

# Responses to the Government “Equal Civil Marriage” consultation

updated 19 June 2012

On 11 June the Church of England submitted its official response to the consultation. The 13 page response is attached.

The Church of England response states (Annex, page 9):

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

...20. The established institution of marriage, as currently defined and recognised in English law, would in effect, have been abolished and replaced by a new statutory concept which the Church – and many outside the Church – would struggle to recognise as amounting to marriage at all. A man and a woman who wished to enter into the traditional institution of marriage would no longer have the opportunity to do so. Only the new, statutory institution, which defined a ‘marriage’ as the voluntary union of any two persons, would be available.

On 11 June the Roman Catholic Church submitted its official response to the consultation. The 10 page response it attached.

The Roman Catholic Church response states:

31. 'Equality' should not be confused with 'sameness' [...] equality in its true sense; a just provision for different groups which takes appropriate account of their differences. For same-sex couples, equality in that proper sense has already been fully provided by the Civil Partnerships Act.

32. ...The Catholic Church is opposed to all forms of unjust discrimination and affirms the importance of treating everyone, whatever their sexual orientation, with equal dignity and respect. There should not be unjust discrimination against homosexual people. But to restrict the institution of marriage to a voluntary union of one man and one woman does not constitute unjust discrimination since it is simply the consequence of the specific characteristic of the institution.

...41. If implemented, the government's proposed legislative changes to the meaning of marriage will permanently diminish the significance of marriage for the whole of society. It will do so by abandoning the innately understood biological and sexual complementarity of the relationship between a man and a woman, and the children their union gives rise to, on which a strong and well-adjusted society is best built.

16 May 2012

The Government has given until 14 June for people to respond to this consultation. The consultation paper and how to respond is available here:

<http://www.homeoffice.gov.uk/publications/about-us/consultations/equal-civil-marriage/>

I have submitted a response to the consultation. The Executive Summary of which reads:

Marriage is a single institution that can be entered into via a civil or a religious ceremony. The consultation (Impact Assessment p.16) says, "the new legislation...will separate out the two types of marriage in law." The proposal will change a single institution of marriage into two separate legal states. Changing the definition of what marriage is, is not extending marriage to include gay people, it is changing marriage for everyone, such that it is no longer marriage as previously understood. The Impact Assessment is therefore mistaken when it states that the change "would not have any impact on heterosexual couples" (p.16). The Government should not change the status of people's marriages. The proposal should not be taken forward.

The proposal will not achieve equal rights for gay people, who already have equal legal rights to heterosexual people through the availability of civil partnerships, which is the direct equivalent of, and has the same rights as, marriage. Equality does not require uniformity. To make this change simply to allow equal access to the legal word 'marriage', would be at the cost of changing for everyone what marriage is, which would be a loss for everyone, gay and heterosexual.

I attach my 8 page full response.

# **A Response to the Government Equalities Office Consultation -*“Equal Civil Marriage”- from the Church of England***

## **Summary**

The Church of England cannot support the proposal to enable “all couples, regardless of their gender, to have a civil marriage ceremony”.

Such a move would alter the intrinsic nature of marriage as the union of a man and a woman, as enshrined in human institutions throughout history. Marriage benefits society in many ways, not only by promoting mutuality and fidelity, but also by acknowledging an underlying biological complementarity which, for many, includes the possibility of procreation.

We have supported various legal changes in recent years to remove unjustified discrimination and create greater legal rights for same sex couples and we welcome that fact that previous legal and material inequities between heterosexual and same-sex partnerships have now been satisfactorily addressed. To change the nature of marriage for everyone will be divisive and deliver no obvious legal gains given the rights already conferred by civil partnerships. We also believe that imposing for essentially ideological reasons a new meaning on a term as familiar and fundamental as marriage would be deeply unwise.

The consultation paper wrongly implies that there are two categories of marriage, “civil” and “religious”. This is to mistake the wedding ceremony for the institution of marriage. The assertion that “religious marriage” will be unaffected by the proposals is therefore untrue, since fundamentally changing the state’s understanding of marriage means that the nature of marriages solemnized in churches and other places of worship would also be changed.

To remove the concept of gender from marriage while leaving it in place for civil partnerships is unlikely to prove legally sustainable. It is unlikely to prove politically sustainable to prevent same sex weddings in places of worship given that civil partnerships can already be registered there where the relevant religious authority consents. And there have to be serious doubts whether the proffered legal protection for churches and faiths from discrimination claims would prove durable. For each of these reasons we believe, therefore, this consultation exercise to be flawed, conceptually and legally.

Our arguments are set out in greater detail below.

## The Church's understanding of marriage

1. In common with almost all other Churches, the Church of England holds, as a matter of doctrine and derived from the teaching of Christ himself, that marriage in general – and not just the marriage of Christians – is, in its nature, a lifelong union of one man with one woman.
2. The Church of England's understanding of marriage as a lifelong union between one man and one woman is derived from the Scriptures and enshrined within its authorised liturgy. According to the Common Worship marriage service (derived from the Book of Common Prayer of 1662):

*"The Bible teaches us that marriage is a gift of God in creation and a means of his grace, a holy mystery in which man and woman become one flesh. It is God's purpose that as husband and wife give themselves to each other in love throughout their lives, they shall be united in that love as Christ is united with his Church.*

*Marriage is given that husband and wife may comfort and help each other, living faithfully together in need and in plenty, in sorrow and in joy. It is given that with delight and tenderness they may know each other in love and through the joy of their bodily union may strengthen the union of their hearts and lives. It is given as the foundation of family life in which children may be born and nurtured in accordance with God's will, to his praise and glory.*

*In marriage husband and wife belong to one another and they begin a new life together in the community. It is a way of life that all should honour and it must not be undertaken carelessly, lightly or selfishly but reverently, responsibly and after serious thought."*

(Paragraphs 2, 3 and 4 of the Alternative Preface to the Marriage Service in *Common Worship: Pastoral Services*, p. 136).

3. This same understanding of marriage is reflected in the vows taken by husband and wife:

*"The Church of Christ understands marriage to be, in the will of God, the union of a man and a woman, for better, for worse, for richer for poorer, in sickness and in health, to love and to cherish, till parted by death."*

(*Common Worship: Pastoral Services*, page 177)

## The Church's position on same-sex marriage

4. **Question 1** of the consultation asks: *Do you agree or disagree with enabling all couples, regardless of their gender, to have a civil marriage ceremony?* We disagree with this proposition for the following reasons which are not only based on the tenets of the Christian faith (and, in particular, the Church of England), but which are also drawn from our commitment, as the established church in England, to the common good of all in society.
5. It is well known that there is a continuing debate within the Church of England about its declared view of sexually active homosexual relationships. It is important to understand that

our response to the question of same-sex marriage does not prejudge the outcome of that continuing theological and ethical debate. Our concern is for the way the meaning of marriage will change for everyone, gay or straight, if the proposals are enacted. Because we believe that the inherited understanding of marriage contributes a vast amount to the common good, our defence of that understanding is motivated by a concern for the good of all in society.

6. We disagree with the proposition on the following grounds:
  - the intrinsic nature of marriage, as enshrined in human institutions since before the advent of either church or state, is the union of a man and a woman.
  - marriage affords many benefits to society, which include mutuality, fidelity and biological complementarity with the possibility of procreation.
  - marriage is a central and unique social institution, not to be confused with the particular ceremony through which it is entered into.

These points are explained in detail below. We deal first with the arguments concerning the nature of marriage. In an Annex we outline the legal arguments relevant to the consultation.

### *Marriage within a flourishing society*

7. Throughout history, in the laws of the land and in the Church of England's Book of Common Prayer on which the laws concerning marriage are grounded, marriage has been understood to be, always and exclusively, between a woman and a man. This understanding is deeply rooted in our social culture. While marriage has evolved as an institution in many other ways this aspect has remained constant. For the consultation document to talk of a "ban" on same sex couples marrying is a misuse of the language. There can be no "ban" on something which has never, by definition, been possible.
8. Many, within the churches and beyond, dispute the right of any government to redefine an ages-old social institution in the way proposed. It is important to be clear that insistence on the traditional understanding of marriage is not a case of knee-jerk resistance to change but is based on a conviction that the consequences of change will not be beneficial for society as a whole.
9. Despite the continuing debate in the Church of England on some key ethical issues in this area, the proposition that same-sex relationships can embody crucial social virtues is not in dispute. To that extent, the Prime Minister's claim that he supports same-sex marriage from conservative principles is readily understandable. Same-sex relationships often embody genuine mutuality and fidelity, two of the virtues which the Book of Common Prayer uses to commend marriage. The Church of England seeks to see those virtues maximised in society.
10. However, the uniqueness of marriage – and a further aspect of its virtuous nature – is that it embodies the underlying, objective, distinctiveness of men and women. This distinctiveness and complementarity are seen most explicitly in the biological union of man and woman which potentially brings to the relationship the fruitfulness of procreation. And, even where,

for reasons of age, biology or simply choice, a marriage does not have issue, the distinctiveness of male and female is part of what gives marriage its unique social meaning.

11. Marriage has from the beginning of history been the way in which societies have worked out and handled issues of sexual difference. To remove from the definition of marriage this essential complementarity is to lose any social institution in which sexual difference is explicitly acknowledged.
12. To argue that this is of no social value is to assert that men and women are simply interchangeable individuals. It also undermines many of the arguments which support the deeper involvement of women in all social institutions on the grounds that a society cannot flourish without the specific and distinctive contributions of each gender.
13. **We believe that redefining marriage to include same-sex relationships will entail a dilution in the meaning of marriage for everyone by excluding the fundamental complementarity of men and women from the social and legal definition of marriage.**
14. This might in itself seem a somewhat theoretical argument if such a redefinition were necessary to remedy an injustice which could not be addressed in some other way. Civil partnerships have, however, already provided a framework within which same sex couples can exhibit the social virtues of fidelity and mutuality.
15. In addition it is not clear what additional new rights, opportunities or responsibilities if any the introduction of same-sex marriage would achieve given that the legal inequalities between heterosexual married couples and same-sex partners have already been addressed through the introduction of civil partnerships – which was supported by the majority of our bishops who voted on the legislation in 2004 when it was before the House of Lords.
16. The one justification for redefining marriage given to us by the Equalities Minister was that it “met an emotional need” among some within the LGBT community. Without wishing to diminish the importance of emotional needs, legislating to change the definition of a fundamental and historic social institution for everybody in order to meet the emotional need of some members of one part of the community, where no substantive inequality of rights will be rectified, seems a doubtful use of the law. We also note that by no means all LGBT people are in favour of redefining marriage in this way.

#### *“Religious” and “Civil” Marriage*

17. **The consultation document draws a distinction between “religious” and “civil” marriage in a way which assumes that such a distinction is a matter of fact. There is no such distinction in law. This use of language is therefore disingenuous and tends to obscure the fact that changing the law to embrace same-sex marriages, on the terms set out in the consultation, would necessitate introducing such a distinction for the first time – something which the consultation goes on to say (at paragraph 2.7) that it does not intend to do.**
18. In law, there is one social institution called marriage, which can be entered into through either a religious or a civil ceremony. To suggest that this involves two kinds of marriage is to make the category error of mistaking the ceremony for the institution itself. In the Annex

to this response we set out further legal analysis of the consultation is in fact proposing and the legal consequences that that would have.

### *Major unresolved questions*

19. We note that in paragraphs 2.14—2.16, the consultation document leaves the complex question of defining adultery, non-consummation etc. to be determined by case law. The stated objective of having identical reasons for ending both a same-sex and a heterosexual marriage is problematic and does not seem to be achievable given that the existing definitions of adultery and non-consummation cannot be applied to the case of a same-sex marriage. The proposed reliance on case law to sort out these points is unsatisfactory. More fundamentally the analysis fails to take account of the fact that consummation has always been an integral part of the common understanding of marriage between church and state, with annulment possible where consummation does not occur.
20. Questions 6 and 8 refer to the proposal to retain the category of civil partnerships solely for same-sex couples, following the introduction of same-sex marriage. No rationale is given. In the absence of a clear rationale it is unlikely that the provisions of a bill that gave effect to this aspect of the proposal would survive the Parliamentary legislative process.
21. Even if they did, it must be very doubtful whether they could withstand a human rights law challenge. Whereas the European Court of Human Rights has upheld the right of states to retain marriage as the union between a man and a woman it seems extremely doubtful that it would uphold the right of a state to retain gender inequality in civil partnerships once the state had legislated for ‘equal marriage’. We say more about this in the Annex to this paper and should be interested to see the Government’s legal analysis of this issue.
22. Given that Parliament has already legislated to enable civil partnerships to be registered in religious premises where the relevant religious authority has so agreed (paras. 24 and 25), some rationale is needed for the current proposal to preclude same-sex marriages from being solemnised in religious premises on exactly the same terms. This appears to be a consequence of the fallacious assumption that “religious” and “civil” marriages are distinct. We do not believe that the current proposal would in fact prove tenable.
23. These confusions have arisen because the proposals are, in fact, of much deeper social significance than has been acknowledged. By attempting to chart a line of least resistance the Government has ended up with recommendations which, whatever view is taken of the underlying principles, are lacking in coherence.
24. The Church of England’s unique place in the current marriage law of England means that the proposals will potentially have a very significant impact on our ability to serve the people of the nation as we have always done.

### **The Consultation Exercise**

25. The terms of the consultation exercise have been unsatisfactory in that, in at least three instances, the consultation document prejudices the outcome:

- **The document expresses the issues in prejudicial terms which pre-empt the principles on which it purports to consult.** For example, (para. 1.1, cp. para. 2.1) “the consultation is about how the ban can be lifted on same sex couples having a marriage through a civil ceremony”. The language of a “ban” has been promoted by certain pressure groups and it is disappointing to see the GEO adopt this polemical language uncritically. To speak of a “ban” implies an act of human will to prevent same sex couples marrying and therefore excludes the alternative view that heterosexual marriage is an ages-old social institution which, by definition, can only be entered into by a man and a woman. Serious and widely-held views are therefore rejected in advance by the way the “problem” is defined.
  - **By asserting the existence of a non-existent concept, the consultation wrongly assumes that changes that would be required by the proposal are already matters of fact.** Para. 1.7 (*et seq.*) introduces the concept of “religious marriage” as if it were an established fact. From the earliest discussions with Ministers on this subject we have pointed out that there is no distinction in law between “religious” and “civil” marriage.
  - **Contentious views, on which the consultation should be seeking respondents’ opinions, are asserted as undisputed facts.** For example (para. 1.9i) “The Government recognises that the commitment made between a man and a man, or a woman and a woman in a civil partnership is as significant as the commitment between a man and a woman in a civil marriage”. However, if one of the significant elements of the commitment that a man and a woman generally make to each other in marriage is to be open to bringing children into the world as a fruit of their loving commitment, then the commitment of same-sex couples (whatever its virtues) cannot be acknowledged as identical. But this viewpoint is effectively excluded by the wording of the consultation document.
26. On 15 March 2012 (just as the consultation was being launched) the Equalities Minister, Lynne Featherstone, was quoted in the *Daily Telegraph* as giving a “cast iron guarantee” that gay civil marriages would be law by the next general election, and that “The essential question is not whether we are going to introduce same-sex civil marriage but how.” **Given that the first question on the consultation document is, “Do you agree or disagree with enabling all couples, regardless of gender, to have a civil marriage ceremony”, the Minister’s comments imply that the question is redundant.** This is not the right way for addressing a subject of this significance.



## Annex

### Marriage law: the position of the Church of England

1. The Church of England has a unique position in relation to the solemnization of marriages in English law. There are therefore particular issues of concern about the impact of the Government's proposals on the Church, notwithstanding statements in the consultation paper that 'religious marriage' would be unaffected by the proposals.
2. England is divided geographically into ecclesiastical parishes so that everyone who lives in England resides in a parish.<sup>1</sup> At common law, parishioners – that is all those who are resident in a parish whether they are members of the Church of England or not – have certain legal rights in relation to the parish church and the ministry of the parochial clergy. Those rights include the right to marry in the parish church and to have the marriage solemnized by the minister of the parish.
3. Anyone who is resident in England has a legal right to marry in his or her parish church irrespective of his or her religious affiliation and the minister of the parish (the rector, vicar or priest in charge) is under a legal duty to conduct the marriage.<sup>2</sup> The existence of this right is recognised by the Marriage Act 1949 (which governs the procedure for all marriages in England and Wales).
4. Additional rights have been created by statute. A person also has a legal right to marry in a parish church which is his or her usual place of worship, which means having his or her name entered on the church electoral roll of the parish in question.<sup>3</sup> A person also has a legal right to marry in the parish church of a parish with which he or she has a 'qualifying connection'.<sup>4</sup>
5. 'Qualifying connections' include having been baptized or confirmed in the parish, having previously lived in the parish for at least six months, having a parent who has lived in the parish for at least six months or having a parent or grand parent who was married in the parish.
6. Owing to the position of the Church of England as the established church in England, all of its clergy are automatically legally authorised to solemnize marriages and they are therefore subject to certain legal duties and responsibilities in relation to marriage simply by virtue of being ordained ministers of the Church. By contrast, ministers of other denominations and religions are able to solemnize marriages only if they are individually appointed as 'authorised persons', and civil registrars are specifically appointed by the local authority as registrars of marriages.
7. The Church of England is also responsible for the legal preliminaries to marriages that take place in its churches. The parochial clergy are under a legal duty to publish banns of marriage and have other responsibilities in connection with that. And various ecclesiastical authorities have legal functions in connection with the granting of marriage licences (i.e. 'common licences' granted by ecclesiastical judges, and the Archbishop of Canterbury's 'special licence').

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<sup>1</sup> This is subject to certain exceptions that are not material for present purposes: e.g. certain Royal residences, cathedral precincts and some other places are extra-parochial.

<sup>2</sup> The exercise of this right is subject to statutory provisions which allow individual clergy to decline to solemnize marriages where a party is divorced and has a living former spouse, or is of the acquired gender under the Gender Recognition Act 2004, or where the parties are within certain degrees of kindred and affinity within which it is now lawful for persons to marry.

<sup>3</sup> Sections 6(4) and 72, Marriage Act 1949.

<sup>4</sup> Section 1, Church of England Marriage Measure 2008.

8. Again, this means that the Church of England is in a distinctive position compared with other denominations and religious bodies. Marriages that take place in their registered buildings are solemnized following civil preliminaries which are the responsibility of the local authority.
9. Around a quarter of marriages solemnized in England are solemnized by the clergy of the Church of England in accordance with the various common law and statutory rights mentioned above.

### **The proposals would change the legal definition of marriage in all cases**

10. The main body of the response points out that there is no distinction in law between ‘religious’ and ‘civil’ marriage (paragraphs 17 and 18) and that the Government’s proposals would involve “a dilution in the meaning of marriage for everyone” (paragraph 13). Here we provide a more detailed legal analysis of those issues.
11. There are a number of different legal procedural routes by which a marriage may be entered into. A marriage may be solemnized according to the rites of the Church of England, the form according to which such a marriage is solemnized being contained in the Book of Common Prayer or in other, legally authorised, alternative forms of service.
12. Alternatively, a marriage may be solemnized in a registered building of another religious denomination or in a register office or on ‘approved premises’ such as a hotel. In all of those cases the marriage may be solemnized without using any statutorily prescribed form or ceremony provided that a certain statutory form of words is used at some point in the proceedings. The same forms of words are used to contract a marriage irrespective of whether it takes place in a register office, a hotel or a non-Church of England religious building.<sup>5</sup>
13. Further alternatives are that a marriage may be solemnized in a synagogue according to Jewish usages or solemnized according to the usages of the Society of Friends (‘Quakers’).
14. **Irrespective of the particular form or ceremony according to which a marriage is solemnized, the legal institution into which the parties enter is the same:** the single legal institution of marriage. That this is so is reflected by other legal provisions concerning marriage. The law concerning capacity to marry and impediments to marriage does not differ according to the form by which a marriage is solemnized (see e.g. sections 1 and 2 of the Marriage Act 1949). Leaving aside purely procedural defects which necessarily vary according to the form used, the grounds on which a marriage is void or voidable are the same irrespective of the form by which it was solemnized (see sections 11 and 12 of the Matrimonial Causes Act 1973).
15. The consultation paper fails to acknowledge the essential point that in English law there has, down the centuries, been a single institution of marriage. That institution has not varied according to the form or ceremony by which a marriage has been solemnized. The solution proposed to deal with the concerns of the Church and other religious bodies about redefining marriage – i.e. that persons of the same sex should be able to enter into a marriage using civil forms but not religious forms – completely fails, therefore, to address those concerns.

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<sup>5</sup> Sections 44, 45 or 46B, Marriage Act 1949.

16. Moreover, what is said at paragraph 2.4 – “There is, however, no legal definition of religious and civil marriage. Marriage is defined according to where it can take place, rather than being either specifically religious or civil” – is wrong. The only kind of marriage which English law recognises is one which is essentially the voluntary union for life of one man with one woman to the exclusion of all others.<sup>6</sup> That is the definition of what marriage is. The question of where a marriage is solemnized, or the form or ceremony used, is immaterial to the definition of marriage.
17. It follows that the consultation paper is misleading when it presents the Government’s proposals as not affecting “religious marriage”. What it is in fact proposing is a redefinition of the legal institution of marriage generally. This emerges from what is said in paragraph 2.7.<sup>7</sup> It is unfortunate that the consultation paper obscures that intention by concentrating on purely procedural matters rather than addressing matters of substance.
18. **The effect of the proposals would be that everyone who wished to marry – irrespective of the form or ceremony by which their marriage was solemnized – would be required to enter into the same new, statutory institution of ‘marriage’. That institution would be one which was defined as the voluntary union for life of any two persons.** English law would, as a result, cease to provide or recognise an institution that represented the traditional understanding of marriage as the voluntary union for life of one man with one woman.
19. This represents a fundamental change. The fact that under what is proposed only opposite-sex couples would be able to have a marriage solemnized according to religious forms and ceremonies does not alter that analysis. The legal institution into which an opposite sex-couple who married according to religious forms and ceremonies entered would be the same legal institution into which a same-sex couple would enter according to civil forms and ceremonies.
20. The established institution of marriage, as currently defined and recognised in English law, would in effect, have been abolished and replaced by a new statutory concept which the Church – and many outside the Church – would struggle to recognise as amounting to marriage at all. A man and a woman who wished to enter into the traditional institution of marriage would no longer have the opportunity to do so. Only the new, statutory institution, which defined a ‘marriage’ as the voluntary union of any two persons, would be available.
21. Saying, therefore, as the consultation paper does, that no changes are proposed to marriage according to the rites of the Church of England overlooks the fact that the institution of marriage would have been redefined generally for the purposes of English law. At the very least that raises new and as yet unexplored questions about the implications for the current duties which English law imposes on clergy of the Established Church.
22. A general redefinition of marriage would also have implications for the legislative provisions that are concerned with the Church’s teaching on marriage.

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<sup>6</sup> *Nachimson v Nachimson* [1930] P 217, CA; *Hyde v Hyde and Woodmansee* (1866) LR 1 P & D 130; *Re Bethell, Bethell v Hildyard* (1888) 38 ChD 220; *Sowa v Sowa* [1961] P 70, [1961] 1 All ER 687, CA.

<sup>7</sup> “Once a couple have got married either through religious or civil means, they will then be treated for legal purposes as being married. We are not proposing to create two separate legal regimes for civil and religious marriages. 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.”

23. The Church of England's teaching on marriage is embodied in law. Canon B 30 states: "*The Church of England affirms, according to our Lord's teaching, that marriage is in its nature a union, permanent and lifelong, for better for worse, till death them do part, of one man with one woman, to the exclusion of all others on either side....*"<sup>8</sup>
24. The Canons of the Church of England are part of the law of England. The Queen's licence and the Royal Assent are required before a canon may be made and promulged. Canons are additionally subject to statutory provisions which provide that they do not have effect if they are contrary to the customs, laws or statutes of the realm.<sup>9</sup>
25. Were legislation to be enacted by Parliament that changed the definition of marriage for the purposes of the law of England, the status and effect of the canonical provisions that set out the Church's doctrine of marriage as being between one man and one woman would be called into question. In this way too the consultation overlooks the implications of what is proposed for the position of the established Church.

### **Scope for challenges to what is proposed under the ECHR**

26. If the proposal to redefine marriage were to be implemented, it must be very doubtful whether limiting same-sex couples to non-religious forms and ceremonies could withstand a challenge under the European Convention on Human Rights.
27. Until recently, the European Court of Human Rights (ECtHR) had consistently held that the right to marry provided for in article 12 of the European Convention on Human Rights and Fundamental Freedoms (ECHR) meant the marriage of a man and woman only and did not cover same-sex unions of any kind. But in 2010 the ECtHR, in deciding the case of *Schalk v Austria*<sup>10</sup> took a different line. The applicants in that case, a same-sex couple, raised complaints under a number of articles of the ECHR following the refusal by the Austrian authorities of their application to marry.
28. The ECtHR had regard to article 9 of the Charter of Fundamental Rights of the European Union which recognised "the right to marry" (rather than that "men and women of marriageable age have the right to marry and to found a family" as per article 12 ECHR). It also had regard to the commentary to the EU Charter which said that article 9 of the Charter was "broader in scope than the corresponding articles of other international instruments" by omitting an explicit reference to "men and women", although there was no requirement that domestic laws should facilitate same-sex marriages.
29. The ECtHR held, in the light of that provision of the EU Charter, that it would no longer consider that the right to marry enshrined in article 12 of the ECHR "must in all circumstances be limited to marriage between persons of the opposite sex". Article 12 could not, therefore, be said to be inapplicable to the applicants' complaint. Nevertheless "the question whether or not to allow same-sex marriage" was left open to regulation by domestic law.<sup>11</sup>

<sup>8</sup> Revised Canons Ecclesiastical, Canon B 30, paragraph 1.

<sup>9</sup> Sections 2 and 3, Submission of the Clergy Act 1533; section 1(3), Synodical Government Measure 1969.

<sup>10</sup> Application No. 30141/04.

<sup>11</sup> See paragraph 61 of the judgment: "Regard being had to art 9 of the charter, therefore, the court would no longer consider that the right to marry enshrined in art 12 must in all circumstances be limited to marriage between two persons of the opposite sex. Consequently, it cannot be said that art 12 is inapplicable to the applicants' complaint. However, as matters stand, the question whether or not to allow same-sex marriage is left to regulation by the national law of the contracting state."

30. *Schalk* represents a substantial shift in the jurisprudence of the ECtHR on the right to marry and same-sex unions. The position of the Court now appears to be that while it remains open to a member state not to make provision for same-sex marriage, where provision is made for same-sex marriage article 12 is applicable whether the parties are of the opposite sex or of the same sex.
31. The Court further held that same-sex couples were in a “relevantly similar situation” to opposite-sex couples for the purposes of article 14 of the ECHR (enjoyment of rights to be secured without discrimination on grounds of personal characteristics), again departing from an earlier line of decisions.
32. A number of points arise from this recent development in the jurisprudence of the ECtHR (to which our domestic courts are required to have regard):
  - It remains the case that member states of the Council of Europe are not obliged to make legal provision for same-sex marriage.
  - If a member state chooses to make provision in its domestic law for same-sex marriage, then so far as the ECHR is concerned same-sex marriage is protected by the Convention in the same way that opposite-sex marriage is protected: the right to marry contained in article 12 is applicable to both categories so far as that state is concerned.
  - Same-sex couples are in an analogous position to opposite-sex couples so far as the anti-discrimination provisions of article 14 of the ECHR are concerned.

Applying those principles to the current proposals leads to the following conclusions:

- The Government does not need to legislate in order to meet its convention obligations. The United Kingdom is already compliant, civil-partnerships conferring equivalent legal rights on same-sex couples as marriage does on opposite-sex couples.
  - If the Government chooses to introduce legislation providing for same-sex marriage – and Parliament passes it – article 12 of the ECHR (the right to marry) would be capable of applying both to opposite-sex and to same-sex couples.
  - If opposite-sex couples were able to enter into the (newly-defined) legal institution of marriage in accordance with either religious or civil forms and ceremonies but same-sex couples were able to enter into that institution only in accordance with civil forms and ceremonies that, of itself, would be unlikely to amount to a breach of article 12 because such an arrangement would not deprive same-sex couples of the substance of the right to marry.
  - **But there would be a serious prospect of a successful challenge to that arrangement under article 14 taken in conjunction with article 12, on the basis that same-sex couples were being discriminated against in relation to matter that was within the ambit of article 12.**
33. It is well established that the non-discrimination provisions of article 14 are applicable where the subject matter of the discrimination is within the ambit of one of the other articles of the Convention. If marriage in England and Wales were redefined to include unions between persons of the same-sex then such unions would, following *Schalk*, come within the ambit of article 12. That being so, it would be open to a same-sex couple to bring a claim (initially in the domestic courts – probably for a declaration of incompatibility – and ultimately in the ECtHR) that they had been treated differently

from opposite sex couples in that, unlike the latter, they were unable to have their marriage solemnized following religious forms and ceremonies.

34. Given what the ECtHR has said in *Schalk*, and given that under what is proposed English law would treat same-sex marriages as the same thing as opposite-sex marriages, the same-sex couple would be in an analogous position to a same-sex couple for the purposes of article 14. A court could not say – as the ECtHR has said on occasions in the past – that the difference in treatment was explicable by the complainants being in a materially different position from the comparators.
35. That being so, the difference in treatment could be upheld only if it could be justified: that is that it was judged to be a proportionate means of pursuing a legitimate aim.
36. Providing that same-sex marriages may not be solemnized in accordance with religious forms and ceremonies would probably be held to be pursuing a legitimate aim in that the intention would be to respect the right to freedom of religion: religious bodies should not be required to solemnize marriages contrary to their religious beliefs. But it is very doubtful that a legislative provision which limited same-sex couples to non-religious marriage ceremonies would be held (either by our domestic courts or by ECtHR) to amount to a proportionate means of pursuing that aim.
37. There are religious bodies which have said that they are ready and willing to solemnize same-sex marriages. That being so, a legislative provision which prevented same-sex marriages being solemnized according to any religious forms and ceremonies would be likely to be held to go further than was necessary to meet the legitimate aim of not requiring religious bodies who were opposed to doing so to solemnize same-sex marriages. Moreover, because sexual orientation is one of the ‘suspect categories’ which require very weighty reasons to justify a difference in treatment the Government would bear a very heavy burden in seeking to show that the means was proportionate to the legitimate aim pursued.
38. It is not possible to predict with certainty the outcome of proceedings that sought to challenge such a provision – either in our domestic courts or in Strasbourg. But if Parliament proceeded to legislate for same-sex marriage, it would not be long before the proposed restriction of same-sex marriage to civil forms and ceremonies came under legal challenge; and such legal challenge would have a good prospect of success.
39. It is doubtful therefore that the line taken in the consultation paper – that same-sex marriages would not be able to be solemnized according to any religious forms and ceremonies – would survive legal challenge.
40. The result is that the assurances the Government seeks to give at paragraphs 2.10 and 2.11 of the consultation paper cannot prudently be relied on. Paragraph 2.10 states that because legislation would make it “clear that marriages conducted according to religious rites on religious premises could not be between a same-sex couple” the result would be “that no religious organisation ... would face a successful legal challenged for failing to perform a marriage for a same-sex couple ...”.
41. And paragraph 2.11 states that because “it would not be legally possible for a Church of England minister to marry a same-sex couple on religious premises through a religious ceremony” the result would be that “there would therefore be no duty on Church of England ministers to marry same-sex couples. Their duty would remain unchanged and relate only to opposite-sex couples within the

relevant parish. As a result, no Church of England minister should face a successful legal challenge for refusing to conduct a same-sex religious marriage”.

42. These assurances are all based on the position being as proposed in the consultation paper: i.e. the limitation of same-sex couples to non-religious forms and ceremonies. If, however, that position were not upheld – either because it was held to be unlawful by the courts or as a result of changes to the applicable legislation during its passage through Parliament or by way of subsequent amendment – the basis for those assurances would fall away.
43. In that scenario a considerable amount of further legislative provision would be required in order to protect the position of the Church of England and other religious bodies. In particular the whole range of rights and duties that exist in relation to marriage and the Church of England would have to be re-examined.
44. Even if a mutually acceptable legislative solution could be found by way of limiting such rights and duties, it cannot be assumed that any such solution would itself withstand subsequent challenge, whether in our domestic courts or in Strasbourg. The ultimate outcome for both Church and State would be quite uncertain.

### **Civil partnerships**

45. It is very doubtful whether the proposed continued limitation of civil partnerships to same-sex couples would withstand legal challenge, were the main proposal concerning the redefinition of marriage to be implemented.
46. Article 14 of the ECHR could also have implications for the Government’s proposal that civil partnerships should remain available for same-sex couples but not opposite-sex couples. Civil partnerships are within the ambit of article 8 of the Convention (right to family and private life). An opposite-sex couple who wished to enter a civil partnership (and not to marry) could bring a complaint under article 14 taken in conjunction with article 8 on the grounds that they were treated differently from a same-sex couple who wished to enter a civil partnership (and did not wish to marry).
47. As the law currently stands, the Government would probably be able to justify the difference in treatment on the basis that civil partnerships for same-sex couples only were a social measure designed to confer legal benefits on same-sex couples that they would not otherwise be able to acquire and that they therefore amounted to a proportionate means of pursuing a legitimate aim.
48. But if the law were changed so that same-sex couples were able to marry, the legitimate aim of providing civil partnerships for same-sex couples only would cease to exist. Or at least it would change very substantially, such that, even if the limitation of civil partnerships to same-sex couples pursued a legitimate aim of providing a legal status for same-sex couples who did not wish to marry, the exclusion of opposite-sex couples from civil partnerships would not seem to be proportionate.
49. This is because some opposite-sex couples might equally not wish to marry but nevertheless wish to acquire a legal status in respect of their relationship. There would be no obvious justification that a court would accept for such a difference in treatment.
50. There is therefore a real question as to whether the line taken in the consultation paper that civil partnerships would remain limited to same-sex couples would withstand legal challenge.



## Response from the Catholic Bishops' Conference of England and Wales to the Government Consultation on "Equal Civil Marriage"

June 2012

### Introduction

1. There is a common and instinctive understanding of the meaning of marriage, shared by people of any religion and none. It pre-dates the Church, and its essence is captured in the commonly understood definition of marriage as the voluntary union for life of one man and one woman to the exclusion of all others.
2. This understanding of marriage has been the constant teaching of the Catholic Church. The Catechism states:  
"The matrimonial covenant, by which a man and a woman establish between themselves a partnership of the whole of life, is by its very nature ordered to the good of the spouses and the procreation and education of offspring."<sup>1</sup>

Marriage, and the family life which is integral to it, has and continues to form a real unit which must be protected by society because together they constitute the living nucleus of the succession (procreation and education) of human generations.

3. It is an understanding which the Church believes is still of vital importance for the common good of society today:  
"We have a positive idea to offer, that man and woman are made for each other ... that marriage develops, first of all as a joyful and blessing-filled encounter between a man and a woman, and then, the family, which guarantees continuity among generations and through which generations are reconciled to each other and even cultures can meet."  
*Pope Benedict XVI*<sup>2</sup>

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<sup>1</sup> Catechism of the Catholic Church, §1601

<sup>2</sup> Press interview, Castel Gandolfo, 5 August 2006



## **The government's Consultation**

4. The primary question of the government's consultation on its proposal to legalise same-sex marriage states: "Do you agree or disagree with enabling all couples, regardless of their gender, to have a civil marriage ceremony?"
5. Although this question appears to be asking about the principle of whether same-sex marriage should be legalised, the government's published documentation on redefining marriage states clearly that the consultation is concerned with how legislative change could best be achieved and not with whether or not such change should happen. In fact, the government is proposing a fundamental change to the basic understanding of marriage and concomitantly a radical change in social policy. Once such a legislative change is made, it will not be reversible and the consequences of the change will not be able to be controlled or predicted by the government.
6. The burden of proof for serious changes to the law falls to those proposing the innovations. The radical change in social policy being proposed by the government requires very careful thought and analysis. The government's proposals for such change and innovation in marriage should be open to extensive discussion and debated thoroughly, prior to the announcement of its determination to instigate legislative change.
7. It is of serious concern to the Bishops therefore that this proposal, which has the potential to impact so immensely on the social stability of our society and which has significant implications for the unique institution of marriage and of family life, appears not to have been subject to such careful study and analysis. The proposal for same-sex marriage legislation is based only on two very brief Party Conference announcements. There has been no Royal Commission, no manifesto commitment, no Green Paper and no White Paper.
8. In considering the responses the consultation document says that the government will consider the points made, 'not the number of responses received'. As the government has no electoral mandate for this policy, and at no time has set out in full the arguments in favour of such a significant social change, it should reflect very carefully not only on the points made by those who object, but also on the number of individuals who make them.

## **Understanding Marriage**

9. It is to be regretted that nowhere in the government's consultation document is there evidence of an understanding of marriage as an institution, as distinct from the civil legal form by which marriage is contracted, and the contribution that the institution of marriage makes to society and the common good.

10. The institution of marriage has intrinsic characteristics which contribute not only to the building up of the unitive relationship between husband and wife but also the relationships they have with any children of their marriage, with their extended family, their local community and with the wider society in which they live.
11. In this view, marriage is essentially conjugal and social, and derives its meaning from its function as the foundation of the family. Marriage joins husband and wife in a life-long bond that is ordered essentially, if not in every instance, to their roles as father and mother and recognises their responsibilities related to procreation and generational care-giving. If the institution of marriage is significantly diminished, so will the well-being of children, the family and of society.
12. The uniqueness of the institution of marriage is based on the fact that the human person exists as both male and female and that their union for the purpose of procreation, mutual support, and love has, over the centuries of human history, formed a stable unit which we call the family. Marriage has long been recognised as a positive building block of human society and has therefore been rightly recognised by societies and cultures as worthy of legal protection.
13. The social and procreative understanding of the institution of marriage pre-dates all the cultures and societies of today. The institution of marriage has never prevented the development of other forms of friendship or human relationship within those cultures and societies but they have never been given the name of 'marriage'. Marriage is therefore unique and distinct from all other human relationships.

### **Commitment and Love**

14. The government's consultation document states that one of its reasons for legislative change to marriage is that: "...it's not right that a couple who love each other and want to formalise a commitment to each other should be denied the right to marry".
15. The argument for change is based on the understanding that marriage is essentially a matter of 'love' and 'commitment', and that the love and commitment of a same-sex couple should be recognised in the legal provision for marriage in the same way as for opposite-sex couples. Marriage, however,

is about a great deal more than simply 'love' and commitment' whether within a legal framework or outside of it.

16. Clearly, there are many other forms of relationship which demonstrate love and commitment yet are not regarded as having equality with marriage. An unmarried adult may share a home with an aged parent and care for them; this is a demonstration of love and commitment but is not akin to marriage. Similarly, two siblings may live together, pooling their financial resources and sharing their leisure interests; this too demonstrates love and commitment but is not akin to marriage.

17. The relationship constituted by the institution of marriage is distinct from all other human relationships. Its unique distinguishing characteristics centre on the biological complementarity of male and female and on the possibility of children. As the UN Human Rights Committee has stated, the right to marry 'implies, in principle, the possibility to procreate'<sup>3</sup>. Professor R.P. George of Princeton University defines it thus:

"Marriage is the community formed by a man and woman who publicly consent to share their whole lives, in a type of relationship oriented toward the begetting, nurturing and educating of children together. This openness to procreation, as the community's natural fulfilment, distinguishes this community from other types."<sup>4</sup>

18. Unmarried couples, single parents and adoptive parents provide loving homes, devoted care and a good upbringing for children, often in difficult circumstances. However, the distinctive legal recognition given to marriage by the State arises primarily because the institution of marriage in general brings unique qualitative benefits for the children and to society. A substantial body of research<sup>5</sup> shows that the best outcomes for a child are most likely to be found where a child has two parents, one of each sex, who are bound to each other in marriage. That is where children learn about what it is to be male or female, and how each sex relates to the other. The best structure suited to raising the next generation is therefore a stable marriage. Many young people still aspire to lifelong marriage for this reason.<sup>6</sup>

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<sup>3</sup> UN Human Rights Committee comment no.19

<sup>4</sup> *In defense of natural law*, Oxford, 1999

<sup>5</sup> *Why is the Government anti-Marriage?*, Centre for Social Justice, December 2009

<sup>6</sup> Friends of the Elderly survey of 4,000 young people on what they thought constituted a life well lived, May 2012 [www.fote.org.uk](http://www.fote.org.uk)

19. The government's proposal risks initiating a social change which, perhaps inadvertently, places the best interests of children to one side in focussing only on the relationship of the couple. The reality of this risk is eloquently expressed by the simple fact that children are not mentioned even once in the government's consultation document. Policy should be guided by the desire to promote justice, preserve freedom and serve the common good for all, especially the vulnerable, over the long term.

20. Laws also have a normative and pedagogical function. They encourage and teach people to see and understand things in a particular way and help shape the development of public attitudes and morals. Changing the law on marriage would, over time, inevitably influence how the public as a whole understands marriage. Marriage would become an arrangement defining the legal relationship of a couple. It would cease to be the foundation of the family. As Professors Tubbs and George put it:

“If a desire to stamp social approval on homosexual conduct and relationships leads to a redefinition of marriage that detaches it not only from biological complementarity and procreation, but also from the related norm of sexual exclusivity, what will be left of the institution?”<sup>7</sup>

### **Civil Partnerships**

21. The government's proposal for legislative change to marriage in respect to the current legal provisions for civil partnerships is unclear.

22. With the support of both of the political parties which now form the government coalition, the previous government, on grounds of equality, made full provision in the Civil Partnerships Act for same-sex couples to receive equivalent civil and legal rights afforded to married couples. When introducing this legislation the previous government also stated that it had no plan to redefine civil marriage to include same-sex couples.

23. Now, legislative change is being proposed by the present government on the basis that “having two separate provisions for same-sex and opposite-sex couples perpetuates misconceptions and discrimination”<sup>8</sup> and that it is unacceptable for same-sex couples not to have “the ability to be able to be

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<sup>7</sup> *Redefining marriage away*, Tubbs DL and George RP, City Journal, Summer 2004

<sup>8</sup> Equal Civil Marriage government consultation, Ministerial Foreward

married and to say that they are married”.<sup>9</sup> However, this argument is inconsistent with the government’s proposed legislative changes which will not make civil partnerships equally available to opposite-sex couples.

24. The logic behind the government’s proposal is open to serious question on its own terms. Changing the legal definition of marriage would deliver no legal or material benefits for same-sex couples which have not already been provided by the Civil Partnerships Act. The difference in equivalent rights and responsibilities identified in the second and third bullet points of Section 1.10 of the government’s consultation document can be met by amending the Civil Partnerships Act. They do not require the proposed legislative changes to marriage.

25. Given that the Civil Partnerships Act is now in force, there is a clear logic in restricting civil partnerships to same-sex couples and marriage to opposite-sex couples. That is the current legal status. However, if the law were to change, the result would be that marriage would be open to opposite-sex and same-sex couples but civil partnerships would be restricted only to same-sex couples. This is likely to be challenged in the European Court of Human Rights.

26. On 23 November 2010, an opposite-sex couple, Ian Goggin and Kristin Skarsholt sought and were refused a civil partnership at Bristol Register Office.<sup>10</sup> In the European Court of Human Rights the case of *Ferguson and others*<sup>11</sup> concerns four British same-sex couples and four opposite-sex couples seeking access to the marriage and civil partnerships respectively. Their application, submitted in February 2011, was drafted by Robert Wintemute, Professor of Human Rights Law at Kings College London, and centres on the argument that as marriage and civil partnerships are so similar in their effect in British law, the only reason for refusing access to either must be discrimination.

27. The Catholic Church’s position is clear; it does not give recognition to any other partnerships or legal unions as having an ethical or legal equivalence with marriage. The Church opposes therefore any change in the definition of marriage to include same-sex couples, or to extending civil partnerships to opposite-sex couples who can marry. It is almost certain though that a likely longer term consequence of the government’s proposed change in the law on marriage would also require a change to the law on civil partnerships, and one which could have significant implications.

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<sup>9</sup> *ibid*

<sup>10</sup> [http://www.petertatchell.net/lgbt\\_rights/partnerships/Heterosexual-civil-partnership-refused-in-Bristol.htm](http://www.petertatchell.net/lgbt_rights/partnerships/Heterosexual-civil-partnership-refused-in-Bristol.htm)

<sup>11</sup> <http://equallove.org.uk/2011/02/equal-love-application-to-echr/>

## **Civil and religious marriage**

28. Currently, in British law there is only one institution of marriage. For the purposes of civil law, it is the same legal commitment that takes place in a registry office as in a Church. The civil legal status of marriage is only conferred because the priest has been authorised by the Registrar General to conduct weddings in the absence of a Registrar. So, in completing the Register of marriages, the priest carries out a civil function.
29. The government's intention is to draft legal measures which would preclude same-sex marriages taking place on religious premises. This at least is to be welcomed. However, once the exclusion of same-sex marriage from taking place in religious premises is dependent on an Act of Parliament, it becomes immediately vulnerable to subsequent parliamentary Acts or amendments, as has happened in the eight short years between the introduction of civil partnerships and the proposals for same-sex marriage. As no Parliament can bind its successors, the Catholic Church and other religious bodies would be at risk indefinitely. Furthermore, a provision which prohibits same-sex marriages being conducted on religious premises would be open to challenge on grounds of religious freedom by those religious bodies (such as the Quakers) who would wish to conduct them. (See further para.36 below)
30. Because there is only one legal concept of marriage, wherever it is conducted, once marriage is legal for same-sex couples, there will be a permanent risk that any exemptions provided for religious bodies may be withdrawn at any point in the future (if they have not already been overturned as unlawfully discriminatory by domestic or European Courts).

## **Equality**

31. 'Equality' should not be confused with 'sameness'. Various professions require strength or fitness tests for their members. The tests are not the same for men and for women, but they do provide a fair and equal test for both sexes, recognising their differences. That is equality in its true sense; a just provision for different groups which takes appropriate account of their differences. For same-sex couples, equality in that proper sense has already been fully provided by the Civil Partnerships Act.
32. A key part of the present government's argument for legislative change to the legal definition of marriage is on grounds of equality. The Catholic Church is opposed to all forms of unjust discrimination and affirms the importance of

treating everyone, whatever their sexual orientation, with equal dignity and respect.<sup>12</sup> There should not be unjust discrimination against homosexual people. But to restrict the institution of marriage to a voluntary union of one man and one woman does not constitute unjust discrimination since it is simply the consequence of the specific characteristic of the institution.<sup>13</sup>

### **Religious Freedom**

33. Recent case law has confirmed that there is no legal right to same-sex marriage under the European Convention on Human Rights, and that a state is free to make differing arrangements for marriage and alternative legal provisions for same-sex unions (*Gas & Dubois v. France* 15 March 2012<sup>14</sup>; *Schalk & Kopf v. Austria* 24 June 2010<sup>15</sup>). However, what has not been tested is whether a state could lawfully open the *same* institution of marriage to same-sex as well as to opposite-sex couples, while insisting that only opposite-sex couples could marry on religious premises. *Prima facie*, this would be a clear exercise of discrimination.
34. By creating new legislation the government would move the whole framework of marriage in such a way that issues which could not come before a court today could be contested at any point in the future. No assurances the government could offer about religious freedom for religious bodies would be able to negate the permanent risk they had created.
35. Most major religious groups in Britain have expressed strong opposition to same-sex marriage. This includes Christian churches, Jewish, Muslim, Sikh and Hindu representatives. Some smaller groups – such as the Quakers - are in favour of same-sex marriage.
36. The government's proposal in the consultation document to protect religious freedom has been to propose that it should be unlawful to conduct a same-sex marriage on religious premises. This, however, immediately creates another problem of religious freedom for those groups such as the Quakers who have made clear that they would wish to celebrate same-sex marriages on their religious premises. The Labour Party has already given its view that there should be permissive powers allowing religious groups that choose to do so, to

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<sup>12</sup> Catholic Herald Article by Archbishop Nichols 2.3.2012 "Don't underestimate the beauty of true friendship"

<sup>13</sup> Congregation for the Doctrine of the Faith (2003), Considerations regarding proposals to give legal recognition to unions between homosexual persons

<sup>14</sup> <http://www.coe.int/t/dghl/standardsetting/media/Article%208/Gas%20and%20Dubois%20v.France.pdf>

<sup>15</sup> <http://cmiskp.echr.coe.int/tkp197/viewhbkm.asp?sessionId=80038299&skin=hudoc-en&action=html&table=F69A27FD8FB86142BF01C1166DEA398649&key=6527&highlight=>

celebrate same-sex marriages on their premises. With the precedent of the Equality Act 2010 allowing civil partnerships to be conducted on religious premises where the religious group consents, it is likely that an amendment to this effect will be tabled.

### **Civil Understanding of consummation and adultery**

37. Men and women are different physically, mentally, and spiritually. They are, in all respects, complementary, both designed and suited for the task of begetting and raising children over a sustained period. Marriage is the legal recognition of this, and without the physical consummation of marriage, where that complementarity is most fully expressed, a marriage is voidable under English law.

38. The consultation document makes clear (para. 2.16) that the concepts of consummation and adultery would apply equally to same-sex marriage. But instead of considering how the law should define these issues for same-sex couples, it simply abandons the matter to future case law. But the common law method proceeds by dealing with the real and difficult cases before the court. The scope for expansion through precedent of what kinds of relationships are covered by marriage or civil partnerships is very real unless there is legislative clarity at the outset defining these issues.

### **Conclusion**

39. What is at stake in this proposal is the intrinsic meaning of marriage and what is best for society as a whole. Pope Benedict XVI has said:

“Defending the institution of marriage as a social reality is ultimately a question of justice, since it entails safeguarding the good of the entire human community and the rights of parents and children alike.”<sup>16</sup>

40. The government’s proposed safeguards for the institution of marriage as understood and conducted on religious premises are not proof against subsequent changes to legislation, and are at early risk of challenge in the European Court of Human Rights.

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<sup>16</sup> Address to a region of the USA Bishops’ Conference, March 2012



41. If implemented, the government's proposed legislative changes to the meaning of marriage will permanently diminish the significance of marriage for the whole of society. It will do so by abandoning the innately understood biological and sexual complementarity of the relationship between a man and a woman, and the children their union gives rise to, on which a strong and well-adjusted society is best built. As the Orthodox Christian Churches express it in their submission:<sup>17</sup>

“The proposed change is not, as is claimed, an extension of the high status and responsibilities of marriage to homosexual couples. Rather, it gives legal recognition to a radical change in the understanding of marriage itself that affects all married couples and hence society as a whole”.

42. In response to the government's primary consultation question therefore, the Catholic Bishops' Conference of England and Wales disagrees with the proposal to enable “all couples, regardless of their gender, to have a civil marriage ceremony” and, for all the reasons noted above, we urge the government not to proceed with its proposed legislative changes to marriage.

Archbishop Peter Smith  
Vice-President, Catholic Bishops' Conference of England and Wales  
Chairman, Department for Christian Responsibility and Citizenship.

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<sup>17</sup> Response to Government consultation by Gregorios, Archbishop of Thyateira & Great Britain

16 Faris Barn Drive  
Woodham  
Surrey  
KT15 3DZ

**Mr Adrian Vincent response to the Home Office, Government Equalities Office  
"Equal Civil Marriage: a consultation"  
16 May 2012**

***Question 1: Do you agree or disagree with enabling all couples, regardless of their gender to have a civil marriage ceremony?***

I disagree for the reasons set out in the answer to Question 2. I also have a concern about the genuineness of this question. The following statements in the consultation document indicate that the Government intends to make this change irrespective of what answers it receives to this question:

- 1.1 "This consultation is about how the ban can be lifted"
- 1.5 "The Government is committed to taking forward equal civil marriage."
- 2.8 "this consultation is about how we best remove the ban on same-sex couples having a civil marriage, not on whether this should or should not happen."
- 2.18 "the Government is moving forward on allowing same-sex couples to enter into civil marriage,"

This leads me to challenge whether this question is a genuine consultation. A genuine consultation leaves open the possibility that the Government might change its policy as a result of considering the consultation responses.

In her blog of 6 May 2012, under the title "Gay marriage stays!", the Minister for Equality Lynne Featherstone MP wrote "There will be no u-turn on equal marriage – we are committed as a government to legislate by 2015". Ms Featherstone is also quoted in an interview in *The Independent* on 15 March 2012 'giving a "cast-iron guarantee" that civil gay marriage would become law by the next general election in 2015.

The Minister should not pre-judge the outcome of her own consultation.

A commitment to equality is held by those opposed to this change as well as those in favour of it. I do not think that this is always appreciated by those in favour, who simply think that something called "equal marriage" must, by definition, be supported by all who support equality. The trouble is not always taken to seek to come with an open mind to the question and to genuinely consider the arguments to the contrary, which may be less popular and more complex than simple slogans, but might actually turn out to be right when they are carefully worked through.

I therefore urge the Government to consider the responses to Questions 1 and 2 with a genuinely open mind, and open to the possibility to recommend a policy change in the light of responses received.

*Question 2: Please explain the reasons for your answer. Please respond within 1,225 characters (approx 200 words).*

Executive summary:

Marriage is a single institution that can be entered into via a civil or a religious ceremony. The consultation (Impact Assessment p.16) says, "the new legislation...will separate out the two types of marriage in law." The proposal will change a single institution of marriage into two separate legal states. Changing the definition of what marriage is, is not *extending* marriage to include gay people, it is *changing* marriage for everyone, such that it is no longer marriage as previously understood. The Impact Assessment is therefore mistaken when it states that the change "would not have any impact on heterosexual couples" (p.16). The Government should not change the status of people's marriages. The proposal should not be taken forward.

The proposal will not achieve equal rights for gay people, who already have equal legal rights to heterosexual people through the availability of civil partnerships, which is the direct equivalent of, and has the same rights as, marriage. Equality does not require uniformity. To make this change simply to allow equal access to the legal word 'marriage', would be at the cost of changing for everyone what marriage is, which would be a loss for everyone, gay and heterosexual.

Full response:

Firstly about myself. Page 2 of the consultation document, the list of groups that the consultation is aimed at includes "those currently in a marriage", and I am responding primarily on that basis. I am also a member of the Church of England's General Synod and hold the traditional Christian view that the teaching of the Bible is that marriage should be between one man and one woman for life (e.g. Genesis 2:24 "Therefore a man leaves his father and mother and clings to his wife, and they become one flesh."). People like myself who hold these views are sometimes either labelled as 'religious' so that our views can be put into a separate box so as not to affect decisions for 'secular' society. This ignores the fact that at the last census the majority of people in the country described themselves as Christian. This consultation by seeking to divide marriage into 'civil' and 'religious' versions colludes with that incorrect perspective. It also goes against recent Government statements. For example, the Prime Minister in December 2011 stated, "We are a Christian country and we should not be afraid to say so". In February 2012, Local Government Secretary Eric Pickles issued a statement that, "For too long, faith has been marginalised in public life, undermining the very foundations of the British nation." This consultation document proposes to change the fundamental definition of marriage and thereby the institution itself, and goes against one of the fundamental building blocks of society where there is currently a shared understanding of all faiths and none as to what marriage is.

The view of marriage that it is to be between one man and one woman and is a union intended to be for life has always been a shared view with society as a whole, and marriage being only possible between one man and one woman has been the basis of our laws on marriage for centuries. However, the consultation document gives a misleading impression

in referring to “religious marriage” and “civil marriage” as if there are two different types of marriage with different laws applying to them. See for example:

- paragraphs: 1.7; 1.11 “make no changes to how religious marriages are solemnized” which is incorrect and should say ‘make no changes to the religious solemnization of marriages’;
- page 9 title “Religious marriage”;
- consultation question 5.)

This presentation in the consultation is incorrect. In fact, there is one set of laws applying to marriage, it is a single institution that can be entered into with a religious or a civil ceremony. The Government, despite the wording of the consultation which seeks to separate out ‘civil marriage’ from ‘religious marriage’ is not actually proposing that as a result of the proposed change the state will treat a married couple differently in law depending upon whether they entered their marriage via a civil or a religious ceremony. There will remain the existing three categories: single, married or civil partnership. Not, as the consultation seems to imply, four: single, civil marriage, religious marriage, or civil partnership. The attempt to argue that the changes proposed will only affect “civil marriage” is therefore incorrect.

The Church of England’s initial response on 15 March 2012 makes the same point:

<http://www.churchofengland.org/media-centre/news/2012/03/initial-response-to-government-consultation-on-same-sex-marriage.aspx>

“The Church of England supports the way civil partnerships offer same-sex couples equal rights and responsibilities to married heterosexual couples. Opening marriage to same-sex couples would confer few if any new legal rights on the part of those already in a civil partnership, yet would require multiple changes to law, with the definition of marriage having to change for everyone.

The issue of whether marriage should be redefined to include those of the same-sex is a more complicated picture than has been painted. Arguments that suggest ‘religious marriage’ is separate and different from ‘civil marriage’, and will not be affected by the proposed redefinition, misunderstand the legal nature of marriage in this country. They mistake the form of the ceremony for the institution itself.

Currently, the legal institution of marriage into which people enter is the same whether they marry using a civil or a religious form of ceremony. And arguments that seek to treat ‘religious marriage’ as being a different institution fail to recognise the enduring place of the established church in providing marriages that have full state recognition. The Church of England will continue to argue against changing the definition of marriage, which has supported society for so long.”

The Church of England’s response takes the most charitable view that this division in the consultation is a “mistake”. However it appears that the authors of the consultation were well aware of the legal position. For example, paragraph 2.9 states “there is currently no legal definition of religious or civil marriage” (see also 2.4, 2.7 and 2.31). What the consultation fails to mention is that this is because there is in law no difference, there is a single legal institution with different ceremony possibilities to enter into it.

This leads to the conclusion that the consultation document in presenting matters in the false categorisation of “religious marriage” and “civil marriage” has been so presented in an

attempt to avoid objections from those with a traditional understanding of marriage. There are also indications of this beyond the wording of the consultation document itself. For example, at a recent meeting of the Lesbian and Gay Christian Movement (LGCM) that I attended, its Chief Executive the Revd Sharon Ferguson said that in her meetings with the Minister for Equality Lynne Featherstone MP prior to the issuing of the consultation document, Ms Featherstone said had said to Ms Ferguson that, despite Ms Ferguson's lobbying, the Government would not propose in the consultation to change 'religious marriage' because they wanted to avoid a confrontation with the Churches.

I suspect therefore that the presentation in the consultation of 'religious marriage' and 'civil marriage' was not that the Government misunderstood the law that marriage is a single legal entity and is not split in that way; but was rather worded in such a way so as to put a 'spin' on the situation in order to minimise the prospect of opposition from the Churches, by implying that the change will not affect the Christian or traditional understanding of what marriage is. Such a spin is unworthy of this Government.

I know that many gay people dedicate their lives to each other and wish that fact to be publicly and legally acknowledged beyond the current public and legal recognition that is available by a civil partnership. However, given that marriage and civil partnership are equal in terms of legal rights and benefits (e.g. paragraph 2.21 "Civil partnerships allowed...equivalent rights, responsibilities and protections to those available to opposite sex couples through marriage") the only change left is to allow the legal word "marriage" itself to apply to that relationship.

However, maintaining the definition of marriage does not trample on people's human rights, and page 18 of the Impact Assessment which quotes the European Court of Human Rights case of *Shalk & Kopf v Austria*, confirms this. What might trample on human rights would be if people in civil partnerships were discriminated against in employment or other matters, but that is already addressed in the Equality Act. If further changes are needed to address remaining discrimination they should be made in that area not in the definition of marriage.

Marriage has always been defined in law and in society as being between one man and one woman, and this has always been maintained despite the sincerely held views of those who wish to change its definition.

For example, some people for sincerely held religious and cultural reasons have what they believe to be and call a 'polygamous marriage'. To them they are in a marriage with more than one person, and the husband will treat each of his 'wives' equally and see each of the relationships as marriage, say they are marriage and act as if they are marriage. However despite that sincerely held belief, and despite the demands for equality of treatment accordingly, the state has not changed its definition of marriage to accommodate those relationships. We have maintained the definition, and consequently in the eyes of the law, someone in a polygamous marriage is only legally married to one of the partners.

Similarly, many gay people in a civil partnership will describe themselves as 'married', but the state has maintained the definition of marriage and has ensured through civil

partnerships that those in that relationship have all the legal rights of marriage, but without changing the definition of marriage. If the Government changes the marriage definition on the grounds of 'equality' in order to accommodate those in a civil partnership, there is no argument not to change it on grounds of 'equality' for those in polygamous relationships so that their human rights are not denied either.

Page 1 of the consultation says "it's not right that a couple who love each other and want to formalise a commitment to each other should be denied the right to marry." Paragraph 1.9 of the consultation document argues that marriage is about the Government recognising the commitment that two people have for each other. However, if, for example, a brother and sister have a loving commitment to each other and ask the Government to recognise that, the Government would rightly refuse to do so. But on what grounds? Presumably the Government would be forced to fall back on the grounds that marriage is more than just two people committed to each other in a loving relationship, but it is also to do with recognising that marriage also has to do with providing a stable basis for the procreation and nurture of children. The consultation document is careful not to use that argument because use of it would go against the proposal for gay marriage. But that factor is real and must be recognised despite the fact that the consultation document does not mention it.

This consultation is not about *extending* marriage, it is about *changing* marriage, because such a so-called 'extension' changes the definition and consequently the fundamental nature of what marriage is. However, the definition of marriage is something that is fixed and historical and its meaning cannot and should not be changed.

Article 16.3 of the UN Universal Declaration of Human Rights states, "The family is the natural and fundamental group unit of society and is entitled to protection by society and the State." Family to the authors of that declaration will have been referring to a mother and father and their children. Therefore it can be argued that it is a legitimate object for the Government to retain the traditional definition of marriage, thereby supporting the family unit in the bringing up of children by their biological parents as the best environment for children out of the many other options.

The argument in the consultation document that changing the definition of marriage is necessary to give equal rights, is also inconsistent with its statement that it the consultation does not propose "opening up civil partnerships to opposite-sex couples." I am not arguing that both should be changed, my point is that neither should be changed, their definitions and meanings when they were established should remain, they are parallel and equivalent rights and therefore changes are not required to achieve 'equality' – equality does not require uniformity.

Page 1 of the consultation document says "This is not about Government interfering in people's lives, this is about providing choice for our modern society." Similarly, page 6 the table "Who will be affected" for "Opposite-sex couples" it states "No change is proposed." However redefining marriage is changing what marriage is. By changing what marriage is, this will change the nature of people's marriages in the eyes of the state and of society, and consequently interfere in the lives of those who are currently married because what they believed they were entering into when they got married is no longer the case in the eyes of

the state. When I got marriage I believed, like all those who have got married to date, that I was entering into a covenant between a man and a woman which was recognised by the state. If this change is introduced I am effectively being told by Government that my understanding of marriage is now wrong and that the Government now sees my marriage in a different way than it did before, not as an exclusive loving commitment between a man and a stable basis for the procreation of children; but simply as a loving commitment between any two people same sex or opposite sex. The Government has no right to change my marriage in this way.

***Question 3: If you identify as being lesbian, gay, bisexual or transsexual would you wish to have a civil marriage ceremony?***

This question doesn't apply to me

***Question 4: If you represent a group of individuals who identify as being lesbian, gay, bisexual or transsexual would those you represent wish to have a civil marriage ceremony?***

This question doesn't apply to me

***Question 5: The Government does not propose to open up religious marriage to same-sex couples. Do you agree or disagree?***

Three options are given in the proforma for responding to this question:

“Agree – religious marriage should not be opened up to same-sex couples

Disagree – religious marriage should be opened up to same-sex couples

Don't know”

However, none of those options are correct. As stated in my answer to Question 2, there is no such legal institution as “religious marriage” (see 2.4, 2.7, 2.9 and 2.31 of the consultation). Therefore, what the question describes as the “opening up” is actually the ‘changing’ of marriage and consequently affects all marriages, irrespective of whether they are entered into via a religious or civil ceremony. Therefore, contrary to the wording of the question, the Government *does* propose to open up religious marriage to same sex couples. I disagree with that proposed change for reasons given in my answers to questions 2 and 14.

***Question 6: Do you agree or disagree with keeping the option of civil partnerships once civil marriage is available to same-sex couples?***

This question presupposes that the Government intends to ignore the answers to Questions 1 and 2 and intends to proceed irrespective of those responses (otherwise Question 6 would have been worded “If civil marriage is available to same-sex couples....”).

My answer is therefore that this change should not take place. However, if it did, I agree that the option of civil partnerships should be retained. There are many gay people in a civil partnership who have entered into it to show their love and commitment to each other and to receive the legal recognition and benefits on a par with marriage; but who do not wish to be married themselves, for some this will be because they see the marriage institution as

patriarchal, for others because they believe that marriage is, by definition, between one man and one woman.

***Question 7: If you identify as being lesbian, gay, bisexual and were considering making a legal commitment to your partner would you prefer to have a civil partnership or a civil marriage?***

This question doesn't apply to me

***Question 8: The Government is not considering opening up civil partnerships to opposite-sex couples. Do you agree or disagree with this proposal?***

I agree. On the one hand, opposite-sex couples who are not comfortable with the 'institution' of marriage should have the option of some legal protection in their relationship. Many people refer to themselves as being in a "common law marriage" only to later discover to their cost when they separate that there is no such legal relationship. However, that legal problem should be addressed by improving legal rights for those who cohabit, rather than by change civil partnerships which is a legal provision that gives gay couples equal rights to those who are married.

***Question 9: If you are in a civil partnership would you wish to take advantage of this policy and convert your civil partnership into a marriage?***

This question doesn't apply to me

***Question 10: Do you agree or disagree that there should be a time limit on the ability to convert a civil partnership into a marriage?***

Civil partnerships should not be converted into marriage. Civil partnerships are for two people of the same sex. Marriage is for two people of opposite sexes.

***Question 11: Do you agree or disagree that there should be the choice to have a civil ceremony on conversion of a civil partnership into a marriage?***

Civil partnerships should not be converted into a marriage. Civil partnerships are for two people of the same sex. Marriage is for two people of opposite sexes.

***Question 12: If you are a married transsexual person would you want to take advantage of this policy and remain in your marriage while obtaining a full Gender Recognition Certificate?***

This question doesn't apply to me.

***Question 13: If you are the spouse of a transsexual person, would you want to take advantage of this policy and remain in your marriage whilst your spouse obtained a full Gender Recognition Certificate?***



This question doesn't apply to me

**Question 14: Do you have any comments on the assumptions or issues outlined in this chapter on consequential impacts? Please respond within 1,225 characters (approx 200 words).**

I note that page 10-11 of the Impact Assessment has a section entitled "Non-monetised benefits", referring a potential positive effect the proposed change might have on the emotional state of some gay people. However the Impact Assessment dismissed the corresponding possibility of potential negative effects. There is no 'Non-monetised dis-benefits' section, and page 16 of the IA states "The policy options considered would not have any impact on heterosexual couples..." In my view, the authors of the consultation have overlooked that impact. For example, in my answer to Question 2 I have indicated the negative emotional effect there will be on some married people such as myself in such a change which will be the state telling me that the marriage which I entered into has been changed in the eyes of state and society, because the state has redefined what marriage is.

Furthermore, page 16 of the Impact Assessment states "there is no legal definition of religious or civil marriage currently; the new legislation to create equal civil marriage will separate out the two types of marriage in law." However, as set out in my answer to Question 2, there is no legal definition of religious or civil marriage, because there is no such thing; there is just marriage, which can be entered into via a religious or civil ceremony. If, as stated in the IA the legislative change proposed will result in two types of marriage in law, this is a profound change for the nature of marriage in this country affecting all couples currently married and those who will be married in the future.

Groups opposed to the change have raised several concerns regarding potential consequential detrimental impacts. For example, that teachers who teach that marriage is between a man and a woman would be open to discipline once the change has come into effect. I do not have the legal expertise or foresight to personally predict whether such fears will be realised. However, this month has seen an example of the sort of low-level discrimination that is likely to be suffered. The Christian Concern website: <http://www.christianconcern.com/our-concerns/social/law-society-bans-a-marriage-conference-because-of-its-%E2%80%98diversity%E2%80%99-policy> reports on how their room booking for a conference to support the traditional view of marriage was cancelled by the venue on the grounds that the views of the conference contradicted the venue's equality policy. Once the change is made, such exclusions on the grounds of 'equality' are likely to become more prevalent.

**Question 15: Are you aware of any costs or benefits? that exist to either the public or private sector, or individuals that we have not accounted for? Please respond within 1,225 characters (approx 200 words).**

No.

**Question 16: Do you have any other comments on the proposals within this consultation? Please respond within 1,225 characters (approx 200 words).**

No.