argentina.html>.

<sup>39</sup> Mark Stevenson (Associated Press) (29 December 2009). "Mexico City enacts region's 1st gay marriage law". MSNBC. [http://www.msnbc.msn.com/id/34514521/ns/world\\_news/](http://www.msnbc.msn.com/id/34514521/ns/world_news/). Retrieved 30 December 2009.

<sup>40</sup> "Supreme Court rules gay weddings valid in all Mexico" *BBC News*. 10 August 2010.

<http://www.bbc.co.uk/news/world-latin-america-10932748>.

<sup>41</sup> Article 15(1) of the Charter.

20. Perhaps unsurprisingly, South Africa was amongst the first nations to embrace same-sex marriage, with gay couples able to marry in the country since November 2006. As a nation which understands - all too well - the injustice of exclusion on the basis of innate characteristics, unequal marriage was rife for reform. The decision to legislate for same-sex marriage came after a challenge to the constitutionality of denying gay couples the right to marry.<sup>42</sup> Faith groups and representatives of religious organisations have the option of hosting same-sex marriages, but are not obliged to do so.

21. Liberty is delighted that, like South Africa and a significant number of others, our Government has pledged to make marriage an inclusive institution. The Government can take heart from statistics which demonstrate that, in those countries where same-sex couples may marry, support for inclusive marriage has remained high or increased. In Norway polls indicate that 66% of the population support same-sex marriage, up 5% from 2003.<sup>43</sup> In Spain recent surveys place support at 60%, whilst a 2008 survey revealed support from 71% of Swedes.<sup>44</sup> In the US, while opinion is more evenly divided, three surveys conducted by the Washington Post and ABC News since May 2011 have shown from 51% - 53% of Americans believe it should be legal for gay and lesbian couples to marry.<sup>45</sup>

22. Similarly, polling carried out in Scotland at the end of last year revealed that more than 60% of the population believed that gay people should be allowed to get married, compared to only 19% who disagreed.<sup>46</sup> The Scottish Government have now consulted on the issue, setting out a preliminary view that gay couples should be able to marry in both civil and religious ceremonies. Cabinet Secretary for Health, Nicola Sturgeon made clear that the Government was:

*aware that for religious reasons, some faith groups and celebrants may not want to solemnise same-sex marriages, and that is why [the Government] are making it clear that they should not be obliged to do so.*<sup>47</sup>

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<sup>42</sup> *Minister of Home Affairs and Another v Fourie and Another; Lesbian and Gay Equality Project and Others v Minister of Home Affairs and Others*

<sup>43</sup> <http://www.buddybuddy.com/mar-norw.html>.

<sup>44</sup> [http://ec.europa.eu/public\\_opinion/archives/eb/eb66/eb66\\_highlights\\_en.pdf](http://ec.europa.eu/public_opinion/archives/eb/eb66/eb66_highlights_en.pdf).

<sup>45</sup> [http://www.huffingtonpost.com/2012/05/09/gay-marriage-polls-trend\\_n\\_1504577.html](http://www.huffingtonpost.com/2012/05/09/gay-marriage-polls-trend_n_1504577.html)

<sup>46</sup> <http://www.scotland.gov.uk/News/Releases/2011/09/02114626>

<sup>47</sup> <http://www.scotland.gov.uk/News/Releases/2011/09/02114626>

23. A report recently published by Stonewall including polling of a representative sample of over 2,000 people in Britain, reveals that 71% of the population support the Government's commitment 'to extend the legal form and name of civil marriage to same-sex couples'.<sup>48</sup> Just 25% of those polled were opposed or strongly opposed to the Government's proposals. We wholeheartedly support the Government in plans which would mark a significant advance for equality and civil liberties in this country. But we also urge the Government, like various of the democracies considered above, to go further and embrace true marriage equality: this means allowing those religious denominations which wish to do so the opportunity to marry same-sex couples.<sup>49</sup>

## **Part 2**

### **Implementing same-sex marriage**

#### **Allowing civil marriage for same-sex couples**

24. The central proposal outlined in the consultation paper is a simple one: where two individuals who are of the same sex wish to formally express their love and commitment to each other they will be able to do so by way of marriage in a civil ceremony. Religious marriage will remain confined to a union between a man and a woman, and civil partnership will only be an option for a same-sex couple.

#### **How the current legal framework will change**

25. The *Matrimonial Causes Act 1973* provides that marriages celebrated after 1971 can be void on a number of grounds, including "*that the parties are not respectively male and female*".<sup>50</sup> The *Marriage Act 1949* itself does not define marriage as between a man and a woman, but rather defines the procedure and premises where a marriage can take place. A marriage will be void unless it takes place in accordance with the provisions of the Act.<sup>51</sup> Accordingly marriage is legally permitted:

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<sup>48</sup> Living together: British attitudes to lesbian, gay and bisexual people in 2012.

<sup>49</sup> [http://www.stonewall.org.uk/documents/stonewall\\_equal\\_marriage\\_consultation\\_response.pdf](http://www.stonewall.org.uk/documents/stonewall_equal_marriage_consultation_response.pdf).

<sup>50</sup> Section 11 Matrimonial Causes Act 1973.

<sup>51</sup> Section 49 Marriage Act 1949.

- (a) in accordance with the rites of the Church of England or Church in Wales;<sup>52</sup>
- (b) in accordance with the usages of the Society of Friends (i.e. the Quakers);<sup>53</sup>
- (c) in accordance with the usages of the Jewish religion;<sup>54</sup>
- (d) in a registered building by an authorised person – including civil marriage and all other religions where a religious officer conducts the ceremony under the oversight and registration of an authorised person;<sup>55</sup>
- (e) in a register office by a superintendant registrar and registered by a registrar, which involves a service without any religious elements;<sup>56</sup>
- (f) on approved premises by a superintendant registrar and registered by a registrar, which involves a service without any religious elements;<sup>57</sup> or
- (g) in a household for those who are housebound or detained.<sup>58</sup>

A clergyman is permitted to refuse to perform the marriage ceremony where he believes that one of the individuals has acquired their gender under the *Gender Recognition Act 2004*.<sup>59</sup>

26. The consultation paper proposes to allow for same-sex marriage by amending grounds (e), (f) and (g) above. That is, marriage will be made available for same-sex couples where it is performed as a civil ceremony in either a registry office, on approved premises such as a hotel or in a household for those who are housebound or detained. The consultation paper makes clear that any amendment to the legislation governing marriage will not alter marriage which takes place on religious premises: it will therefore not be legally possible for a minister of faith to marry a same-sex couple as part of a religious ceremony.<sup>60</sup>

27. Same-sex couples then will be able to have a civil marriage, or continue to register a civil partnership under the *Civil Partnership Act 2004*, a regime to which no changes are proposed. The Government says it has chosen to retain the civil partnership regime, rather than entirely replace it with marriage, because it believes

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<sup>52</sup> See s 26(1)(e) and Part II Marriage Act 1949.

<sup>53</sup> Sections 26(1)(c), 47 Marriage Act 1949.

<sup>54</sup> Section 26(1)(d) Marriage Act 1949.

<sup>55</sup> Section 26(1)(a) Marriage Act 1949.

<sup>56</sup> Section 26(1)(b) Marriage Act 1949.

<sup>57</sup> Other than where the person seeks a Jewish or Quaker religious ceremony: s 26(1)(bb) Marriage Act 1949.

<sup>58</sup> Section 26(1)(dd) *Marriage Act 1949*.

<sup>59</sup> Section 5B Marriage Act 1949.

<sup>60</sup> Consultation Paper, *ibid*, at para 2.11.

that some same-sex couples value civil partnership in preference to marriage.<sup>61</sup> Those who have committed to a civil partnership will be able to convert it to a marriage, with no loss of rights which have already begun to accrue under the partnership.<sup>62</sup> No changes are suggested which will allow civil partnerships to be made available as an option for an opposite sex couple. The consultation paper states this is because there has not been a need or want identified for civil partnership to be so extended.<sup>63</sup>

28. The Consultation Paper states that it is intended that civil partnership will still be able to take place on religious premises, as is currently the case.<sup>64</sup> The ability of couples to have a religious ceremony to celebrate their civil partnership is a relatively new, and very welcome, development. As originally passed the *Civil Partnership Act 2004* expressly excluded the possibility of civil partnerships taking place on religious premises.<sup>65</sup> 'Religious premises' is defined in the Act to include premises used solely or mainly for religious purposes, or which have been so used and have not been subsequently used solely or mainly for other purposes since.<sup>66</sup> During the passage of the *Equality Bill 2010* the House of Lords sought to rectify this issue by proposing an amendment which would lift the ban on civil partnership registration in religious premises in the CPA, also allowing, for the avoidance of doubt, that nothing in the Act places an obligation on religious organisations to host civil partnerships if they do not wish to do so.<sup>67</sup> Responding to the concerns raised – echoing those seen around this consultation on allowing for same-sex civil marriage - the Labour Government allowed a freedom of conscience vote on the amendment. Both Houses voted in favour<sup>68</sup> and following consultation the amendment was brought into force in late 2011. Religious premises can now apply for approval to hold a civil partnership ceremony. The change was a huge step forward and one Liberty supported. We believe that, in keeping with our overarching human rights framework, this reform allows for all of our inherent characteristics and various beliefs to co-exist to the benefit of all; as noted by Baroness Campbell supporting the insertion of the amendment to lift the ban in the CPA, "*accepting and valuing human diversity by supporting our fundamental*

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<sup>61</sup> Consultation Paper, *ibid*, at para 2.17 to 2.18.

<sup>62</sup> Consultation Paper, *ibid*, at para's 2.22 and 2.23.

<sup>63</sup> Consultation Paper, *ibid*, at para 2.17.

<sup>64</sup> Consultation Paper, *ibid*, at para 2.24.

<sup>65</sup> Section 6(2) CPA before amendment.

<sup>66</sup> Section 6(2) CPA.

<sup>67</sup> Section 202.

<sup>68</sup> Section 216(3).

*differences will be the glue that binds us in the future*".<sup>69</sup> Further, despite concerns raised at the time that this would expose to legal challenge those religions who chose not to allow for civil partnerships to be registered on their premises, at the time of writing no such challenges have been forthcoming.

29. Legal entitlements and obligations which arise as a result of either civil or religious marriage will remain the same: it is not intended that two separate legislative regimes will be created for civil and religious marriage.<sup>70</sup> Currently civil partnership is, legally speaking, intended to mirror the entitlements which a couple gains via marriage. Accordingly entitlements in the context of housing, property, taxation, business and immigration for example are the same for same-sex civil partners and married couples. Having said that, notable exceptions of legal inequity remain – discriminatory treatment is still meted out for the provision of pensions, for example.<sup>71</sup> The consultation also proposes that procedures for divorce will be the same as at present whether the ceremony is civil or religious..<sup>72</sup> Under the current regime marital divorce is governed by the *Matrimonial Causes Act 1973*, which specifies a number of grounds on which a marriage can be legally terminated.

30. The consultation paper also proposes making changes to ensure that people who wish to change their gender do not have to obtain a divorce or dissolve their civil partnership in order to remain together. Under the current law, a Gender Recognition Certificate will only be given to someone who is not legally married or civilly partnered. Accordingly in order to stay married or partnered and also change their sex, individuals have to end their current arrangements with the consequent loss of accrued benefits and pensions. By allowing for civil marriage for same-sex couples, a couple will be able to remain married where they become the same-sex during the course of their marriage.<sup>73</sup> Similarly those who are in a civil partnership will be able to convert to civil marriage where one partner changes their gender such that they become an opposite sex couple.<sup>74</sup>

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<sup>69</sup> Baroness Campbell of Surbiton, House of Lords Hansard, 25<sup>th</sup> January 2011 at column 1201.

<sup>70</sup> Consultation Paper, *ibid*, at para 2.7.

<sup>71</sup> Currently under

<sup>72</sup> Consultation Paper, *ibid*, at para 2.15.

<sup>73</sup> See para 2.29.

<sup>74</sup> See para 2.29.

**If same-sex couples obtain predominantly the same legal rights as married couples through civil partnership, why make the change?**

31. As outlined above, the Civil Partnership Act was introduced to ensure that decades of discrimination faced by same-sex cohabiting couples who wanted to formally commit to each other was eradicated. For the most part, this has been achieved. Allowing for civil marriage for same-sex couples, however, is not just a question of semantics. It is a small legal amendment which will lead to huge positive social change.

32. During the listening exercise conducted by the Government regarding the next steps for civil partnership “*it was clear that there was a desire to move towards equal civil marriage*”.<sup>75</sup> The debate around present proposals has been variously confused, disingenuous and purposefully inflammatory. In its response to the consultation and in media messaging around its release, the Church of England has suggested that these proposals will lead to legal challenges against those faith groups which, for religious reasons, object to marrying gay couples.<sup>76</sup> The legal opinion of Karon Monaghan QC, makes clear that these allegations are completely unfounded:

*In my view, a refusal by a church or other religious organisation, to conduct a same-sex marriage, so as to comply with the tenets of its religion or the strongly held and faith based convictions of its members, will invariably be regarded by any court as justified.*<sup>77</sup>

33. Indeed, the attached legal opinion makes clear that any requirement compelling a reluctant religious organisation to conduct gay marriages would itself fall foul of human rights protections:

*Indeed a requirement that a church or other religious organisation conduct same-sex marriages, contrary to their faith, would very likely be regarded*

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<sup>75</sup> See Government Equalities Office (November 2011) Summary of Responses, Civil partnerships on religious premises: A consultation at para 1.17. In our response to this consultation Liberty outlined support for civil marriage for same-sex couples: see Liberty’s response to the Ministry of Justice consultation on Civil Partnerships on Religious Premises (June 2011) available at <http://www.liberty-human-rights.org.uk/pdfs/policy11/liberty-s-response-to-the-moj-consultation-on-civil-part.pdf>.

<sup>76</sup> <http://www.churchofengland.org/media/1475149/s-s%20marriage.pdf>.

<sup>77</sup> Legal Opinion of Karon Monaghan QC, paragraph 53.

*as discriminatory under Article 14 read with Article 9 as against it since “the right not to be discriminated against in the enjoyment of the rights guaranteed under the Convention is also violated when States without an objective and reasonable justification fail to treat differently persons whose situations are significantly different.”<sup>78</sup> Treating churches and religious organisations that have doctrinal objections to same-sex marriage in the same way as those that do not, is to fail to make a distinction between the two which will result in a discriminatory outcome.*

34. The attached legal opinion also sets out, in the clearest possible terms, the kind of legal infrastructure which could be put in place to ensure full and proper respect for the right to freedom of conscience and belief of all religious organisation.

35. Since these proposals were announced wild claims have emerged regarding the possible consequences of same-sex marriage, ranging from immorality and social breakdown<sup>79</sup> to a risk of polygamy and marriage between siblings.<sup>80</sup> Such furore, which attacks the integrity and dignity of the homosexual community. In order to stop social marginalisation which persists despite steps towards legal equality the social recognition and respect which flows from marriage must be extended to everyone in the community. This is why Liberty wholeheartedly welcomes these proposals.

### **Part 3**

#### **Balancing religious freedom and equality**

36. It has been disappointing that certain sections of the media and some senior religious and political figures have cast the proposal for same sex marriage as one which pits religious freedom against same-sex equality. Our human rights framework makes clear that this simplistic dichotomous approach is as inaccurate as it is unhelpful. In our free and fair society there is room for both religious

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<sup>78</sup> Thlimmenos v Greece (2000) 31 EHRR 411 at para 44.

<sup>79</sup> “Gay marriage is like slavery and goes against ‘natural law’ says Catholic leader” (5<sup>th</sup> March 2012) Daily Mail, available at <http://www.dailymail.co.uk/news/article-2109982/Cardinal-Keith-OBrien-brands-Camerons-gay-marriage-plans-grotesque.html>.

<sup>80</sup> According to Reg Bailey, the Prime Minister’s adviser on family issues, as reported: “Senior Jew and Sikh fight gay marriage” The Daily Telegraph (17<sup>th</sup> March 2012), available at <http://www.telegraph.co.uk/news/religion/9150808/Senior-Jew-and-Sikh-fight-gay-marriage.html>.

freedom and equal treatment, with both principles finding legal protection under our Human Rights Act.

### **The human right to religious freedom**

37. Article 9 of the Human Rights Convention<sup>81</sup> provides that everyone has the right to freedom of thought, conscience and religion. The right encompasses the freedom to change your religion or belief, either alone or in community with others, and to manifest your religion or belief, in public or private, in worship, teaching, practice and observance. The right can only be limited in law where it is necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.<sup>82</sup> The right is given extra weight by section 13 of the HRA, which provides that courts must have particular regard to Article 9 when considering any issue which might affect the exercise, by a religious organisation or its members, of the right to freedom of thought, conscience and religion. The effect of these two provisions is a robust protection for an important tenet of the British tradition of liberty. The role of the State under this right is simply to encourage religious tolerance.

38. Liberty has long advocated for the protection of religious freedom. There is no doubt Article 9 has played an important role in promoting and protecting religious freedom in modern Britain. In 2008 Liberty represented 14-year-old Sarika Singh, a pupil at Aberdare Girls' School who was excluded from classes for wearing her kara – a plain bangle widely accepted as a central tenet of the Sikh race and religion. Using the HRA, we successfully defended Sarika's right to wear her kara in the wider pursuit of freedom of thought, conscience and religion for everyone in Britain.<sup>83</sup> Similarly in another case to be shortly heard by the European Court of Human Rights, a devout Christian forced to take unpaid leave from her employment at British Airways because the company would not allow her to wear a small cross on a chain around her neck, will challenge this decision using Article 9 of the Convention.<sup>84</sup> Nadia Eweida argues that her cross is an important symbol of her Christianity and she should have been permitted to wear this simple and

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<sup>81</sup> The European Convention on Human Rights has been incorporated into domestic law by the Human Rights Act 1998.

<sup>82</sup> Article 9(2).

<sup>83</sup> *Watkins-Singh, R (on the application of) v Aberdare Girls' High School & Anor* [2008] EWHC 1865 (Admin) (29 July 2008).

<sup>84</sup> Application no's 48420/10 and 59842/10 *Eweida and Chaplin v the United Kingdom*.

inoffensive sign of her faith at work. Liberty has also recently been granted permission to intervene in the challenge to the French law which has outlawed the wearing of clothing to conceal the face – the so-called ‘burqa ban’.<sup>85</sup> In our submissions we have outlined the importance of the right to freedom of religion which, given the Convention’s historical impetus, needs to be carefully guarded.

## **Equal treatment**

39. Also enshrined in our human rights framework is the fundamental principle of non-discrimination. The Human Rights Convention was written following one of the most brutal periods of discriminatory treatment in modern global history.<sup>86</sup> The principle of non-discrimination, enshrined comprehensively in the Convention, the HRA and equalities legislation, provides for a person not to be discriminated against, whether on the grounds of race, sex, religion, language, sexual orientation or political opinion. Article 14 of the Convention prohibits discrimination in the application of human rights. While the article does not give a free-standing right to non-discrimination, it does require that all the other rights protected by the HRA can be secured without discrimination. In this way, freedom from discrimination is the key to the effective protection of human rights for all, meaning, for example, that protection against torture does not apply only to people of certain faiths, the right to liberty is not dependent on nationality and the right to protest is not dependent on an individual’s political views.

## **Balancing religious freedom and equality?**

40. While the right to religious freedom is not absolute (the HRA provides for this right to be interfered with where it is proportionate in order to, among other things, protect the rights and freedoms of others), allowing for same-sex (civil or religious) will not dilute the protection available to those organisations which are opposed to carrying out such ceremonies. This point is, again, reinforced in the attached legal opinion:

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<sup>85</sup> SAS v France, Application No. 43835/11.

<sup>86</sup> For a history of British involvement in the drafting of the European Convention on Human Rights and the events which led to its creation, see Osborne, P and Norman, J (2009) Churchill’s Legacy: The Conservative Case for the Human Rights Act (Published by Liberty: London), available at <http://www.liberty-human-rights.org.uk/policy/reports/churchill-s-legacy-the-conservative-case-for-the-hra-october-2009.pdf>.

*The Article 9 protection afforded religious organisations is strong, as discussed above. This too would provide real safeguards to a religious organisation that did not wish to conduct same-sex marriages on doctrinal grounds, as I have addressed above.*

41. Societies evolve, change and advance; historically, in most cases, this has been for the better. We have, as a society, put an end to entirely deplorable activities once considered acceptable - from slavery to apartheid to the subordination of women. And just as we have seen an end to this type of differential treatment so too will differential treatment of the LGBT community come to an end; denying the extensions of the benefit of marriage to same sex-couples and continuing to hide differential treatment behind a mask of religious freedom is unjust and unfair. Former Archbishop of Canterbury Lord Carey, who has vehemently opposed same-sex marriage, has himself acknowledged that *“The state does not ‘own’ the institution of marriage. Nor does the church. The honourable state of matrimony precedes both the state and the church, and neither of these institutions have the right to redefine it in such a fundamental way.”*<sup>87</sup> We agree – the kinship of two people living co-dependently pre-dates religion, and this concept of kinship has remained constant even as the formal structures to recognise this relationship have evolved to reflect social change. This consultation does not involve the Government imposing a definition of marriage on everyone, it simply stops religious institutions from doing the same.

42. There are a number of other arguments which have been put forward against same-sex civil marriage following the Government’s publication of its reform proposals. It has been argued for example that allowing for same-sex marriage will dilute the strength of the institution of marriage - around which our societal family structure is based. If a marital family unit is considered to be the most robust way to structure a society then why not extend it to everyone? Accepting that marriage is a common good and given the developments in other areas of law such as same-sex parenting, it is only logical that same-sex marriage be now introduced.

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<sup>87</sup> “Marriage will ONLY remain the bedrock of a society if it is between a man and a woman” *Daily Mail*, 19<sup>th</sup> February 2012, available at: <http://www.dailymail.co.uk/debate/article-2103513/Marriage-ONLY-remain-bedrock-society-man-woman.html>

## Protecting Freedom of Religion

43. While Liberty appreciates that the consultation paper's restriction of same-sex marriage to civil premises is an attempt to respond to concerns of faith groups regarding same-sex marriage, the consultation paper has not addressed the other issue of religious freedom – the freedom of those religious leaders and faith groups who wish to perform same-sex marriages within the tenets of their faith to be able to do so. Even within seemingly fixed religious positions there are ongoing internal discussions about how religions seek to address these questions. The Church of England, for example, has set out its position that while the Church supports same-sex partnership it supports a separation between civil and religious marriage and therefore entirely rejects these proposals.<sup>88</sup> Yet a recent letter to *The Times* from senior influential members of the Anglican Church gave some context to the officially adopted position:

*Recent statements by church leaders past and present may have given the mistaken impression that the Church is universally opposed to the extension of civil marriage to same-sex couples. We believe that does not adequately reflect the range of opinion which exists within the Church of England.*

*The Church calls marriage holy or sacramental because the covenant relationship of committed, faithful love between the couple reflects the covenanted love and commitment between God and his Church. Growing in this kind of love mean we are growing in the image of God. ...That there are same-sex couples who want to embrace marriage should be a cause for rejoicing in the Christian Church. We believe that the Church of England has nothing to fear from the introduction of civil marriage for same-sex couples. It will be for the churches to then decide how they respond pastorally to such a change in the law.*

Similarly there seems to be lack of unity between congregations and the public statements of some senior religious figures. A recent poll conducted by Stonewall of the attitudes of congregations towards gay marriage found that 58% of people

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<sup>88</sup> See *A Response to the Government Equalities Office Consultation – “Equal Civil Marriage” – from the Church of England* available at <http://www.churchofengland.org/media/1475149/s-s%20marriage.pdf>.

of faith support the Government's plans to extend civil marriage to same sex couples.<sup>89</sup>

44. There are also faith groups which have officially resolved that they wish to conduct same sex marriages on their religious premises. Liberty believes that just as forcing a religious group to conduct a same sex marriage against their doctrine would be wrong, so too is depriving a religious group whose members and leaders would choose to manifest their beliefs by conducting these ceremonies if it were legally permitted by the State. In 2009, for example, the Quakers in Britain unanimously approved revision of the relevant sections of the Quaker Faith and Practice to enable Quaker Ministers to perform marriage ceremonies for same-sex couples.<sup>90</sup> The fact that the law impedes them from doing so is a serious restriction on the ability of Quakers to provide for the same recognition and celebration for same-sex couples as they do for opposite sex couples. As the attached legal opinion points out a permissive regime, which allows, but never requires a group to solemnise a same-sex marriage “*would not intrude upon the Article 9 rights of any religious organisation*”.<sup>91</sup>

45. Liberty has been provided with a number of contributions from numerous faith groups seeking to support same-sex marriage. The Movement for Reform Judaism stated:

*A recognition of equality for marriage of same-sex couples can only strengthen society and the institution of marriage. We welcome moves to legislate to this end. We are all made in God's image, an image that has a wide prism of characteristics and believe therefore that same-sex partnerships based on the same stability, faithfulness, love and mutual support as heterosexual relationships should be seen as fully equal in the eyes of the law. Religious bodies who wish to do so should have the freedom to conduct same-sex marriages in their places of worship.*

**Rabbi Laura Janner-Klausner, the Movement for Reform Judaism**

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<sup>89</sup> Living together: British attitudes to lesbian, gay and bisexual people in 2012.

<sup>90</sup> “Quakers agree to same-sex marriages” The Guardian 31<sup>st</sup> July 2009, available at <http://www.guardian.co.uk/world/2009/jul/31/quakers-gay-marriage>.

<sup>91</sup> Legal opinion of Karon Monaghan QC, paragraph 43.

46. The General Assembly of Unitarian and Free Christian Churches is firmly committed to freedom of choice for religious organisations:

*The Unitarian General Assembly believes that all couples, same-sex or mixed sex, should have equal access to civil marriages, religious marriages and civil partnerships. We have no wish to impose this legislation on those faith traditions who feel, for religious reasons, unable to comply. Religious freedom means that the right to say “no” must be accompanied by allowing those religious bodies whose beliefs lead them to support equal marriage to do so.*

**Derek McAuley, Chief Officer. the General Assembly of  
Unitarian and Free Christian Churches**

47. Similarly, for Liberal Judaism, celebrating same-sex marriage is an important matter of conscience:

*For us, equal marriage is simply a matter of justice in both a religious and a human rights sense. We can see no good grounds for depriving two men or two women of an equal right to affirm their life-long commitment in the same way as we would a man and a woman.*

**Rabbi Danny Rich, Chief Executive, Liberal Judaism**

#### **Part 4**

#### **Time for a straightforward legal structure?**

48. Liberty is in full support of the proposals contained in the Consultation Paper. As outlined in Chapter 1, we have for many years campaigned, lobbied and litigated to advance the causes of equal treatment and religious freedom. The introduction of same-sex marriage is a logical step in an increasingly tolerant society which recognises the injustice of exclusion on the basis of innate characteristics. Yet maintaining two different tracts to consolidate the union between two people is retaining a division which we consider undermines the parity the Government is intending to establish with this latest consultation.

49. While Liberty appreciates the piecemeal approach which has previously been taken by Governments responding to changing social tides, we believe that a

'separate but equal' regime can no longer be sustained. An increasingly complex web of legislation which would allow for religious marriage for opposite-sex couples, civil marriage for opposite and same-sex couples and same-sex-civil partnership, including on religious premises when particular circumstances are met, creates a convoluted system of entitlements and protections. Accordingly we urge the Government to seize this opportunity and create a truly equal marriage and partnership scheme for England and Wales.

### **A clearer, fairer future for marriage**

50. Liberty submits that there should be simple but wholesale reform of matrimonial and partnership law, incorporating one piece of legislation providing for an interchangeable union of spouse or partner, applying to both same-sex and mixed sex couples, applicable on any approved premises. There should be a clear opt-in system for faith groups who choose to conduct same-sex marriage or partnership on their premises, and unequivocal protection for faith groups who want to preserve marriage or partnership as a union between man and woman. This would follow the precedent set by the Scottish Government and similar, tried and tested regimes, which operate successfully in countries such as Iceland, Holland, Spain, Norway and Sweden amongst others. Similarly this should not affect the right of ministers of faith to preach their belief that marriage should only take place between an opposite-sex couple.<sup>92</sup>

51. Liberty believes that the easiest and simplest way to implement these changes is to introduce one consolidated Act of Parliament providing for an official union to take place between gay and straight couples alike. This should replace separate options to marry or conclude a civil partnership, but should allow both gay and straight couples to choose how they define their relationship either as a legal partnership or a marriage – it could also provide couples with the right to choose to describe the person they marry as a husband, wife or partner. A parallel infrastructure to that currently incorporated into the civil partnership regime could easily be put in place to ensure that, while those faith groups which embrace equal marriage have the opportunity to act accordingly, there is no obligation on those who do not wish to take the step. The Civil Partnership Act already sets out a

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<sup>92</sup> The consultation paper also declares its intention that it will not be possible for any minister of faith to end up facing legal action for hate speech or discrimination if they preach a belief that marriage should only take place between an opposite sex couple.

process by which consent is to be obtained from religious leaders. As outlined above, there is no legal reason that faith groups who do not wish to perform marriage could not be adequately and expressly protected by the law. Predictions of a rash of legal activity brought against faith groups following in the wake of the changes to allow civil partnerships to take place on religious premises have proved mistaken.

**Sophie Farthing**

**Isabella Sankey**

**Sophie Farthing**

## **ANNEX 1: Legal Opinion of Karon Monaghan QC**

IN THE MATTER OF:

### THE GOVERNMENT'S CONSULTATION ON "EQUAL CIVIL MARRIAGE"

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#### OPINION

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#### Introduction

1. I have been asked by Liberty to provide an opinion on a number of matters arising out of, and related to, the Government's consultation on the lifting of the ban on same – sex marriage; "Equal Civil Marriage: A Consultation" (March 2012) Government Equalities Office.<sup>93</sup>
2. In essence Liberty seek advice as to whether provision could be made so as to allow faith groups willing to do so to conduct legally binding same-sex couples marriages (in the same way as they are currently able to do in the case of opposite-sex marriages under Part III, Marriage Act 1949) without exposing faith groups that do not wish to conduct same-sex marriages to a realistic risk of successful legal challenge on equality or other grounds.
3. In particular, I am asked to consider the following questions:
  - a. Were Parliament to enact provisions that would allow religious bodies willing to do so to conduct legally binding marriages in the same way that they can currently conduct marriages under Part III, Marriage Act 1949, would the decision of a body opposed to same-sex marriage not to do so, or the refusal of an individual minister not to conduct such a ceremony, be

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<sup>93</sup> Available at <http://www.homeoffice.gov.uk/publications/about-us/consultations/equal-civil-marriage/consultation-document?view=Binary>.

- challengeable under the Equality Act 2010, under another anti-discrimination provision or on human rights grounds?
- b. If so, would a provision similar to section 6A(3A) Civil Partnership Act 2004 be sufficient to protect a religious body and/or individual members of the clergy from such legal challenges?
  - c. Are there any additional safeguards that could be built into the legislation to forestall such a risk?
  - d. Would provisions similar to those in the Marriages and Civil Partnerships (Approved Premises) Regulations 2005 be adequate to prevent a maverick clergy member conducting a same-sex marriage that might arguably be legally binding?
  - e. Again, are there any additional safeguards that could be built into the legislation to mitigate the risk?
  - f. Would the Article 9 rights of religious bodies that do not wish to conduct same-sex marriages on doctrinal grounds reinforce any safeguards built into the legislation?
4. Additionally, and in the light of comments made by the Church of England in its response to the Consultation<sup>94</sup>, I am asked to advise whether, if the Government maintains its present position so as to allow same-sex partners only to marry in a civil ceremony, there are realistic prospects of a successful challenge (whether brought in the domestic courts under the Human Rights Act 1998 or in the European Court of Human Rights under the European Convention on Human Rights) which might result in religious organisations, in particular the Church of England, being required to conduct same-sex marriages in church?
5. In summary, I advise that:
- a. A refusal by a minister or a body opposed to same-sex marriage to conduct same - sex marriages would not violate the Equality Act 2010 so long as they could demonstrate that to do so would be in conflict with the strongly held convictions of a significant number of the religion's followers. Further, it is very unlikely that a refusal to conduct a same-sex marriage in such

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<sup>94</sup> "A response to the Government Equalities Office Consultation – 'Equal Civil Marriage' – from the Church of England"

circumstances would unjustifiably violate the Convention rights of any other person, in particular those of a same-sex couple seeking to marry.

- b. For the avoidance of doubt, provision could be made in any legislation (permitting same-sex marriage) analogous to that seen in s6A(3A), Civil Partnership Act 2004.
- c. Again for the absolute avoidance of any doubt, the Equality Act 2010 could be amended so as to add a clause to Schedule 23 (paragraph 2(14)) making it clear that nothing in the Equality Act 2010 “should be taken to require a religious organisation or minister to solemnise a same-sex marriage if they do not wish to do” or similar.
- d. Provisions similar to those in the Marriages and Civil Partnerships (Approved Premises) Regulations 2005 would be adequate to prevent a maverick clergy member conducting a legally sanctioned same-sex marriage.
- e. No further safeguards are required to address the “maverick clergyman” other than those described above (requiring or dispensing with consent in each case at the behest of the governing authority) and those that are ordinarily and already found in this context.
- f. The Article 9 protection afforded religious organisations is strong. This too would provide real safeguards to a religious organisation that did not wish to conduct same-sex marriages on doctrinal grounds.

#### The Consultation

6. The Government Equalities Office’s consultation “Equal Civil Marriage” considers the best way to remove the current ban on same-sex civil marriages, but does not propose to make any changes to the way in which religious organisations solemnise marriages. Under the Government’s plans, civil partnerships will continue to be available to same-sex couples but in addition to, rather than instead of, the option to marry in a civil ceremony. Those couples who have already entered a civil partnership will have the opportunity to convert their civil partnership into a marriage. Transgender people will no longer be forced to dissolve their marriage if they legally change their gender. The Government has committed itself to ensuring that the legal rights and privileges which attach to marriage will be identical in the case of gay and straight couples. If these proposals are implemented, civil marriages – absent any religious elements –

will be available to gay and straight couples, civil partnerships will be restricted to same-sex couples and religious marriages will be restricted to opposite-sex couples.

7. The Government has indicated in its consultation paper that:

We are proposing that the law is clear that marriages conducted through a civil ceremony would be open to all couples and marriages conducted through a religious ceremony and on religious premises can only be between a man and a woman.

As we are only seeking to lift the ban on same-sex couples getting married through a civil ceremony, we would ensure that any subsequent legislation on equal civil marriage is clear that marriages conducted according to religious rites and on religious premises could not be between a same-sex couple. This would mean that no religious organisation, premises, or leader would face a successful legal challenge for failing to perform a marriage for a same-sex couple, whether or not the religious organisation, premises or leader involved performs marriages for opposite-sex couples. Any changes to the legislation as a result of this consultation will not, legally, enable same-sex couples to have a marriage through a religious ceremony and on religious premises (paras 2.7 and 2.10).

8. It is proposed that the prohibition on same-sex marriages through a religious ceremony and on religious premises will be a general one. This means that those religious organisations that would choose to conduct same-sex marriages through religious ceremonies and on religious premises will be prohibited from so doing.

#### Marriage

9. The law on marriage is regulated by the common law and statute. For the purposes of this Opinion, the main statutory provisions are found in the Marriage Act 1949 and the Matrimonial Causes Act 1973, both of which would require amendment if the Government's proposals are to be given effect.

10. Section 11, Matrimonial Causes Act 1973 provides that a marriage will be void “if the parties are not respectively male and female” or (amongst other things) “at the time of the marriage either party was already lawfully married [or a civil partner]” (section 11(b) and (c)).<sup>95</sup>
  
11. Otherwise marriage is generally sanctioned according to where it can take place, and subject to certain formalities, rather than being specifically designated either a religious or civil marriage. Marriage, as set out under the Marriage Act 1949 can presently be effected in the following ways:
  - a. A marriage according to the rites of the Church of England or Church in Wales (Part II, Marriage Act 1949).
  - b. A marriage according to the usages of the Society of Friends (the Quakers) (s26(1)(c) and s47, Part III, Marriage Act 1949).
  - c. A marriage according to the usages of the Jewish religion (s26(1)(d), Part III, Marriage Act 1949).
  - d. A marriage in a registered building, namely one certified by law as a place of religious worship,<sup>96</sup> in the presence of an authorised person or registrar (this will be a marriage conducted through a religious ceremony and on registered religious premises. This is generally conducted by a minister of faith and overseen and registered by an authorised person that has been appointed by the Registrar General as being able to oversee the solemnisation of marriage) (s26(1)(a), s41 and s43, Part III, Marriage Act 1949).
  - e. A marriage in a register office conducted by a superintendent registrar and registered by a registrar. This ceremony cannot contain any religious elements (s26(1)(b) and s45(2), Marriage Act 1949).
  - f. A marriage on approved premises (e.g. a hotel) conducted by a superintendent registrar and registered by a registrar. This ceremony also cannot contain any religious elements (s26(1)(bb) and s46B(4), Marriage Act 1949).<sup>97</sup>

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<sup>95</sup> Reflecting the common law position: *Hyde v Hyde and Woodmansee* (1866) LR 1 P&D 130; *Corbett v Corbett* (otherwise *Ashley*) [1971] P 83).

<sup>96</sup> Section 2, Places of Worship registration Act 1855.

<sup>97</sup> There is also provision made for housebound and detained persons and for “death bed” marriages (s26(1)(dd), Marriage Act 1949 and s1, Marriage (Registrar General's Licence) Act 1970, respectively) neither

12. The Government's proposals are such that same-sex marriages in a register office and on approved premises, in either case conducted by a superintendent registrar and registered by a registrar, will become lawful. In both cases, the ceremony may not contain any religious elements. This will be so whether or not any particular faith group would otherwise be willing to solemnise a same-sex marriage.
13. By s5B, Marriage Act 1949:
  - (1) A clergyman is not obliged to solemnise the marriage of a person if the clergyman reasonably believes that the person's gender has become the acquired gender under the [Gender Recognition Act 2004](#).
  - (2) A clerk in Holy Orders of the Church in Wales is not obliged to permit the marriage of a person to be solemnised in the church or chapel of which the clerk is the minister if the clerk reasonably believes that the person's gender has become the acquired gender under that Act.
14. This is so notwithstanding that s9(1), [Gender Recognition Act 2004](#) provides that once a full gender recognition certificate is issued to a person, the person's gender becomes "for all purposes the acquired gender". This provision may appear in obvious conflict with s5B, Marriage Act 1949. However, by s9(3), [Gender Recognition Act 2004](#), s9(1) is subject to provision made by any other enactment or any subordinate legislation. In this way s5B, Marriage Act 1949 takes priority. As I address below, there is no reason why analogous provision could not be made in the case of same sex marriages.
15. A number of religious organisations which are permitted under the Marriage Act 1949 to solemnise marriages discriminate on religious grounds. As my instructions indicate, religious organisations which restrict access to marriage on grounds of religion include:
  - a. Orthodox Jews: mixed marriages are prohibited by Deuteronomy 7, 3-4 as interpreted in the Talmud.
  - b. Roman Catholic Church: Under Canon 1125 of the Code of Canon Law the local ordinary can grant permission for a marriage between a Roman

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of which are material to this Opinion and both of which it is expected will be made available to same sex partners ("Equal Civil Marriage", para 2.47).

Catholic and a non-Catholic but only on certain conditions. Further, Canon 1065 § 1 generally requires Catholics who have not been confirmed to be confirmed before they marry.

- c. Quakers: Section 47 Marriage Act 1949 only allows non-Quakers to be married according to Quaker usage if they are authorised under or in pursuance of a general rule of the Society of Friends. A certificate to that effect signed by a registering officer of the Society must be produced to the superintendent registrar. Chapter 16 of "Quaker faith and practice" requires non-Quakers who wish to be married (or indeed civilly partnered) in a meeting house to obtain the support in writing of two adult Friends for each non-Quaker partner. The supporting Friends must satisfy themselves that the applicants are "in unity with our testimony as to the nature of marriage, and [have] experience of our meetings for worship" (paragraph 16.19.)

16. This discrimination is not unlawful under the Equality Act 2010 because of explicit exceptions made, as is addressed below.

17. Further, some religious organisations restrict marriages so as to exclude those who have been divorced, including:

- a. The Roman Catholic Church: Canon 1141 provides that a marriage that is ratified and consummated cannot be dissolved by any human power or by any cause other than death. Canon 1085 § 1 makes clear that a person who has entered into a marriage that has not been consummated cannot marry, while Canon 1085 § 2 provides that where a marriage was invalid or dissolved for any other reason a further marriage cannot be entered into until the nullity or the dissolution of the previous one has been established lawfully.
- b. The Church of England: While the Church of England has lifted its absolute bar on divorcees getting married in church, the decision is left to the individual clergy member subject to guidance from the House of Bishops (Canons of the Church of England B 30 and the accompanying "Advice to clergy concerning marriage and the divorced".)

18. The religious prohibitions on the marrying of those who have been divorced will not be unlawful under the Equality Act 2010 since there is no protection provided for couples seeking to marry in such circumstances. The (very limited) protection against discrimination connected to marriage and civil partnership under the Equality Act 2010 applies only to those who are presently married or civilly partnered (s8, Equality Act 2010), not those who have been. In any event such protection as there is against marriage and civil partnership discrimination does not extend to any of the activities caught by the Equality Act 2010 that might involve marriage.<sup>98</sup>

#### Civil Partnerships

19. The Civil Partnership Act 2004 as originally enacted prohibited the celebration of a civil partnership on religious premises (s6(1)(b), (2)). Several faith groups (including the Unitarians, Society of Friends (Quakers) and Liberal Jews) objected to this prohibition. During the passage of the Equality Act 2010 Lord Ali moved an amendment to remove the prohibition. This was passed and became section 202 of the Equality Act 2010. This section, which came into force on 5<sup>th</sup> December 2011, removes from the Civil Partnership Act 2004 the subsections containing the prohibition on the conducting of civil partnerships on religious premises (s6(1)(b) and (2)) and inserts provisions into s6A ((2A)-(2C) and (3A) – (3C)) allowing for religious premises to be approved for the celebration of civil partnerships. It also inserts a new subsection 6A(3A), which provides that:

“For the avoidance of doubt nothing in this Act places an obligation on religious organisations to host civil partnerships if they do not wish to do so.”

20. On the same day as these amendments took effect the Government amended the Marriages and Civil Partnerships (Approved Premises) Regulations 2005 SI 2005/3168 (by SI 2011/2661) (the Regulations). Regulation 3A now allows the proprietor or trustee of religious premises to apply for approval of religious premises as a place at which two people may register as civil partners. Mirroring section 6A(3A), regulation 2B makes clear that nothing in the regulations can be taken as requiring the proprietor

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<sup>98</sup> Protection against marriage and civil partnership discrimination extends only to the unlawful acts addressing employment and related areas.

or trustee to do so. The application must be accompanied by consent as required by regulation 2D. Regulation 2D(2) with Schedule A1 identifies who must consent to the use of specified religious premises so that, for example, the General Synod must consent to the use of a church or chapel of the Church of England. For religious premises that are not of a description listed in Schedule A1, regulation 2D(3) provides that consent must be given by the “governing authority” of the religious organisation for whose purposes the religious premises are used. Regulation 2D(4) allows the governing authority of a religious body to decide that its consent is not necessary.<sup>99</sup>

21. These provisions are clearly aimed at preventing a maverick cleric or congregation acting in conflict with the wishes of their religious body's hierarchy.
22. The provisions are permissive (so do not compel any faith group to effect civil partnerships) and ensure that any decision to allow civil partnerships to be conducted on religious premises is in accordance with the religious tenets of the organisation as decreed by its hierarchy.

#### Equality Act 2010

23. A refusal either at institutional level or by a minister individually to marry a same-sex couple would amount to direct discrimination (s13, Equality Act 2010) because of sexual orientation (a protected characteristic; s12, Equality Act 2010). As such, but for certain exemptions, it will be unlawful under s29, Equality Act 2010. Section 29, Equality Act 2010 makes it unlawful to discriminate in the provision of services (s29(1), Equality Act 2010) and in the exercising of public functions (s29(6), Equality Act 2010).
24. Case law holds that the conduct of a civil marriage amounts to the provision of a service or the exercise of a public function for the purposes of equality law (Islington London Borough Council v Ladele (Liberty intervening) [2009] EWCA Civ 1357; [2010] ICR 532, then under the Equality Act (Sexual Orientation) Regulations 2007 SI 2007/1263).

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<sup>99</sup> The regulations also makes clear that consent is not required for an application made in relation to a Quaker Meeting House.

25. A Church or other religious organisation will not be a core public authority (Aston Cantlow and Wilmcote with Billesley Parochial Church Council v Wallbank [2003] UKHL 37; [2004] 1 AC 546). It is possible, however, that the solemnisation of a marriage, even by a religious organisation, would be regarded as a public function and therefore fall within the scope of s29, Equality Act 2010 (and s6, Human Rights Act 1998) (see, In re All Saints'. Sanderstead [2012] Fam 51 Southwark Consistory Court and Aston Cantlow and Wilmcote with Billesley Parochial Church Council v Wallbank, in particular, para 16, Lord Nicholls, para 86, Lord Hobhouse and para 170, Lord Rodger).
26. However, and in any event, if not a public function, the solemnisation of marriage will most likely be regarded as constituting a service for the purposes of s29(1), Equality Act 2010<sup>100</sup> and accordingly discrimination in the provision of it will be prima facie unlawful.
27. The Equality Act 2010 anticipates that certain acts done by religious organisations consistent with the religious ethos of the organisations and the beliefs of their members will fall within the Equality Act 2010. In consequence, the Equality Act 2010 creates wide exemptions so that, in general, the statutory torts created by it do not apply, or do not apply in respect of certain otherwise protected characteristics, where the acts done are closely linked to faith, including religious practice, worship or devotion.
28. As is material to this Opinion, these exemptions include an exemption applicable to certain acts done by "organisations relating to religion or belief," so far as relating to sexual orientation (Schedule 23, para 2, Equality Act 2010).
29. The organisations to which this exemption applies are organisations "the purpose of which" is to practice a religion or belief; to advance a religion or belief; to teach the practice or principles of a religion or belief; to enable persons of a religion or belief to receive any benefit, or to engage in any activity, within the framework of that religion or belief or to foster or maintain good relations between persons of different religions

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<sup>100</sup> Since the Equality Act 2010 (by its exemptions) assumes that the religious activities of religious organisations do fall within s29, I shall assume the same in respect of marriage (though there is an argument otherwise based on older case law under the RRA; Dockers Labour Club & Institute Limited v Race Relations Board [1976] AC 285 (on the meaning of "the public or a section of the public").

or beliefs (Schedule 23, para 2(1), EA 2010<sup>101</sup>). The exemption will cover, then, all the main churches and faith groups.

30. The exemption permits such an organisation to restrict membership of the organisation; participation in activities undertaken by the organisation or on its behalf or under its auspices; and to restrict the provision of goods, facilities or services in the course of activities undertaken by the organisation, or on its behalf or under its auspices (Schedule 23, para 2(3), EA 2010).
31. Further, an exemption applies in relation to ministers<sup>102</sup> in the case of such organisations, so far as relating to sexual orientation. The exemption applies in cases where participation in activities carried on in the performance of the minister's functions in connection with or in respect of the organisation is restricted for reasons of sexual orientation. It also applies where the provision of goods, facilities or services in the course of activities carried on in the performance of the minister's functions in connection with or in respect of the organisation, is restricted, again for reasons of sexual orientation (Schedule 23, para 2(5), EA 2010).
32. These exemptions are subject to a number of limitations.
33. Firstly, where the organisation falls within the scope of the exemption because its purpose is to foster or maintain good relations between persons of different religions or beliefs, the exemptions insofar as they relate to sexual orientation, do not apply (Schedule 23, para 2(11), EA 2010). In essence, therefore, the exemption applies only to those organisations the key purpose of which is to protect and promote the core aspects of the practice of a religion or belief.<sup>103</sup>
34. Secondly, and in relation to sexual orientation, "a restriction" for the purposes of the exemption is permitted only if it is imposed because it is necessary to comply with the doctrine of the organisation or to avoid conflict with strongly held convictions (Schedule 23, para 2(7), EA 2010). "Strongly held convictions", for these purposes are,

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<sup>101</sup> The exemption applies to acts done by the organisation, or some other person on behalf of or under the auspices of the organisation; Sch 23, para 2(4), EA 2010. The exemption does not apply to an organisation whose sole or main purpose is commercial; Sch 23, para 2(2), EA 2010.

<sup>102</sup> As to which, see Sch 23, para 2(8), EA 2010.

<sup>103</sup> In the context of Art 9 and to the same effect, see *Van den Dungen v Netherlands* (1995) 80-A DR 147, 150.

in the case of a religion, the strongly held religious convictions of a significant number of the religion's followers. In the case of belief, strongly held convictions are those relating to the belief of a significant number of the belief's followers (Schedule 23, para 2(9), EA 2010).

35. Accordingly, a refusal by a religious organisation or a minister to effect or solemnise a same-sex marriage would not be unlawful under the Equality Act 2010, if that refusal were necessary to comply with the doctrine of the organisation or to avoid conflict with the strongly held convictions of a significant number of the religion's followers. It is not necessary that all followers share the conviction (in this case, the opposition to same-sex marriage), only that a significant number do. This would invariably protect any church or religious organisation against a complaint of sexual orientation discrimination.
36. This exemption also applies so as to exempt discrimination connected to religion and belief. However, in the case of religion or belief the exemption is subject to a (less rigorous) limitation so that a restriction will fall within the scope of the exemption where it is imposed because of the purpose of the organisation or to avoid causing offence, on grounds of the religion or belief to which the organisation relates, to persons of that religion or belief.<sup>104</sup> This means discrimination based on religion and belief in the conducting of marriages by churches and other religious organisations (for example, by requiring both partners to be of the same religion as each other and reflecting that of the organisation concerned) will be lawful.
37. Islington London Borough Council v Ladele (Liberty intervening) [2009] EWCA Civ 1357; [2010] ICR 532 is of no relevance to this issue since it did not concern the functions of a religious organisation but instead a public authority and public official.

#### Article 9

38. The Article 9 right to freedom of religion includes the "freedom, either alone or in community with others and in public or private, to manifest ... religion or belief, in worship, teaching, practice and observance." It provides protection for both individuals and churches and other religious organisations. Accordingly any intrusion,

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<sup>104</sup> Schedule 23, para 2(6), EA 2010. The same objective analysis will be required if this defence is to be established.

by a State compulsion to engage in a practice contrary to the beliefs of its members - for example to conduct same-sex marriage in the case of some faiths – would prima facie violate that organisation's (and its members') Article 9 rights.

39. Whilst any such violation might be justified under Article 9(2) (in the case of the manifestation of any belief by, for example, the refusal to conduct same-sex marriages), this requires that any interference be “prescribed by law and .. necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.” Assuming that a requirement to conduct same-sex marriages met the threshold of prescribed by law, then it might be argued that it is necessary to protect the rights and freedoms of others (same-sex couples seeking to marry).
40. However, it is extremely difficult to see how interfering with the religious freedom of churches by requiring them to celebrate marriages that they not only consider to be doctrinally impermissible but also not in fact to be marriages could be justified as proportionate having regard to the importance of the rights under Article 9 and the case law from the ECtHR. As the case law makes clear, “[t]he autonomous exercise of religious communities is indispensable for pluralism in a democratic society” (see, The Supreme Holy Council of the Muslim Community v Bulgaria (2005) 41 EHRR 3, para 93-96). Case law under Article 9 positively anticipates that accommodations might be required to facilitate “conscientious objection” (see, for example, Thlimmenos v Greece (2000) 9 BHRC 1). The Court has not been sympathetic to “conscientious objections” in the context of employment, as is well known, but principally on the basis that one is not required to accept or remain in particular employment. This is plainly not relevant in the context of the practices of a religious organisation.
41. As I have already indicated, Islington London Borough Council v Ladele (Liberty intervening) [2009] EWCA Civ 1357; [2010] ICR 532 is of little assistance here since that case concerned a civil registrar employed to conduct civil marriages. Her role, even if she did not see it this way herself, was entirely secular. The position is wholly different in the case of a religious marriage solemnised in a church or other religious building by a minister or similar. A religious body or minister conducting a marriage is, at least in the eyes of some Christian churches, celebrating a sacrament. Although

weddings in church may by virtue of the arrangements under the Marriage Act 1949 create legally binding marriages, the celebrants are also conducting “acts of worship or devotion forming part of the practice of a religion or belief” (Pichon & Sajous v France Decision 2/10/2001) which will fall within the protection of Article 9.

42. In my view, therefore, any requirement upon a church or religious organisation to conduct same-sex marriages, contrary to the religious convictions of its members', would violate their Article 9 rights (and those of any person compelled to take part, for example a minister).
43. Merely permitting the solemnisation of same-sex marriages on religious premises, as with opposite-sex marriages, would not, of course, intrude upon the Article 9 rights of any religious organisation.
44. Presently, domestic law does not require any church or other religious organisation to approve same-sex relationships and less so to legally sanction them. The provision made in the Civil Partnership Act 2004 and accompanying regulations, as mentioned above, is entirely permissive as is made expressly clear and nothing in the Equality Act 2010 requires otherwise. The same model could readily be adopted in the case of same-sex marriage.

#### EU law

45. For completeness the European Commission has promulgated a proposal for a new Equal Treatment Directive (“proposal for a Council Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation” COM (2008) 426 Final). This is intended to extend the protection against discrimination connected to, inter alia, religion and belief and sexual orientation outside the employment and occupational spheres.
46. However, even if enacted, the Directive will not compel the UK to introduce laws interfering with the rights of a church or other religious organisations in respect of their core activities, including the solemnising of marriage. This is because the proposed Directive by its Article 3(4) will provide that the Directive is “without

prejudice to national legislation .... concerning the status and activities of churches and other organisations based on religion or belief”.

#### Articles 9 and 14

47. So far, this Opinion has addressed the rights (and protections) afforded churches and other religious organisations. However, certain of the Convention rights confer equality rights on same-sex couples.
48. The right to marry under Article 12 does not (yet) guarantee the right to marriage for same-sex partners: *Schalk & Kopf v Austria* (App. No.30141/04, judgment of 3<sup>rd</sup> June 2010, para 61). In *Schalk* the ECtHR held open the possibility that it might extend its interpretation of Article 12 to include same-sex marriage, but presently the issue of whether to allow such marriages falls within states’ margin of appreciation. As such, Article 12 of the Convention does not impose an obligation to grant same-sex couples the right to marry (para 63).
49. However, were the UK, as appears likely, to permit same-sex marriage in some circumstances, then it is difficult to see why such marriages would not fall within the ambit of Article 12 so as to engage Article 14. Whilst a civil partnership would in all probability not be regarded as sufficiently analogous to a marriage to trigger the application of Article 14 given the case law as it stands (*Gas & Dubois v France* (App. No.25951, judgment of 15<sup>th</sup> March 2012)), the same could not be said of a same-sex marriage as compared to an opposite-sex marriage.
50. A refusal by a church or other religious organisation to marry a same-sex couple (assuming the same were made lawful), if a public function, might violate Article 14, read with Article 12 (and indeed Article 8, as affecting “family life”<sup>105</sup>), absent justification. In the circumstances, such a refusal would be contrary to s6, Human Rights Act 1998.
51. In determining whether any such discrimination by a religious organisation was justified, it would be necessary for a court to determine (a) whether the discriminatory treatment pursues a legitimate aim; and then, (b) whether there is a reasonable

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<sup>105</sup> *Schalk & Kopf v Austria* (App. No.30141/04, judgment of 3<sup>rd</sup> June 2010, paras 94-5).

relationship of proportionality between the means employed and the aim sought to be realized (see, for example, Ghaidan v Godin-Mendoza [2004] UKHL 30, [2004] 2 AC 557, [2004] 3 WLR 113; A v Secretary of State for the Home Department [2005] 2 AC 68, para 54).

52. The Article 9 rights of the church or religious organisation concerned would be highly material in determining justification under Article 14. Article 9 is given particular weight under the Convention and this is reflected in the Human Rights Act 1998 (s13). The exemptions in the Equality Act 2010 reflect the respect for religious freedom ordinarily accorded at common law in this jurisdiction and under the Convention.
53. In my view, a refusal by a church or other religious organisation, to conduct a same-sex marriage, so as to comply with the tenets of its religion or the strongly held and faith based convictions of its members, will invariably be regarded by any court as justified.
54. Indeed a requirement that a church or other religious organisation conduct same-sex marriages, contrary to their faith, would very likely be regarded as discriminatory under Article 14 read with Article 9 as against it since “the right not to be discriminated against in the enjoyment of the rights guaranteed under the Convention is also violated when States without an objective and reasonable justification fail to treat differently persons whose situations are significantly different.”<sup>106</sup> Treating churches and religious organisations that have doctrinal objections to same-sex marriage in the same way as those that do not, is to fail to make a distinction between the two which will result in a discriminatory outcome.

#### Questions for consideration

55. In light of the advice above, I now address the specific questions posed by my instructions.

Were Parliament to enact provisions that would allow religious bodies willing to do so to conduct legally binding marriages, would a refusal of a body or minister opposed to same-

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<sup>106</sup> Thlimmenos v Greece (2000) 31 EHRR 411 at para 44.

sex marriage, be challengeable under the Equality Act 2010, under another anti-discrimination provision or on human rights grounds?

56. For the reasons I have given above, a refusal by a minister or a body opposed to same-sex marriage to conduct such marriages would not violate the Equality Act 2010 so long as they can demonstrate that to do so would be in conflict with the strongly held convictions of a significant number of the religions followers. In the case of those churches and other organisations that would object to the conducting of same-sex marriage, clearly that sets a low threshold.
57. Further, for reasons given above, I consider it very unlikely indeed that a refusal to conduct a same – sex marriage in such circumstances would unjustifiably violate the Convention rights of any other person, in particular those of a same-sex couple seeking to marry.

If so, would a provision similar to section 6A(3A) Civil Partnership Act 2004 be sufficient to protect a religious body and/or individual members of the clergy from such legal challenges?

58. As I have indicated, in my view a religious organisation would not be open to challenge if it refused to conduct same-sex marriage because of an objection to such marriages where that objection is founded in religious faith or doctrine.
59. However, provision could be made in any legislation (permitting same-sex marriage) analogous to that seen in s6A(3A), Civil Partnership Act 2004 so as to make clear that “nothing in this Act places an obligation on religious organisations to solemnise [same-sex marriages] if they do not wish to do so.”

Are there any additional safeguards that could be built into the legislation to forestall such a risk?

60. Even absent a provision similar to s6A(3A) Civil Partnership Act 2004, for reasons given above there is still no room for challenge under the Equality Act 2010.
61. It is difficult, therefore, to see why any further protective measures would be required or could be justified.

62. However, for the absolute avoidance of any doubt, the Equality Act 2010 might be amended so as to add a clause to Schedule 23 (paragraph 2(14)) making it clear that nothing in the Equality Act 2010 “should be taken to require a religious organisation or minister to solemnise a same-sex marriage if they do not wish to do”<sup>107</sup> or “Nothing in this Act [the Equality Act 2010] places an obligation on religious bodies to conduct same-sex marriages if they do not wish to do so.”
63. This would appear to me to be unnecessary but would put to rest any doubt at all.

Would provisions similar to those in the regulations be adequate to prevent a maverick clergy member conducting a same-sex marriage that might arguably be legally binding?

64. As explored above, the Marriages and Civil Partnerships (Approved Premises) Regulations 2005 SI 2005/3168 (as amended by SI 2011/2661) require that any application by a proprietor or trustee of religious premises for approval of religious premises as a place at which two people may register as civil partners, must be accompanied by consent from the body specified in the regulations (Schedule A1). This prevents “maverick clergy” from seeking approval of premises contrary to the position decreed by the organisations’ hierarchy.
65. There is nothing so far to suggest that the model has proved anything other than adequate. It is difficult to see why the position would be any different in relation to same-sex marriage. Requiring consent from the governing body identified in the regulations ensures against any maverick clergyman seeking approval contrary to the orthodox doctrine of the religious organisation concerned.
66. For this reason, I consider that provisions similar to those in the regulations would be adequate to prevent a maverick clergy member conducting a legally sanctioned same-sex marriage.

Again, are there any additional safeguards that could be built into the legislation to mitigate the risk?

67. In my view, no further safeguards are required to address the “maverick clergyman” other than those described above (requiring or dispensing with consent, in each case

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<sup>107</sup> And amend Sch 23, para 2(8) so as to apply the definition of “minister”.

at the behest of the governing authority) and those that are ordinarily and already found in this context, as below.

68. My instructions suggest that provision could be made in any legislation such that same-sex marriages conducted in religious premises which have not been registered for that purpose (with the necessary consent) would be invalid.
69. Assuming any new legislation follows the model of the Marriage Act 1949 (or amends it to include provision for same-sex marriage), such provision will inevitably be included. Sections 25 and 49, Marriage Act 1949 treat as void any marriage which has been conducted in a way which does not comply with the Act. This includes circumstances pertaining to the location of the marriage (being otherwise than as specified in the relevant certificates). Similar provision is made in respect of civil partnerships (s49, Civil Partnership). No doubt the equivalent provision could be and would be made in the case of same-sex marriages.

Would the Article 9 rights of religious bodies that do not wish to conduct same-sex marriages on doctrinal grounds reinforce any safeguards built into the legislation?

70. The Article 9 protection afforded religious organisations is strong, as discussed above. This too would provide real safeguards to a religious organisation that did not wish to conduct same-sex marriages on doctrinal grounds, as I have addressed above.

If the Government maintains its present position so as to allow same-sex partners only to marry in a civil ceremony, are there realistic prospects of a successful challenge (whether brought in the domestic courts under the Human Rights Act 1998 or in the European Court of Human Rights under the European Convention on Human Rights) which might result in religious organisations, in particular the Church of England, being required to conduct same-sex marriages in church?

71. Again, I stress that the protection afforded by Article 9 to religious organisations is strong. For the reasons set out above, particularly at paragraphs 37 to 41, I consider that requiring a faith group or a member of its clergy to conduct same-sex marriages contrary to its doctrine or the religious convictions of its members would violate Article 9. Any challenge brought on human rights grounds seeking to establish a same-sex couple's right to marry in church would inevitably fail for that reason. In

balancing the rights of a same-sex couple and a religious organisation's rights under Article 9 (in particular, in relation to a matter such as marriage, so closely touching upon a religious organisation's beliefs) the courts would be bound to give priority to the religious organisation's Article 9 rights.

72. I hope this is of assistance to those instructing me and if I can be of any further help, they should not hesitate in contacting me.

KARON MONAGHAN QC

12 June 2012