MARRIAGE (SAME SEX COUPLES) BILL

NOTE FOR THE JOINT COMMITTEE ON HUMAN RIGHTS

February 2013

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Introduction

1. This note discusses human rights issues arising from the Marriage (Same Sex Couples) Bill ("the Bill") in relation to its compatibility with the European Convention on Human Rights ("the Convention"). The Articles of the Convention of most relevance to the Bill are Article 9 (freedom of thought, conscience and religion), Article 12 (right to marry), and Article 14 (prohibition of discrimination) (read with Article 8 (right to respect for private and family life), Article 9, Article 12, Article 1 of the First Protocol ("A1P1") (protection of property) and Article 2 of the First Protocol ("A2P1") (right to education)).

2. The consideration of issues below is done generally by reference to the Article most likely to be engaged and is not repeated in respect of each Article that might also be argued by a claimant, unless different considerations apply. Accordingly, if an Article 14 read with Article 9 claim is most likely to succeed, we have not in general separately considered an Article 9 claim on the same facts (to avoid unnecessary repetition and undue length in the note). Unlike other forms of discrimination that fall within Article 14, in almost every case in which there is discrimination on grounds of religion there will be a breach of a substantive right, namely Article 9. The converse is also true. In almost every case where there is no interference with Article 9 rights, there will not be discrimination on grounds of religion under Article 14.

Summary of the Bill

3. The main purposes of the Bill are:
   - To extend marriage to same sex couples in England and Wales.
   - To permit marriage of same sex couples by way of a civil ceremony and to allow religious organisations to determine whether to permit marriage of same sex couples according to religious rites and usages (except in the case of the Church of England).
   - To provide protection against successful legal challenge for organisations and individuals who do not wish to marry same sex couples.

4. Other key purposes of the Bill are:

- To allow same sex couples who have registered a civil partnership to convert that relationship to a marriage.
- To allow certain individuals to change their legal gender without having to end an existing marriage.
- To recognise extra-territorial marriages of same sex couples as marriages under the common law.

5. The Bill has 18 clauses and 7 Schedules. In this note we have considered the Schedules along with the clauses in the Bill which bring them into effect. It is divided into three Parts: Part 1 (marriage of same sex couples in England and Wales); Part 2 (other provisions relating to marriage and civil partnership); and Part 3 (final provisions).

Clause 1

6. Clause 1 provides that marriage of same sex couples is lawful and sets out the ways in which such marriage can be solemnized. It makes clear that no Canon of the Church of England is contrary to the Submission of the Clergy Act 1533 regarding making provision about marriage being the union of one man with one woman. It also provides that the duty on a member of the clergy of the Church of England or the Church in Wales to solemnize marriages (and any corresponding right of people to have their marriages solemnized by such clergy) is not extended by the Bill to marriages of same sex couples.

Clause 2

7. This clause provides religious protections so that:

(a) a person or religious organisation may not be compelled to carry out an opt-in activity (defined to mean the various types of activity relating to the decision of a religious organisation to opt in to solemnizing marriage for same sex couples);

(b) a person may not be compelled to conduct, be present at, or otherwise participate in a religious marriage ceremony of a couple because the marriage is of a same sex couple; and

(c) a person or religious organisation may not be compelled to consent to a religious marriage ceremony because the marriage is of a same sex couple.

8. It also amends the Equality Act 2010 ("the EA 2010") to provide an exception under that Act so that a person may lawfully not conduct, be present at, or otherwise participate in a religious marriage ceremony of a couple because the marriage is of a same sex couple; and so that a person or religious organisation may lawfully not consent to a religious marriage ceremony because the marriage is of a same sex couple.

Clause 3

9. Clause 3 substitutes a new paragraph 26 in Part 3 of the Marriage Act 1949 ("the MA 1949") concerning marriage of same sex couples for which no opt-in is necessary.

Clause 4 and Schedule 1

10. This clause (and Schedule) inserts a new paragraph 26A into Part 3 of the MA 1949 concerning the opt-in to marriage of same sex couples in places of worship. Schedule 1 makes amendments to Part 3 of the MA 1949 regarding registration of buildings etc.

Clause 5

11. Clause 5 inserts a new paragraph 26B into Part 3 of the MA 1949 concerning the opt-in to marriage of same sex couples and other religious ceremonies (Quaker, Jewish, and for housebound and detained persons).

Clause 6

12. This clause amends Part 5 of the MA 1949 concerning the opt-in to marriage of same sex couples and armed forces chapels.

Clause 7

13. Clause 7 sets out provision for the opt-in in respect of 'deathbed marriages' of same sex couples.

Clause 8

14. This clause provides a power for the Lord Chancellor to make an order to allow the Church in Wales to marry same sex couples, if he is satisfied that the Governing Body of the Church in Wales has resolved that the law should be changed to allow such marriages according to the rites of the Church in Wales.

Clause 9

15. Clause 9 provides that parties to an England and Wales civil partnership and to specified civil partnerships formed outside the UK may convert their civil partnership into a marriage. It gives a power to the Registrar General to make regulations for the purpose of converting civil partnerships registered in England and Wales; and a separate power to the Secretary of State for the purpose of converting civil partnerships formed under an Order in Council made under section 210 or 211 of the Civil Partnership Act 2004 ("the CPA 2004") (registration at British consulates etc. or by armed forces personnel).

Clause 10 and Schedule 2

16. This clause (and Schedule) provides for the recognition of extra-territorial marriages. It deals in particular with the treatment of English and Welsh marriages of same sex couples in Scotland and Northern Ireland.

Clause 11 and Schedules 3 - 4

17. Clause 11 (and the Schedules) provide that marriage has the same effect in relation to same sex couples as in relation to opposite sex couples. In particular, all England and Wales legislation (whenever passed or made) has effect subject to this, subject to any contrary provision. Schedule 3 sets out provisions concerning marriage-related terminology, including the extension of the meaning of "husband", "wife" etc. Schedule 4 provides for where the general rule set out in clause 11 does not apply, regarding private legal instruments, presumption of legitimacy, divorce and annulment of marriage, jurisdiction in matrimonial proceedings, the state pension, and occupational pensions and survivor benefits.

Clause 12 and Schedule 5

18. This clause (and Schedule) provides for amendments to the Gender Recognition Act 2004 ("the GRA 2004") that will allow couples in "protected

marriages" to remain in their marriage where one party to the marriage changes legal gender.

Clause 13 and Schedule 6

19. This clause (and Schedule) provides for consular marriage overseas, certificates of no impediment and armed forces marriages. It repeals the Foreign Marriage Act 1892.

Clauses 14 - 18 and Schedule 7

20. These clauses (and Schedule) set out the powers to make transitional and consequential provision and the final provisions.

Considerations of general application to the Bill

21. The Bill extends marriage in England and Wales to same sex couples, permitting such marriage either through a civil ceremony or with religious rites on religious premises. It therefore enhances the rights of same sex couples. It also respects the wishes of those same sex couples who want to marry through a religious ceremony, and permits religious organisations and individuals to solemnize such marriages, if they wish to. At the same time, it protects religious organisations and individuals who do not wish to conduct such ceremonies. As such, it is in line with the principles of the Convention, both in terms of the aim of providing equal treatment to same sex couples and in terms of securing religious freedom, both for those in favour of same sex marriage and for those opposed to it.

Analysis of Articles engaged by the Bill's provisions

Article 9

Introduction

22. Article 9(1) provides that everyone has the right to freedom of thought, conscience and religion. Article 9(2) provides that freedom to manifest one's religion or beliefs shall be subject only to such limitations as meet the criteria in that provision.

23. What counts as "manifesting" a religion or belief has been limited by the courts so that it does not cover every act which is motivated or influenced by

a religion or belief. Protected acts are those intimately linked to beliefs or creeds such as acts of worship and devotion which are the aspects of the practice of a religion or belief in a generally recognised form.

24. Measures which prevent a person from manifesting their belief in a way that is recognised under Article 9 or penalising them for doing so will generally constitute a limitation of the person's right which will require justification. Requirements to act in a particular way will not necessarily constitute an interference with Article 9 rights notwithstanding the person's objection to them on grounds of principle.

25. Where the State imposes restrictions on manifestations of belief these may be justified if they are prescribed by law and necessary in a democratic society:

- in the interests of public safety;
- for the protection of public order, health or morals; or
- for the protection of the rights and freedoms of others.

26. The exercise that the courts must carry out is to decide whether the means are proportionate to the aim of the interference.

Marriage of same sex couples according to religious rites and usages (clauses 1 - 8 and Schedule 1)

27. Article 9 provides protection for both individuals and churches and other religious organisations. The provisions of the Bill which concern marriage of same sex couples according to religious rites and usages clearly engage Article 9 as being concerned with the right to freedom of religion.

28. The Bill provides for a process to allow religious organisations to opt in to solemnizing marriages of same sex couples. It also provides protection for those organisations that do not wish to solemnize such marriages. There is therefore potential interference with the Article 9 right in various circumstances considered below.

Individuals who cannot be married in the religious ceremony of their choice because a religious organisation has decided not to opt in

29. Any compulsion by a State on a religious organisation to engage in a practice contrary to the beliefs of its members would engage the Article 9 rights of the organisation and its members.

30. We consider that it could not be proportionate to interfere with the religious freedom of religious organisations by requiring them to solemnize marriages that they consider to be doctrinally impermissible. In reaching this conclusion, we note the importance of the rights under Article 9 and the case law of the ECtHR. As the case law makes clear, "[t]he autonomous exercise of religious communities is indispensable for pluralism in a democratic society"[1]. It also positively anticipates that accommodations might be required to facilitate "conscientious objection"[2]. The ECtHR has not in the past been sympathetic to "conscientious objections" in the context of employment, but principally on the basis that one is not required to accept or remain in particular employment[3]. This is plainly not relevant in the context of the practices of a religious organisation where it may be appropriate to permit conscientious objections.

31. A religious marriage solemnized in a church or other religious building is wholly different to the position considered in the application to the ECtHR by Lillian Ladele, a marriage registrar employed by the London Borough of Islington, who was designated as a civil partnership registrar even though she objected to that because of her religious beliefs[4] (the position of marriage registrars is considered separately below). A religious body or individual solemnizing a marriage is, at least in the eyes of some, celebrating a sacrament. Although marriages solemnized according to religious rites and in a religious building may by virtue of the arrangements under the MA 1949 create legally binding marriages, the celebrants are also conducting "acts of

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[1] *The Supreme Holy Council of the Muslim Community v Bulgaria* [2004] ECHR 690, para 93-96

[2] For example, *Thlimmenos v Greece* [2000] ECHR 162

[3] For example, *X v Denmark* (1976) 5 DR 157, *Ahmad v the United Kingdom* (1982) 4 EHRR 126, *Kontinnen v Finland* (1996) 87-A DR 68 and *Stedman v the United Kingdom* [1997] ECHR 178, but note *Eweida and others v UK* [2013] ECHR 37 at para 83 where the ECtHR held that the better approach would be to weigh the option of resignation in the overall balance when considering whether the restriction was proportionate.

[4] *Ladele v the United Kingdom* Application no. 51671/10, now reported at [2013] ECHR 37 (c.f. *Lillian Ladele v the London Borough of Islington* [2009] EWCA Civ 1357).

worship or devotion forming part of the practice of a religion or belief"[5] which will fall within the protection of Article 9.

32. It is therefore considered that any requirement upon a church or other religious organisation to marry same sex couples, contrary to its religious doctrines, would infringe their Article 9 rights (and those of any person compelled to take part, for example a minister). The Bill does not require that any religious organisation or individual must solemnize marriages of same sex couples and so there is no infringement.

33. We consider the risk of success of any challenge brought by a same sex couple under Article 9, in order to establish their right to marry according to religious rites in a particular church or other religious building, is so small as to be negligible in significance. In balancing the rights of a same sex couple and a religious organisation's rights under Article 9 (in particular, in relation to a matter such as marriage, so closely touching upon a religious organisation's beliefs), we think the domestic courts (and also the ECtHR) would be bound to give priority to the religious organisation's Article 9 rights, since to do otherwise would almost inevitably constitute a breach of that organisation's rights. In our view, any interference with the rights of the same sex couple which results would be justified. The legitimate aim would be the protection of the rights and freedoms of others (the religious organisation and its members) in terms of protecting their Article 9 rights as to what takes place on their premises according to their rites. We think the measure is proportionate in that couples have the choice of a religious ceremony where a religious organisation has opted in to that process, so there is no blanket ban on such ceremonies. In addition, the requirement of the consent of the religious organisation and individuals is also proportionate in our view.

34. The availability of an opt-in for most religious organisations does not alter this balance and does not mean that States must compel organisations to provide marriage ceremonies for same sex couples. This would accord insufficient weight to the Article 9 rights of the religious organisation, its ministers and its members.

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[5] *Pichon & Sajous v France* Application no. 49853/99 (2 October 2001)

35. We note in this context the case of *Gas and Dubois v France*[6], which concerned the right to adopt of the lesbian partner of a couple who had registered a Pacte Civil de Solidarité (PACS). It was reported in the UK press that the ECtHR had ruled in this case that "if gay couples are allowed to marry, any church that offers weddings will be guilty of discrimination if it declines to marry same-sex couples"[7]. This is incorrect: the ECtHR did not consider (and indeed has never done so) the issue of religious marriage ceremonies for same sex couples.

Individuals unwilling to solemnize marriages of same sex couples according to religious rites and usages

36. Merely permitting the solemnization of marriages of same sex couples according to religious rites on religious premises, as with marriages of opposite sex couples, would not, however, infringe the Article 9 rights of any religious organisation. The Bill sets out a process for allowing religious organisations to opt in to marrying same sex couples.

37. Where an organisation has opted in to the process of conducting same sex marriage ceremonies, there may be individual 'unwilling' ministers and "authorised persons" who do not wish to solemnize or participate in such marriages. (An authorised person is appointed by the Registrar General under section 43 of the MA as being able to oversee and register a marriage conducted by a minister; they effectively perform the role of a registrar for marriages in registered buildings (though not Anglican, Quaker or Jewish) where the trustees or governing body wish for such a person to be appointed.) The Bill provides protection for such individuals in clause 2.

38. An 'unwilling' individual will be protected from claims made by a same sex couple under Article 9. In addition, a religious organisation will not be able to require that an individual minister affiliated to it should conduct marriages of same sex couples, if they do not wish to. In such circumstances, the organisation will be able to arrange for another minister to conduct such a ceremony. The 'unwilling' individual is not imposing their own views on the organisation and its members by such a refusal, they are simply not willing to

[6] [2010] ECHR 444
[7] http://www.dailymail.co.uk/news/article-2117920/Gay-marriage-human-right-European-ruling-torpedoes-Coalition-stance.html

compromise their own beliefs by carrying out such marriages themselves. Accordingly, we consider that the rights and freedoms of others (the religious organisation and its members) are not infringed by this conduct.

Individuals who wish to solemnize marriage for same sex couples according to religious rites and usages but are prevented from doing so

39. Within those religious organisations which do not opt in, individuals may wish to solemnize such marriages but be prevented from doing so, which may engage their Article 9 rights. We consider that any interference in the rights of the individual would be justified. The legitimate aim would be the protection of the rights and freedoms of others (the religious organisation and its members). In our view, the measure is proportionate in that an individual has a choice as to which organisation they should be affiliated to and so it is open to them to be affiliated to an organisation which shares their views on marriage of same sex couples. It would not be proportionate for a 'rogue' individual to be able to impose their views on the organisation which they represent, by marrying a same sex couple according to religious rites when the religious organisation does not believe that such marriage is doctrinally permissible. This differs from the position of an 'unwilling' minister as described above, since in that case the individual is not imposing their views on the organisation which they represent.

The Church of England (clause 1)

40. The Bill specifically provides that no Canon of the Church of England is contrary to section 3 of the Submission of the Clergy Act 1533[8] by virtue of its stating that marriage is the union of one man with one woman. This preserves the status of Canon law by ensuring that it is not in conflict with the general law. The Bill also sets out that no duty on any member of the clergy to marry extends to marriage of same sex couples (nor any corresponding right of persons to be married by such clergy). Part II of the MA 1949 (marriage according to the rites of the Church of England) is not amended to enable marriage of same sex couples and other provisions under which the Church of England may marry couples are similarly not extended. The Bill

[8] Section 3 provides: "*Provided alway that no canons constitucions or ordynance shalbe made or put in execucion within this Realme by auorytie of the convocacion of the clergie, which shalbe contraryaunt or repugnant to the Kynges prerogatyve Royall or the customes lawes or statutes of this Realme; any thyng conteyned in this acte to the contrarye herof notwithstondyng*".

therefore treats the Church of England differently to other religious organisations, which are permitted to opt in to a process for solemnizing marriage for same sex couples. This is because different issues apply to the Church of England, as set out below.

41. First, the Church of England as the Established Church is under a duty to marry a parishioner in their parish church (or one in which they have a qualifying connection)[9]. A clergyman who refuses to marry a person who is entitled to be married in his or her church could be subject to ecclesiastical discipline for failing to carry out the duties of a clergyman. The right of every parishioner to be married in his or her parish church stems from establishment of the Church of England and the Church of England is therefore in an unusual position. (For the position of the Church in Wales see below.)

42. Secondly, the Canons of the Church of England are part of the law of England, in so far as they are consistent with civil law, by virtue of the position of the Church of England as the Established Church. Canon law includes Canon B30, which sets out the fundamental position of the Church of England in respect of the nature of marriage, namely that it is:

"*...in its nature a union permanent and lifelong, for better for worse, till death them do part, of one man with one woman...*"[10].

43. The Church of England has made clear that it is not in favour of marriage of same sex couples. Having regard to their specific circumstances in relation to marriage law, it would not be possible for it simply not to opt in to the process for solemnizing marriage for same sex couples, as other religious organisations may choose to do. This is because the right of every parishioner to be married in his or her parish church would then be engaged as regards same sex couples as well as opposite sex couples. Accordingly, the Bill makes clear that there is no duty on a member of the clergy to solemnize marriages of same sex couples. Clause 1 also provides that no conflict between the civil law and Canon law arises.

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[9] *Agar v Holdsworth* (1758) 2 Lee 515; Church of England Marriage Measure 2008 (2008 No.1)

[10] Canon B available at http://www.churchofengland.org/about-us/structure/churchlawlegis/canons/section-b.aspx

44. The Church of England has expressly requested that the Bill should not enable them to opt in. If they were in future to change their views on marriage for same sex couples, they could bring forward to the General Synod an Amending Canon to amend their Canon law, and a Church of England Measure to change the Book of Common Prayer and amend the MA 1949 and other relevant legislation as necessary. A Measure has the same force as an Act of Parliament; a resolution of both Houses of Parliament and Royal Assent is required. Given the unique position of the Church of England and the deference likely afforded by Parliament, it is considered that this requirement is proportionate and necessary.

45. Although this potentially limits the choice of same sex couples and also the powers of individual clergymen, any interference is justified. As noted above, any requirement upon the Church of England to marry same sex couples, contrary to its religious doctrine, would infringe its Article 9 rights.

46. It is important to recognise that, should any challenge be made before the ECtHR, in considering the margin of appreciation in this area there is a unique relationship between Church and State in England and Wales. The Bill strikes a balance between conferring a right for same-sex couples to marry but at the same time ensuring that the requirements of our civil law do not conflict with the doctrine of the Church of England. Marriage legislation safeguards their particular position and their religious practices in relation to solemnization of marriages. The margin of appreciation must depend on the particular conditions within a State, which in the UK's circumstances includes these complex issues. Legislating to interfere with these practices against the religious beliefs of the Church of England would in our view be unjustified.

The Church in Wales (clauses 1 and 8)

47. The Church in Wales is in the same position as the Church of England as regards marriage law and the MA 1949 applies, as extended by the Marriage (Wales and Monmouthshire) Act 1962, in the same way as it applies to the Church of England (subject to certain exceptions) despite the disestablishment of the Church of Wales by virtue of the Church in Wales Act 1914.

48. The Church in Wales therefore has a duty to marry parishioners in their parish church, just like the Church of England. The Bill makes clear that there is no duty on a member of its clergy to solemnize marriages of same sex couples. As described above, this is because the right of every parishioner to be married in his or her parish church would otherwise be engaged as regards same sex couples as well as opposite sex couples. In addition, Part II of the MA 1949 (marriage according to the rites of the Church of England), which applies to the Church in Wales, is not amended to enable marriage of same sex couples and other provisions under which the Church in Wales may marry couples are similarly not extended.

49. The disestablishment of the Church in Wales has the effect that it will not be able to amend legislation in the future should it change its mind and decide that it does wish to carry out marriage of same sex couples. To enable any opt-in by the Church in Wales, the Bill provides a power for the Lord Chancellor, being satisfied that the Governing Body of the Church in Wales has resolved to opt-in, to make an order amending legislation for this purpose. Similarly to the position of the Church of England described above, this process would require parliamentary approval but, given the position of the Church in Wales and the safeguards in the operation of the power (only on the resolution of the Governing Body of the Church in Wales), it is considered that this approach is proportionate.

Opt-in procedure for religious organisations solemnizing marriages of same sex couples (clause 5)

50. Religious organisations (other than the Church of England, Church in Wales, Jews and Quakers) will be able to opt in to solemnizing marriages of same sex couples by specially registering their building with the consent of their governing body. This builds on the existing law tying the solemnization of marriage to particular premises.

51. Jews and Quakers do not register their buildings in this way under the current law and can solemnize marriages in any place. They will be able to opt in by giving the consent of their governing authority before the superintendent registrar issues the certificates authorising the marriage. The opt-in respects the existing practices of all religions and enables those organisations which want to opt in to do so, whilst providing protections for those that do not.

Therefore the religious freedom of all organisations is respected and not interfered with any more than necessary.

Consent when building is shared by more than one religious organisation (clause 4 and Schedule 1)

52. The Bill provides that where a building is shared by more than one religious organisation under a formal sharing arrangement as provided for in the Sharing of Church Buildings Act 1969 ("the SCBA 1969"), the governing authorities of all religious organisations sharing the building will need to consent to the registration of the building for the purpose of solemnizing marriages of same sex couples (see new section 51A of the MA 1949 inserted by Schedule 1).

53. This requirement that all sharers consent protects the Article 9 rights and religious freedoms of those religious organisations that do not want to opt in nor be involved in marriages of same sex couples.

54. New section 51A of the MA 1949 enables the Secretary of State to make regulations which deal with sharing arrangements, including where there is no formal sharing arrangement under the SCBA 1969. The power will be used to protect the rights of religious organisations by balancing the rights of sharers in relation to solemnizing marriages of same sex couples. The Secretary of State will consider compatibility with the Convention when making the regulations and they will be subject to the affirmative procedure.

Withdrawal of consent by religious organisations to solemnizing marriages of same sex couples (clause 4 and Schedule 1)

55. The Bill provides that the registration of a building for the purposes of the solemnization of marriages of same sex couples may be cancelled if the relevant governing authority gives written consent (new section 43C of the MA 1949). However, where more than one church shares a church building, the consent of all governing authorities is not required for withdrawal (new section 51A of the MA 1949).

56. This protects the Article 9 rights of religious organisations and their members by ensuring that no religious organisation which shares a building is required

to allow it be used for marriage of same sex couples (even where they have previously consented to the registration for those purposes).

Article 12

Introduction

57. Article 12 provides that men and women of marriageable age have the right to marry and to found a family, according to the national laws governing the exercise of this right.

Marriage of same sex couples

58. The right to marry under Article 12 does not guarantee the right to marriage for same sex couples[11]. In *Schalk and Kopf v Austria* the ECtHR held open the possibility that it might extend its interpretation of Article 12 to include marriage of same sex couples, but currently the issue of whether to allow such marriages falls within States' margin of appreciation. As such, Article 12 does not impose an obligation to grant same sex couples the right to marry[12]. (A right to marry for same sex couples also cannot be derived from Article 14 read with Article 8, since the Convention is to be read as a whole and its Articles should therefore be construed in harmony with one another.)

59. The ECtHR noted in *Schalk* that there is an emerging European consensus towards legal recognition of same sex couples. But there is not yet a majority of States providing for legal recognition of same-sex couples and so it stated that the area in question must still be regarded as one of evolving rights with no established consensus, where States must also enjoy a margin of appreciation in the timing of the introduction of legislative changes[13]. To date we are aware of only eight States[14] (out of 47) that have implemented legislation permitting marriage for same sex couples.

60. An application was made to the ECtHR in February 2011 by individuals involved in the Equal Love campaign[15]. As part of this application, four same sex couples claim breach of Article 12, alone or in conjunction with Article 14,

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[11] *Schalk and Kopf v Austria* [2010] ECHR 1996 (para 61)
[12] *Schalk* (para 63)
[13] See *Courten* [2008] ECHR 1546 and *M.W. v the United Kingdom* [2009] ECHR 1113
[14] Belgium, Denmark, Iceland, Netherlands, Norway, Portugal, Spain and Sweden
[15] http://equallove.org.uk/the-legal-case/

because they cannot marry. We are not aware of the ECtHR's decision on the admissibility of this application.

Gender recognition (clause 12 and Schedule 5)

61. Gender recognition is governed by the GRA 2004. Pursuant to the GRA 2004 a transgender person may make an application for a Gender Recognition Certificate ("GRC") to the Gender Recognition Panel ("the Panel") to change their legal gender ("the acquired gender"). The issue of a full GRC entitles the recipient to full legal recognition in his or her acquired gender. If the applicant meets the evidential requirements in the GRA 2004 and is not married or in a civil partnership, the GRC which is issued will be a full GRC. If the applicant meets the evidential requirements in the GRA 2004 and is married or in a civil partnership, then an interim GRC will be issued. Under the Matrimonial Causes Act 1973 ("the MCA 1973"), where an interim GRC is issued, a marriage becomes voidable. Following this, if the applicant applies to the court within six months of the interim GRC being issued, the court can grant a decree of nullity and issue a full GRC. An application to void a marriage can also be made if the respondent to the application is a person whose gender at the time of the marriage had become the acquired gender pursuant to the GRA 2004.

62. The consequence of the current provisions is that in order to obtain a full GRC any existing marriage or civil partnership of the applicant must be ended. This approach has been held to be lawful by the ECtHR (see *Parry v the United Kingdom*[16], in which the ECtHR applied its ruling in *Goodwin v the United Kingdom*[17] that in recognising a change of gender it was a matter for individual States how to deal with subsisting marriages). Given that States are entitled not to permit marriages of same sex couples it must be permissible for them not to allow individuals to remain married to someone who would be regarded as being of the same legal gender as them once they have gone through the gender recognition process.

63. Under the Bill, a married couple whose marriage is registered in England and Wales or outside the UK (referred to in the Bill as "protected marriages") will be able to remain in their marriage even when one spouse obtains a full GRC.

[16] [2006] ECHR 1157
[17] [2008] ECHR 61

The evidential requirements in section 3 of the GRA 2004 are amended to require applicants to submit a statutory declaration as to whether they are married and where that marriage is registered.

64. A result of this provision is that the applicant's spouse ("the non-trans spouse") could find themselves in a marriage with a person of the same sex as a result of his or her spouse's change of gender. To ensure this only occurs where both the applicant and non-trans spouse wish to stay married, the non-trans spouse will also have to make a statutory declaration as part of the GRC application process indicating that he or she wishes to remain married once a full GRC is granted to the applicant (with additional provision to allow them to withdraw this consent before a full GRC is issued). Where no statutory declaration is made at the time of the application for a GRC or the non-trans spouse indicates to the Panel that he or she does not consent to the marriage continuing, an interim GRC will be issued. If, within six months of the issue of the interim GRC, a statutory declaration from the spouse is submitted to the effect that he or she now consents to the marriage continuing, a full GRC will be issued and the couple can remain married. Applicants and their spouses will be entitled to be notified when a full GRC is issued to prevent fraud. If a statutory declaration from the non-trans spouse has been obtained fraudulently, this will render the marriage void.

65. Although this engages the Article 12 rights of both the applicant and non-trans spouse as concerning the right to marry (and also both parties' Article 8 rights in terms of private and family life), we consider that there is no interference and therefore no breach of the Convention rights of either spouse. The key here is choice: the Bill protects the rights of couples who wish to remain married following the issue of a full GRC, while at the same time protecting the right of the non-trans spouse to leave a marriage if the trans spouse is seeking to obtain a GRC.

Article 14

Introduction

66. Article 14 provides that the enjoyment of the Convention rights shall be secured without discrimination on any ground "such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status".

67. The ECtHR has consistently held that Article 14 complements the other substantive provisions of the Convention and its Protocols and it has no independent existence. The principles of the application of Article 14 are that there must be a difference in treatment of persons in relevantly similar situations, in the enjoyment of rights guaranteed under the Convention, for there to be a breach of that Article. Such a difference of treatment is discriminatory if it has no objective and reasonable justification; in other words, if it does not pursue a legitimate aim or if there is not a reasonable relationship of proportionality between the means employed and the legitimate aim that is pursued. However, States enjoy a margin of appreciation in assessing whether and to what extent differences in otherwise similar situations justify a difference in treatment (*Burden & Burden v the United Kingdom*[18]), including distinctions of legal treatment (*Marckx v Belgium*[19]).

68. The ECtHR has held that differences based on sexual orientation require particularly serious reasons by way of justification (see *Karner v Austria*[20]; *L and L & V v Austria*[21]; and *Smith and Grady v the United Kingdom*[22]). On the other hand, a wide margin is usually allowed to the State under the Convention when it comes to general measures of economic or social strategy (see, for instance, *Stec and Others v the United Kingdom*[23]). The scope of the margin of appreciation will vary according to the circumstances; one of the relevant factors may be the existence or non-existence of common ground between the laws of States (see *Petrovic v Austria*[24]).

69. Administrative difficulties would not normally suffice as a justification as in *Darby v Sweden*[25] where this was the sole basis for barring non-residents who worked in Sweden from an exemption to church tax available to residents in Sweden. Nor can justification for interferences with rights be derived purely from negative attitudes that a particular minority might arouse -

[18] [2006] ECHR 1064
[19] [1979] ECHR 2
[20] [2003] ECHR 395 (para 37)
[21] [2003] ECHR 20 (para 45)
[22] [1999] ECHR 72 (para 90)
[23] Application no. 65731/01 and 65900/01
[24] [1998] ECHR 21
[25] [1990] ECHR 24

see *Smith and Grady* where this was rejected as a justification for the UK's ban on homosexuals in the army. A certain allowance is, however, given to States as regards the timing of changes which reflect a shift in society's attitudes, as in *Petrovic* where the ECtHR would not criticise the Austrian government for extending parental leave to fathers as well as mothers in a gradual manner.

Civil partnerships for opposite sex couples

70. The Bill does not permit the extension of the civil partnership regime under the CPA 2004 to opposite sex couples. They will remain available only to same sex couples. Under current law, marriage is limited to opposite sex couples and civil partnership is limited to same sex couples i.e. there are two distinct regimes. But under the Bill, these regimes will not be distinct.

71. As noted above, an application was made to the ECtHR in February 2011 by individuals involved in the Equal Love campaign. As part of this application, four opposite sex couples claim breach of Article 8, alone or in conjunction with Article 14, because they cannot enter into a civil partnership. No notification of the ECtHR's decision on admissibility has been received by the Government regarding this application.

72. Just as there is no right of same sex couples to marry pursuant to Articles 8 and 12, we do not consider that there is a right of opposite sex couples to enter a civil partnership protected by Article 8. However, an opposite sex couple would be likely to be able to show that the difference in treatment with a same sex couple is at least within the ambit of Article 8, as concerning family life.

73. The couple would then need to show that the treatment is based on a personal characteristic or status. In this case, difference in treatment on grounds of sexual orientation would fall within Article 14 (see for example *Sutherland v the United Kingdom*[26]).

74. As for justification of any interference, the opposite sex couple who wish to enter a civil partnership could argue that, if the choice of marriage or civil

[26] [2001] ECHR 234

partnership is available to same sex couples, there is no reason why that choice should not also be available to opposite sex couples. They may not wish to marry because of marriage's history or past religious associations, but may nevertheless wish to be accorded the rights and recognition available to civil partners.

75. In response, we consider that it is within the margin of appreciation of a State to recognise different forms of relationship for same sex and opposite sex couples. In the past (and prior to the CPA 2004) it was not unlawful for opposite sex couples to enjoy greater recognition of their relationship than same sex couples. That was a choice States were permitted to make. We consider that, equally, it is not unlawful for same sex couples now to have more options available to them in terms of the recognition of their relationship. That is so, in particular, given the historical context, namely that civil partnerships are relationships that were specifically created for same sex couples to give them similar recognition to that given by marriage, and were never intended for opposite sex couples as an alternative to marriage.

76. The Government's view is that marriage is the status which is regarded by the State as being the more desirable for couples to enter, and that opposite sex couples should therefore be encouraged to marry rather than enter civil partnerships. In addition, equivalent legal status to that of a civil partnership can be gained through a civil marriage ceremony. There is no evidence of material harm to an opposite sex couple who cannot enter into a civil partnership. The only complaint an opposite sex couple could have would be an objection to marriage as a concept, rather than in terms of any practical consequences that might arise.

77. We consider that there must be a significant margin of appreciation in this area, given that there is no consensus within States about the provision of civil unions (that are not marriage) to opposite sex couples. Given the lack of material harm, and the only possible objection being to marriage as a concept, we consider that it would be within the margin of appreciation for a State to determine that it is not obliged to create a new form of legal relationship for opposite sex couples to counter that objection.

Individuals who cannot be married in the religious ceremony of their choice because a religious organisation has decided not to opt in (clauses 1 - 8 and Schedule 1)

78. A refusal by a church or other religious organisation to marry a same sex couple could engage the couple's rights under Article 14 (read with Articles 12, 9 and possibly Article 8[27]). The couple would be likely to be able to show that the difference in treatment to that of an opposite sex couple is in the ambit of those Articles, as concerning marriage, religion and family life.

79. The couple would then need to show that the treatment is based on a personal characteristic or status. In this case, difference in treatment on grounds of sexual orientation would fall within Article 14.

80. As for justification of any interference, the Article 9 rights of the church or religious organisation concerned (which are considered in detail under the Article 9 analysis above) would be highly material. Article 9 is given particular weight under the Convention and this is reflected in the Human Rights Act 1998 (section 13). It is considered highly likely that a refusal by a church or other religious organisation to solemnize a marriage of a same sex couple, so as to comply with the doctrine of its religion or the strongly held and faith-based convictions of its members, would be regarded by any court as justified.

81. Indeed, a requirement that a church or other religious organisation solemnize marriages of same sex couples, contrary to their religious doctrine, could be regarded as discriminatory under Article 14 read with Article 9. Treating churches and religious organisations that have doctrinal objections to marriage of same sex couples in the same way as those that do not, in the context of whether or not they should themselves solemnize such marriages, is to fail to make a distinction between the two which could result in a discriminatory outcome.

Armed forces marriages (clause 6 and Schedule 6, Part 3)

82. The Bill amends Part 5 of the MA 1949 so as to enable a naval, military or air force chapel in England and Wales to be registered, on application by the Secretary of State, for the solemnization of marriage of same sex couples.

[27] *Schalk* (paras 94-95)

By contrast with registration of chapels for marriage of opposite sex couples, this will not permit marriages according to the rites of the Church of England or the Church in Wales. The reasons for this exclusion are discussed above.

83. A further difference is that the Bill enables the Secretary of State to make regulations about the registration of chapels for marriage of same sex couples. In addition to procedural matters, it is provided that such regulations may require consents to be obtained before an application for registration is made. This reflects the fact that each chapel is used for worship by several religious organisations, some of which may have doctrinal objections to its use for marriage of same sex couples. In relation to shared civilian places of worship the Bill meets that concern as described above by requiring that in certain circumstances all of the organisations using the building must individually consent to its registration for marriage of same sex couples (which thereby meets the Article 9 rights of those organisations and their members); a power is given to the Secretary of State to make regulations where there is no formal sharing arrangement. Since military chapels are Crown land, used for the purposes of the State, it is necessary not only to accommodate the concerns of the religious organisations which use them but also to ensure that the State itself does not infringe Article 14 (in conjunction with Article 9) by making its chapels available for marriage only for opposite sex couples. The regulation-making power is designed to offer maximum flexibility in balancing these considerations, following consultation with the organisations concerned. The Secretary of State will consider compatibility with the Convention when making the regulations and they will be subject to the affirmative procedure.

84. Similar considerations apply to Part 3 of Schedule 6 to the Bill, which confers power to make an Order in Council authorising marriages of armed forces personnel overseas and accompanying civilians, including marriages of same sex couples. Again it will be necessary to ensure that any such provisions, by virtue of applying only to same sex couples, do not involve infringement of Article 14 (in conjunction with Article 9) by the State.

<u>Presumption on birth of child to married woman (Schedule 4, Part 2)</u>

85. Clause 11 of the Bill sets out a general rule of equivalence between marriages of same sex and opposite sex couples. Schedule 4 paragraph 2

makes clear that the common law presumption that a child born to a woman during her marriage is also the child of her husband (often referred to as "the presumption of legitimacy") is not extended by clause 11. Therefore, where two women are married to each other and one of the parties to that marriage gives birth to a child, the other party will not be presumed to be the parent of that child by virtue of the common law presumption. There may be other ways in which the party to the marriage who does not give birth to the child is treated in law as the parent[28], but in all such cases it is not the common law presumption of legitimacy that treats her as the parent of that child.

86. We acknowledge that there is a possibility that it might be argued that an individual's rights under Articles 8 and/or 14 (read with Article 8) of the Convention could be engaged by these provisions. We consider it extremely unlikely that such an argument would be successful and that, in any event, such an argument would be based upon a false premise. This provision will not change the current situation or actually what the legal position is once the Bill comes into force. Instead the provision simply clarifies what the legal position will be in terms of the common law presumption. Even if the presumption did apply to a marriage between two women (which we do not consider it would do because the presumption is about fatherhood and the Bill does not change the law on fatherhood), it would be rebutted by the factual scenario. Therefore, this provision does not interfere with that woman's right to a family life. It should also be noted that there will still be ways in which a woman married to another woman can become the legal parent of the child her wife gives birth to[29]. We are therefore satisfied that this provision does not amount to a breach of rights under Articles 8 and/or 14 of the Convention.

Adultery (Schedule 4, Part 3)

87. Schedule 4 paragraph 3 of the Bill makes an amendment to section 1 of the MCA 1973, which sets out the five facts for proving the ground of divorce (irretrievable breakdown of a marriage). The amendment sets out that adultery can only be committed through conduct with a person of the opposite

[28] For example, the amendment made by Schedule 7 paragraph 36 of the Bill to section 42 of the Human Fertilisation and Embryology Act 2008 provides that, where a woman is in a civil partnership *or a marriage with another woman* at the time of treatment with donor sperm, her civil partner *or wife* will be treated as the child's parent unless it is shown that she did not consent to her treatment.

[29] As set out in footnote 28.

sex, whether the adultery relates to a marriage of a same sex or opposite sex couple.

88. This could potentially engage an individual's Article 14 rights (read together with Article 12) as it has a different impact on same sex couples than on opposite sex couples. Although Article 12 makes no express reference to divorce, this was considered in *Johnston v Ireland*[30] and *F v Switzerland*[31] (in the former, the ECtHR rejected the complaint that impediments to the right to divorce breached Article 12, whereas in the latter it emphasised that divorced persons should not be unduly restricted from remarrying). Accordingly, the case law suggests that the proposed definition of adultery as evidence for proving the ground of divorce would not be covered by Article 12 and therefore the Convention would not apply. However, if it is covered, any difference in treatment between same sex couples and opposite sex couples in that regard could potentially engage Article 14. A same sex couple would need to show that the treatment is based on a personal characteristic or status. In this case, difference in treatment on grounds of sexual orientation would fall within Article 14.

89. Under current law, where a marriage is validly formed and existing as a matter of law, it may be terminated by a court following a petition for divorce. The sole ground on which a petition for divorce may be presented is that the marriage has broken down irretrievably. Irretrievable breakdown may be established only by proof of one or more of five facts as specified in statute[32]:

(a) that the respondent has committed adultery and the petitioner finds it intolerable to live with the respondent;

(b) that the respondent has behaved in such a way that the petitioner finds it intolerable to live with the respondent;

(c) that the respondent has deserted the petitioner for a continuous period of at least two years;

(d) that the parties have lived apart for a continuous period of two years and the respondent agrees to a decree being granted;

(e) that the parties have lived apart for a continuous period of at least five years.

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[30] [1986] ECHR 17
[31] (1987) 10 EHRR 411
[32] Section 1 MCA 1973

90. Adultery is defined under common law as consensual sexual intercourse between a married person and a person of the opposite sex[33] who is not their spouse. There must at least be partial penetration of the female by the male for the act of adultery to be proved[34]. Although indecent behaviour, short of sexual intercourse, is not adultery, an inference of adultery may be drawn by the court[35]. In addition to the actual act of adultery, it must also be shown separately that the petitioner finds it intolerable to live with the respondent.

91. Conduct not amounting to adultery may amount to behaving in such a way that the petitioner cannot reasonably be expected to live with the respondent. This is judged in the context of the two individual parties and the test applied is whether a right-thinking person, looking at the particular husband and wife, would ask whether one could reasonably be expected to live with the other taking into account all the circumstances of the case and the respective characters and personalities concerned[36].

92. The provisions on adultery in the Bill mean that there is no substantial difference in treatment between same sex and opposite sex couples, since divorce will be available to both in respect of the same form of behaviour (that is extra marital sex with a person of the opposite sex). It is likely that reliance on evidence of adultery will be less common in respect of divorce of a couple in a same sex marriage. On that basis, our view is that there is no interference and therefore no breach of the Convention.

93. However, it might be argued that there ought to be a difference in the definition of adultery in respect of a marriage of a same sex couple to reflect the circumstances of the relationship. This is because Article 14 is also violated when States, without an objective and reasonable justification, fail to treat differently persons whose situations are significantly different. It could be argued that the sexual act required in order to prove adultery should be the same as the sexual act which is inherent to the marriage, which would obviously differ depending on whether the marriage is of a same sex or opposite sex couple.

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[33] *W v W (nullity)* [2000] 3 FCR 748
[34] *Dennis v Dennis* [1955] P 153 at 160
[35] *Elwes v Elwes* (1796) 1 Hag Con 269 at 278
[36] *Buffery v Buffery* [1988] FCR 465

94. As to whether any interference is justified, we consider that the aim is legitimate in that there should be clarity in the law as to what constitutes adultery (separate from unreasonable behaviour which already covers a wide range of behaviour). Evidential difficulties introduce an element of uncertainty to what would constitute adultery for same sex couples which would leave the grounds for divorce (potentially for both same sex and opposite sex couples) uncertain. Same sex couples will be able to divorce relying on evidence that the respondent has behaved in such a way that the petitioner cannot reasonably be expected to live with them. Since the petitioner must under current law already show that they find it intolerable to live with the respondent in addition to proving the actual act of adultery, the evidence relating to adultery could be seen as additional rather than absolutely necessary in order to obtain a divorce.

Non-consummation (Schedule 4 Part 3)

95. Under Schedule 4 paragraph 4, it is provided that it will not be possible for a same sex couple to annul their marriage on the ground of non-consummation. This is different to the provision for opposite sex couples, who are able to annul their marriage under section 12(a) or (b) of the MCA 1973, where the marriage has not been consummated owing either to the incapacity of either party to consummate it or to the wilful refusal of the respondent to consummate it.

96. This could potentially engage an individual's Article 14 rights (read together with Article 12) as it has a different impact on same sex couples than on opposite sex couples. As set out above in relation to adultery, Article 12 makes no express reference to the termination of a marriage, whether by divorce or annulment. Our view is that it is likely that not providing non-consummation as a ground on which a marriage of a same sex couple is voidable would not be covered by Article 12 and therefore the Convention would not apply. However, if it is, any difference in treatment between same sex couples and opposite sex couples in that regard could potentially engage Article 14. A same sex couple would need to show that the treatment is based on a personal characteristic or status. In this case, difference in treatment on grounds of sexual orientation would fall within Article 14.

97. Non-consummation as a ground on which a marriage is voidable is a provision which can be traced back hundreds of years, ultimately deriving from religious doctrine on the nature of marriage. Its legal significance arises from theories of marriage as having the purpose of producing legally recognised descendants of the partners, or of providing sanction to their sexual acts together, or both, and amounts to treating a marriage ceremony as falling short of completing the creation of the state of being married. Thus in some traditions, a marriage is not considered a binding contract until and unless it has been consummated. For example, Catholic Canon law defines a marriage as consummated when the "spouses have performed between themselves in a human fashion a conjugal act which is suitable in itself for the procreation of offspring, to which marriage is ordered by its nature and by which the spouses become one flesh"[37]. Within the Roman Catholic Church, a marriage that has not yet been consummated, regardless of the reason for non-consummation, can be dissolved by the Pope.

98. We therefore consider that consummation is in fact a concept that can only be applied to sexual conduct with a person of the opposite sex, since it historically concerns the possibility of procreation.

Conversion of a civil partnership to a marriage (clause 9)

99. The Bill provides that for civil partnerships registered in England & Wales (or in some cases if it was registered abroad), the couple will have the option to convert the partnership into a marriage. The effect of converting the relationship will be that any rights, responsibilities and benefits accrued during the civil partnership which are matched by rights, responsibilities and benefits within marriage would continue once the couple were married, and they will be treated as accruing from the date of the original civil partnership (rather than the date of conversion).

100. The Bill does not make this conversion process available in relation to civil partnerships registered outside of England & Wales (though it will be available in respect of civil partnerships registered at British consulates or by armed forces personnel where couples have jointly elected England and Wales as the relevant part of the UK). Marriage is a devolved matter, and it is

[37] Canon 1061 para 1 – see http://www.vatican.va/archive/ENG1104/_P3V.HTM

for the devolved administrations in Scotland and Northern Ireland to determine whether or not the conversion process should be available. In Scotland it is proposed to introduce marriage for same sex couples with a similar conversion process. At present, the position in Northern Ireland is that marriage for same sex couples and an equivalent conversion process for existing civil partnerships is not proposed.

101. The consequence of this would be as follows: if Couple A, who live in London, have a civil partnership registered in England and Wales, they will be able to convert that partnership into a marriage in England and Wales. By contrast Couple B would not be permitted to convert a civil partnership into a marriage if that partnership were registered in Northern Ireland. It would not matter for these purposes if Couple B also live in London and wish the conversion to a marriage to take place in England and Wales.

102. As noted above, the ECtHR has affirmed in *Schalk* that there is no right to marriage for same sex couples pursuant to the Article 12, or Article 14 read with Article 8. Nor is it unlawful discrimination to treat same sex couples differently to opposite sex couples by permitting only the latter to marry. It would not, therefore, be unlawful *per se* for Northern Ireland to refuse to register marriages of same sex couples or to refuse to permit couples to convert civil partnerships into marriage.

103. A more difficult question is whether it would constitute unlawful discrimination pursuant to Article 14 (read with Articles 8 and/or 12) to treat Couple A and B differently (i.e. to treat same sex couples who reside in England and Wales differently depending on whether their civil partnership was registered in England & Wales or in Northern Ireland).

104. It is likely that Couple B would be able to establish that the difference in treatment with Couple A would fall within the ambit of Articles 8 and/or 12. It concerns matters related to marriage which fall within the ambit of the right to family life and the right to marry.

105. Couple B would then need to show that the treatment is based on a personal characteristic or status. The question would be whether having a civil partnership registered in Northern Ireland, as compared to a civil partnership

registered in England & Wales, constitutes "other status" within the meaning of Article 14.

106. In a number of cases it has been held that the application of different legal regimes to the different jurisdictions within the UK does not mean that individuals subject to those regimes have different "status" from one another so as to enable them to bring a claim for breach of Article 14. This was held to be the case when an objection was made to anti-terrorism legislation in Northern Ireland that was different to the legislation in place in England & Wales (*Magee v the United Kingdom*[38]). It was also held to be the case where an objection was made to different penal regimes in Scotland as compared to England and Wales (*Nelson v the United Kingdom*[39]). The ECtHR held that the difference in treatment in such cases resulted not from some different status of the individuals, but from the fact that they were arrested and detained in different regions. An inevitable consequence of a devolved system of government is that there will be different laws applicable to different jurisdictions. That does not, in itself, mean that the difference in treatment is on the basis of a different status as between individuals so as to fall within Article 14. We consider that the courts are likely to treat the place where a civil partnership was registered as being an administrative matter that flows from the devolution of power to the different jurisdictions within the UK rather than a matter giving rise to a personal "status" within the meaning of Article 14.

107. If a court concluded that Article 14 was engaged, we think that the courts would find that any difference in treatment was justified. As noted above, it would not be a breach of the Convention for Northern Ireland to refuse to recognise marriage of same sex couples. As the ECtHR held in *Schalk*, different jurisdictions are entitled to take different views on that question reflecting their particular social and cultural values. Permitting a civil partnership registered in Northern Ireland to be converted into a marriage would, in effect, be to recognise a Northern Irish civil partnership as a marriage. That would be inconsistent with a decision by Northern Ireland not to recognise the marriage of same sex couples. It is considered that this would be regarded as a sufficient justification for the difference in treatment of

[38] [2000] ECHR 216
[39] [2008] ECHR 247

Couple A and B. That would mean that there is no breach of Article 14 in treating Couple A and B differently.

Gender recognition (clause 12 and Schedule 5)

Devolution

108. As explained above, the Bill proposes to allow married couples to remain married even where one party is issued with a full GRC. The provision only extends to marriages registered in England and Wales and outside the UK as marriage and the registration of marriages are devolved in relation to Scotland and Northern Ireland. The devolved administration in Scotland proposes to introduce marriage for same sex couples and in the process to allow a couple where one party to the marriage obtains a full GRC to remain in their marriage. The position in Northern Ireland may be different if the devolved administration decides not to reissue marriage certificates to a same sex couple following the grant of a GRC to one party to the marriage. Under the Bill, the position would be that those couples whose marriage certificates were issued in Northern Ireland will not be able to remain married if a full GRC is issued. The trans spouse will be issued with an interim GRC and will need, as now, to end their marriage in order to obtain a full GRC.

109. The position is straightforward in relation to those couples with Northern Ireland marriage certificates who are resident in Northern Ireland. In effect they will be in the same position as any other same sex couple resident in Northern Ireland. The ECtHR has held in *Parry* that this is lawful.

110. The Bill will have a different impact on couples who are resident in England and Wales but have marriages registered in Northern Ireland. So, under the Bill a couple who live in England and Wales and whose marriage is registered there (Couple A) will be able to remain married even if one party to the marriage is issued with a full GRC. By contrast a couple who live in England and Wales, but whose marriage is registered in Northern Ireland (Couple B), would be required to terminate their marriage if one spouse wishes to be issued with a full GRC. Allowing for any other effect would amount to the law of England and Wales having an impact in a devolved area (marriage registration).

111. Couple B might wish to argue that there has been a difference in treatment within the ambit of Articles 8 and/or 12 of the Convention. The difference in question is between Couple A and B's respective ability to remain married if one spouse is issued with a full GRC. The difference would be said to relate to the rights to private and family life (Article 8) and marriage (Article 12).

112. As to whether the difference amounts to discrimination on the basis of a characteristic protected by Article 14, and whether it is justified, the issues are similar to those regarding the bar on the conversion of civil partnerships registered in Northern Ireland to marriages, considered above. As in that case, we think that the courts are likely to conclude that a difference in treatment of Couples A and B based upon the place where their marriage was registered does not constitute a difference in "status" within the meaning of Article 14.

113. We consider that any interference with Couple B's rights would be found to be justified. If a couple whose marriage was registered in Northern Ireland but who no longer chose to live there could remain married following the issue of a full GRC to one party to that marriage, their Northern Irish marriage would continue notwithstanding that it was between a same sex couple. That would not be consistent with the current law in Northern Ireland which, in not allowing same-sex marriage, is nonetheless compatible with Article 12. It would, in effect, enable a couple who married in Northern Ireland to avoid the full effect of the Northern Ireland marriage laws when they live in England and Wales. For these reasons, we consider that it would be justified and proportionate to refuse to permit a Northern Ireland registered marriage to continue once a full GRC has been issued to one party to the marriage. That is the case even if it meant treating Couple A and Couple B differently, notwithstanding that both now reside in England & Wales.

Civil partnerships

114. As explained above, the Bill only allows married couples in protected marriages to remain in their marriages. It does not extend to couples in civil partnerships because opposite sex civil partnerships will still be unlawful. If a couple are in a civil partnership registered in England and Wales, and wish to remain in their union following one of the parties' application for a GRC, the Panel will advise them to take up the option of converting the partnership into

a marriage before the trans party applies for a full GRC. Once the civil partnership has been converted the couple will be able to remain married following the issue of the full GRC as set out above. The couple will also have the option of converting their civil partnership to a marriage within six months of the issue of the interim GRC.

115. As above, couples in civil partnerships may seek to argue that refusing to permit them to remain in a civil partnership if the trans partner is to be given a full GRC falls within the ambit of Articles 8 and/or 12. The difference relates to private and family life (Article 8) and marriage (Article 12).

116. Where a couple in a civil partnership is treated differently to a couple in a marriage, that is a difference which a couple might seek to establish on the basis of "other status" pursuant to Article 14 as it relates to a difference based on marital status[40].

117. As to justification of any alleged interference, the issue will be broadly similar to whether it is justified to refuse to permit opposite sex couples to register civil partnerships. This is considered above. On the assumption that this will be justified for the reasons given then it will be lawful to refuse to permit a couple to remain in a civil partnership following the issue of a full GRC to one partner.

Marriage registrars

118. Under the Bill, marriage registrars whose role it is to register marriages for civil purposes pursuant to the MA 1949 will be responsible for marriages of same sex couples as well as opposite sex couples. The Bill does not make provision for the conscientious objection of those registrars whose religious or philosophical beliefs mean that that they do not want to solemnize marriage of same sex couples.

119. Following the recent judgment (published on 15 January 2013 and not yet final) of the ECtHR in *Ladele*, refusing to permit civil partnership registrars to

[40] See *P.M. v the United Kingdom* (2006) 42 EHRR 45 in which the ECtHR held that difference in treatment as between a married and unmarried father fell within Article 14, where both were separated from the mother and living apart from their child; though see also, for example, *Lindsay v the United Kingdom* (Application no. 11089/84 (11 November 1986)).

conscientiously object to registering civil partnerships is lawful pursuant to both the EA 2010 and the Convention.

120. There is also no requirement under Article 14 read with Article 9 to allow for conscientious objection in the case of marriage registrars whose religious or philosophical beliefs mean that that they do not want to conduct same sex marriage ceremonies. We consider that any interference is justified by the legitimate aim that public officials should offer their services to all without discrimination based on the sexual orientation of customers. There is a balance to be struck between the rights of same sex couples in this regard and the rights of those who believe, whether or not motivated by religion, that homosexual acts are morally wrong or that same sex relationships should not be promoted. But there can be little doubt that promoting equality and tackling discrimination because of sexual orientation is a legitimate, indeed a weighty, aim for a public authority – the ECtHR held that this aim was legitimate in *Ladele*. The ECtHR has held on many occasions that particularly convincing and weighty reasons are necessary to justify subjecting individuals to differences in treatment on the grounds of their sexual orientation.

121. As for proportionality, Ms Ladele argued that there were "less severe and intrusive means available to Islington" and services could have been arranged so that other registrars, without her beliefs, would register civil partnerships. However, Islington argued that it was entitled to conclude that it would undermine its pursuit of its aim if it were to make exceptions for employees as to the work they were required to perform because those employees did not wish to provide services to same sex couples. The ECtHR held in *Ladele* that there is a wide margin of appreciation for national authorities when it comes to striking a balance between competing Convention rights (cf *Evans v the United Kingdom*[41]) and that Islington did not exceed the margin of appreciation in this case[42]. Similar considerations would apply to registrars in relation to marriage of same sex couples.

122. Arising from this, there is a question as to whether it would be open to local authorities to arrange their services so that they can permit those marriage

[41] [GC], no. 6339/05, para 77, ECHR 2007-I
[42] Para 106

registrars with a conscientious objection to marriage of same sex couples to conduct only opposite sex marriage ceremonies.

123. In *Ladele* the Court of Appeal held that it would constitute a breach of the Equality Act (Sexual Orientation) Regulations 2007[43] (now broadly replicated in the EA 2010) for Islington to arrange its services so as to permit Ms Ladele to refuse to register civil partnerships because of her views on same sex relations. (This issue was not considered by the ECtHR in its judgment.) If that reasoning is applied to marriage of same sex couples, it means that a marriage registrar whose role will encompass conducting same sex and opposite sex marriage ceremonies, because of the change of definition of marriage, cannot lawfully refuse to marry same sex couples while marrying opposite sex couples.

124. There may be criticism of the Court of Appeal's conclusion that there will be less favourable treatment of a same sex couple even where they are able to register their partnership on the day and in the manner they wish, without knowing of the internal arrangements as to who should act as their civil partnership registrar. However, it is arguable that the prohibition on discrimination requires offering services equally to all, and that offering services in a different way (including their being provided by different personnel), in and of itself, constitutes less favourable treatment. That is so even if the couple are able to get married at the time and place they choose.

125. Accordingly, it appears that it would be unlawful for a local authority to arrange its services so that marriage registrars who have a conscientious objection to marriage for same sex couples would not have to conduct such marriages.

Other 'conscience' issues

126. There may be other scenarios where a belief that marriage can only be between a man and a woman could potentially give rise to a claim of breach of Article 9 or Article 14 read with Article 9. They could involve either the public or the private sector. Three particular areas are considered below.

[43] S.I. 2007/1263

127. In general terms, it should be for a tribunal or court to consider the facts in each individual case, in particular what views have been expressed, the context in which they were expressed, the nature of the disadvantage imposed by the employer or other body and the justification which is put forward for it. The tribunal or court can then decide whether the actions of the employer or other body are proportionate and in pursuit of a legitimate aim. We do not consider that expressing views that marriage should be between a man and a woman, made in an appropriate setting and in non-inflammatory language, would justify the employer or other body subjecting a person to a detriment. Accordingly, subjecting someone to a detriment is likely to be held to be unlawful and no amendment to the current law is required to protect individuals expressing such views. In that case, there is no breach of the Convention.

128. A claimant may argue that a claim concerning 'conscience' falls within the ambit of Article 9, given that it relates to a religious (or indeed a non-religious) belief about the nature of marriage. They are likely to claim that the discriminatory treatment was based on their religion or belief. Cases of this kind are therefore likely to focus on the question of justification of any interference.

Employment

129. An example of a potential employment issue could be a marriage guidance counsellor who does not wish to provide counselling to same sex couples (see *McFarlane v the United Kingdom*[44]).

130. There are instances in which employers are able to justify dismissing or taking disciplinary actions against an employee because of views expressed outside of their employment. See, for example, *Redfearn v Serco*[45] where an employer dismissed a driver for children and adults with special needs when it was discovered that he was standing to be a BNP counsellor[46]. The claim illustrates that it may, in certain cases, be justified for an employer to dismiss

[44] Application no. 36516/10 now reported under [2013] ECHR 37 (c.f. *McFarlane v Relate Avon Ltd* [2010] ICR 507).
[45] [2006] EWCA Civ 659
[46] The ECtHR recently ruled in favour of Mr Redfearn on a separate issue regarding the length of employment required before a claim for unfair dismissal can be made.

employees based on beliefs expressed outside work provided there is a legitimate concern as to how they might act during their employment.

131. However, it is difficult to see how an employee simply expressing the view their religious teaching states that marriage should be between a man and a woman could be said to interfere with their ability to carry out their work or that it could be said to be so offensive that it would affect the reputation of the employer to continue to employ them. If there is no suggestion that the employee holds homophobic views or that expressing views as to religious teaching on marriage indicates that they may act inappropriately or in a discriminatory manner towards an individual because of their sexual orientation, then the employer is unlikely to be able to show that it is acting in a proportionate manner in pursuit of a legitimate aim and any dismissal would be unlawful.

132. See in particular the recent decision in *Smith v Trafford Housing Trust*[47], where an employee was demoted because of comments on his personal Facebook page regarding civil partnerships on religious premises. The High Court found in favour of Mr Smith, showing that the expression of such views in non-inflammatory language outside of work is acceptable.

133. It should be noted that the same issues as those outlined above would arise in relation to expressions of other views, for example if a person preaches that civil partnerships are contrary to religious teaching or that people (whether in a same sex or opposite sex relationship) should not have children outside marriage etc. In any particular case, if an employee was disciplined or dismissed for expressing such views, the same legal framework, and in particular the question of justification and proportionality, would apply.

Education

134. There may be parents who do not want their children to learn about marriage of same sex couples at school. A number of domestic provisions would apply to that situation.

[47] [2012] EWHC 3221 (Ch)

135. First, the Sex and Relationship Education (SRE) Guidance[48] issued by the Department for Education (DfE) emphasises that pupils must be protected from teaching and materials which are inappropriate having regard to the age and the religious and cultural background of the pupils concerned. It should be noted that section 403(1) of the Education Act 1996 ("the EA 1996") provides that, where sex education is given, it is given in such a way as to encourage due regard for moral considerations and the value of family life. Section 403(1A) provides that Secretary of State must issue guidance designed to secure that, when sex education is given to registered pupils at maintained schools, they learn about the nature of marriage and its importance for family life and the bringing up of children.

136. In terms of domestic discrimination law, section 89(2) of the EA 2010 provides that the EA 2010 does not apply to "anything done in connection with the content of the curriculum". So the subject matter itself would not give rise to a claim for religious discrimination against a child whose parents did not believe in same sex marriage, and the parents could not object to children being taught that marriage of same sex couples is lawful as part of the curriculum. However, the parents would be permitted to request that their child is exempted from sex education classes (if the school is a maintained school) pursuant to section 405 of the EA 1996 except insofar as the education is comprised in the National Curriculum. If, however, a lesson is not part of sex education, the parents would have no right to withdraw their child. Any action by a school resulting from withdrawal of a child from a lesson which is not part of sex education would not be on the basis of the child's religious beliefs, but the unauthorised withdrawal from school, and would not therefore constitute unlawful discrimination.

137. However, the way in which the subject of marriage for same sex couples is taught could be caught by the EA 2010. Accordingly, if a school (or someone authorised by the school) conveyed its belief in a way that involved haranguing, harassing or berating a particular pupil or group of pupils, then this would be unacceptable in any circumstances and is likely to constitute unlawful discrimination. None of this, however, is a problem particular to

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48 https://www.education.gov.uk/publications/standard/publicationdetail/page1/dfes%200116%202000

beliefs about the nature of marriage. The same issues would arise if a pupil was bullied or mocked for expressing any other religious or philosophical beliefs, and there is no basis for altering the law specifically to deal with marriage for same sex couples.

138. Parents might attempt to argue that the classes constitute "political indoctrination" which is prohibited pursuant to section 406 of the EA 1996. Assuming, however, that the lesson is properly taught and does not constitute "the promotion of partisan political views" within section 406(1)(b), it would not fall foul of the EA 1996.

139. There may also be a claim under A2P1 of the Convention, since parents might attempt to argue that requiring their child to attend lessons about, for example, the history of the homosexual civil rights movement constitutes a failure to "respect" their right to ensure education is in conformity with their religious and philosophical convictions. However, we consider that such an argument is likely to fail. The case law of the ECtHR has interpreted the requirement to "respect" the rights of parents in A2P1 in such a way as to impose a high threshold on parents to establish a breach (see *Folgero v Norway*[49] in which the ECtHR considered the limits of the requirement to respect parental views). The Convention certainly does not require all educational provision to occur in a way which parents agree is consistent with their religious and philosophical convictions. Provided that the lessons are taught in a balanced way and do not constitute political indoctrination, requiring a pupil to attend will not breach A2P1.

140. Furthermore, objections by parents to a curriculum can occur for all manner of reasons. There is no reason to treat objections to teaching about marriage for same sex couples as a different category. It would be peculiar if pupils were not exempted from lessons which consider civil partnerships, the history of the homosexual civil rights movement or same sex relations more generally, but that if marriage for same sex couples is mentioned parents are permitted to withdraw their children from the class. Provided the teaching occurs in a manner which is sensitive, does not constitute political indoctrination and is not dismissive of the views of those that consider, on the

[49] (2008) 46 EHRR 47

basis of sincerely held religious or philosophical beliefs, that marriage should be a union between a man and a woman, we do not consider that there is any reason why a school should not include, as part of its curriculum, teaching about marriage for same sex couples.

141. In light of the above, we consider that any interference with the rights of the parents and/or child is justified.

Fostering

142. Potential fosterers may consider that it is their belief about marriage which gives rise to their not being considered suitable as fosterers (see *Johns v Derby CC*[50]). However, views on marriage of same sex couples *per se* are unlikely to justify a refusal to allow individuals to act as foster parents. It is difficult to see why a person who considers that marriage should be between a man and a woman, but exhibits no discriminatory views about sexual orientation, would be unsuitable to be a foster parent simply because of their attitude to marriage of same sex couples. The High Court in *Johns* held that "the local authority is entitled to explore the extent to which prospective foster carers' beliefs may affect their *behaviour*, their *treatment* of a child being fostered by them"[51]. Accordingly, it is not necessarily inappropriate for a local authority to ask about attitudes to marriage of same sex couples; but if a person expresses views that marriage should be between a man and a woman, that is in itself unlikely to affect their treatment of a foster child (though see below for further in this regard). A refusal is therefore likely to be unlawful.

143. It should be noted that there is a two stage approval system for foster parents. First, a person applies to be assessed and approved as a foster parent *per se*, under the Fostering Services (England) Regulations 2011[52]. At that stage their views on same sex marriage are unlikely to justify a decision that they are not suitable to be foster parents, as described above.

144. Second, a local authority looking to place a particular child with foster parents makes a decision about where to place that child. The local authority is under

[50] [2011] EWHC 375
[51] Para 97
[52] S.I. 2011/581

a duty in section 22C of the Children Act 1989 to place the child in the most appropriate placement available, and under the duty in section 22(3)(a) of that Act to safeguard and promote the child's welfare. So the local authority might legitimately decide that a child of a same sex couple could not be placed with those foster parents if their views on same sex marriage would affect the child, or for example frustrate contact between the child and his parents. This would not be a decision that they were unsuitable to be foster parents, but a decision that it was not appropriate for them to foster a particular child. This is in line with the *Johns* case, in that the foster carer's beliefs in that particular case may affect their behaviour and treatment of the child.

State pension (Schedule 4, Part 5)

145. The Bill will extend the derived entitlement to the state pension to members of same sex married couples, on the same basis as civil partners and men married to women. The differences in treatment thereby created are a result of the pre-existing preferential treatment of women married to men in relation to entitlement to a derived rights state pension. We consider the avoidance of creating a new difference in treatment based on gender between male and female civil partners to be proportionate and therefore not a breach of Article 14 read with A1P1.

Occupational pensions and survivor benefits (Schedule 4, Part 6)

146. Occupational pension schemes that are or were contracted-out are obliged to ensure surviving spouses of scheme members receive a portion of the Guaranteed Minimum Pension ("GMP") payable to the scheme member. The portion depends on whether the survivor is a widow of a marriage with a person of the opposite sex (50% of any GMP accrued since 1978), or widower or surviving civil partner (50% of GMP accrued since 1988). The Bill will extend the entitlement to post-1988 GMP to widows and widowers of a marriage with a person of the same sex. Contracted-in occupational pension schemes are not obliged to provide survivor benefits; however if they do these must be provided to civil partners as well as widows or widowers but only in relation to pensionable service after 2005. The Bill will make the same provision for widows and widowers of a marriage with a person of the same sex.

147. We consider that treating widows and widowers of a marriage with a person of the same sex in the same way as surviving civil partners in relation to contracted-out benefits is compatible with Article 14 as read with A1P1 given the Government's wide margin of appreciation in the consideration of A1P1 rights and the existing differences of treatment which mean that any option adopted would create further differences. In relation to non-contracted-out benefits, survivors of a marriage with a person of the same sex will be treated in the same way as survivors of a civil partnership; equal survivor benefits to those available in relation to a marriage with a person of the opposite sex are only required in relation to post-2005 pensionable service because the Government considers that the relevant time for comparison under Article 14 read with A1P1 is the time the benefits accrued and not when they are paid, which reflects the nature and funding of occupational pension schemes.