December 2011

The Scottish Human Rights Commission is a statutory body created by the Scottish Commission for Human Rights Act 2006. The Commission is a national human rights institution (NHRI) and is accredited with ‘A’ status by the International Co-ordinating Committee of NHRIs at the United Nations. The Commission is the Chair of the European Group of NHRIs and is also a representative of Scotland on the Advisory Panel to the Commission on a Bill of Rights. The Commission has general functions, including promoting human rights in Scotland, in particular to encourage best practice; monitoring of law policies and practices; conducting inquiries into the policies and practices of Scottish public authorities; intervening in civil proceedings and providing guidance, information and education.

1. Introduction

The Scottish Human Rights Commission (the Commission) welcomes this opportunity to submit evidence to the Scottish Government on its consultation “The Registration of Civil Partnerships Same Sex Marriage.” The Commission welcomes the proposals put forward by the Scottish Government and is pleased to submit its views in relation to the primary questions of the Consultation:

- The introduction of same sex marriages

The issue of marriage and civil partnerships, which covers private and social dimensions, is of fundamental importance in a free and democratic society. Marriage and civil partnership engages a number of human rights standards such as human dignity, the prohibition of discrimination and legal equality before the law, including equal access to services, the right to marry and found a family and the right to freedom of religion. The introduction of same sex marriage raises a number of specific issues related to rights protected under the European Convention of Human Rights. However, the introduction of same sex marriage goes beyond the legal or technical question and
also engages a social and cultural dimension related to equality and inclusion.¹

2. Legal Framework

The Commission draws particular attention to the following human rights standards:

- The European Convention of Human Rights (ECHR)
- The International Covenant of Civil and Political Rights (ICCPR)
- The International Covenant on Economic, Social and Cultural Rights (ICESCR)
- The Human Rights Act 1998
- The Yogyakarta Principles on the Application of International Human Rights Law in relation to Sexual Orientation and Gender Identity

The following articles of ECHR are particularly relevant:

- Article 8   Right to private and family life
- Article 9   Right to freedom of thought, conscience and religion
- Article 12 Right to marry
- Article 14 Prohibition of discrimination

3. The introduction of same sex marriages

Marriage has traditionally and legally been defined as the voluntary union for life of one man and one woman to the exclusion of all others.² Article 12 of the ECHR reads:

“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.”

Despite there being no European consensus regarding same sex marriage there has been in recent years a move in Europe towards the principle of equalising the terms under same sex marriage. Seven EU countries have recognised in law the equal right of same sex couples to marry (Belgium, Iceland, the Netherlands, Norway, Portugal, Spain and Sweden). The European Court of Human Rights

¹ In preparing the present submission the Commission has liaised with the Equality and Human Rights Commission in Scotland.
² Hyde v Hyde (1866) LR 1 P&D 130; Marriage (Scotland) Act 1977,
The ECtHR has moved slowly in relation to the classic formulation of marriage.\(^3\) An important recent case is *Schalk and Kopf v. Austria*, \(^4\) where the ECtHR concluded that Article 14, taken in conjunction with Articles 8 (and 12), cannot be interpreted as imposing an obligation on contracting States to grant same-sex couples access to marriage. The ECtHR adjudicated that contracting states are best placed to assess and respond to the needs of society and found this issue to be within the margin of appreciation. It is important to note that this does not mean that Member states cannot choose to interpret the provisions more widely.

However, two points are relevant:

1. The ECtHR found that "men and women" in Article 12, which was not included in the equivalent article of the EU Charter of Fundamental Rights,\(^5\) no longer means that “the right to marry enshrined in Article 12 must in all circumstances be limited to marriage between two persons of the opposite sex”\(^6\)

2. The ECtHR found that Article 14 was applicable in combination with the "respect for family life" branch of Article 8. "The Court notes that since 2001 … a rapid evolution of social attitudes towards same-sex couples has taken place in many member States. Since then a considerable number of member States have afforded legal recognition to same-sex couples … Certain provisions of EU law also reflect a growing tendency to include same-sex couples in the notion of 'family' … In view of this evolution the Court considers it artificial to maintain the view that, in contrast to a different-sex couple, a same-sex couple cannot enjoy 'family life' for the purposes of Article 8.”\(^7\)

In its jurisprudence the ECtHR has built on preceding views of international human rights bodies, such as the UN Human Rights Committee.\(^8\) That Committee recognised as early as 1999 that “The provision [on the right to marry] in no way limits the liberty of States

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\(^3\) For example *Rees v UK* (1986) 9 EHRR 56

\(^4\) *Schalk and Kopf v Austria* [2010] 30141/04

\(^5\) Article 9 of the Charter states: “The right to marry and the right to found a family shall be guaranteed in accordance with the national laws governing the exercise of these rights” This Article neither prohibits nor imposes the granting of the status of marriage to unions between people of the same sex. This right is thus similar to that afforded by the ECHR, but its scope may be wider when national legislation so provides. (legal explanations) available at http://www.eucharter.org/

\(^6\) Ibid

\(^7\) Ibid

\(^8\) The UN body of independent experts charged with monitoring States Parties compliance with the ICCPR
... to recognize, in the form of marriage or in some other comparable form, the companionship between two men or between two women."

Recent views of UN human rights bodies have welcomed steps by States to legally recognise the equal right of same sex couples to marry. An important example of this is in the recent review by the UN Committee on Economic, Social and Cultural Rights on the report of Argentina, the first country in Latin America to legalise same sex marriage.

It should be recognised that the question of same sex marriage also engages social and cultural aspects. The ability to marry is something that heterosexual couples living in Scotland enjoy while homosexual couples do not. Marriage has a unique and fundamental position in society. The current level of debate in relation to this consultation highlights how much social and cultural importance is attached to the perception of marriage as a social institution.

By creating a separate institution for same-sex couples, regardless of whether the rights enjoyed are identical, the protection and promotion of human dignity and inclusion within social and cultural norms in Scotland may be hindered. The ECtHR found in Schalk and Kopf that Member States are best placed to interpret the provisions of Article 12 of the Convention (margin of appreciation doctrine) in accordance with their own realities.

In this context, it is helpful to understand social attitudes in Scotland toward same sex marriage. The Scottish Social Attitudes Survey has questioned Scottish respondents repeatedly on this issue from 2002 to 2010 and positive attitudes towards equal marriage have increased from 41% in 2002 to 61% in 2010. The percentage of people who oppose same sex marriage has dropped from 29% in 2002 to 19% in 2010. It is also important to note that there is a spread of opinion among religious bodies with a number welcoming the current proposal.

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9 Joslin v New Zealand, UN Human Rights Committee, Communication No. (902/1999), ICCPR, A/57/40 vol. II (17 July 2002), Individual Opinion by Mr. Rajsoomer Lallah and Mr. Martin Scheinin (concurring).
10 The UN body of independent experts charged with monitoring States Parties compliance with the ICESCR.
The opposite-sex requirement in the definition of marriage creates a legal distinction between opposite-sex and same-sex couples on the basis of sexual orientation which should not be justified in a modern Scottish society. Therefore, the Commission is of the view that Scotland should recognise in law the equal right to marry of same sex couples.

The fairest approach, and the simplest in terms of legislation, would be to amend the Marriage (Scotland) Act 1977 s 5 to extend marriage to same-sex couples.\textsuperscript{14}

In this regard the Commission also highlights the importance of the right to freedom of thought, conscience and religion. While religious freedom is primarily a matter of individual conscience, it also implies, inter alia, freedom to manifest in private or in community their views.\textsuperscript{15} The freedom to manifest one's religion or beliefs can however be subject to limitations prescribed by law and necessary in a democratic society, such as not interfering with the rights of others. Nevertheless, the Commission takes a balanced view and agrees with the current Government proposal and shares the view that no religious body or its celebrants should however be required to solemnise same sex marriages.

Finally, the Commission also notes the important place of pluralism, including among faith communities and throughout the secular community, within a modern democratic society.

\textbf{Civil partnerships}

In Scotland, civil partnerships are currently designed for same-sex couples only. The Commission’s view is that there does not appear to be a reasonable and objective justification to limit civil partnership in this way. Consequently this limitation may amount to discrimination on the basis of sexual orientation. As the responsibilities and rights of civil partners are very similar to the responsibilities and rights of married couples, this should be extended to all parties. This will serve various purposes, inter alia, making the legislation apply consistently across different groups in society.

\footnotesize{Available at http://www.bbc.co.uk/news/uk-scotland-15082413
\textsuperscript{14} See Faculty of Advocates evidence in the Consultation on Civil Partnership Registration: analysis of the responses, Strachan at al (2004) Centre for Public Policy and Management, The Robert Gordon University.
\textsuperscript{15} See for example, The Church of Scientology Moscow v Russia [2007] ECHR 258}
The Commission believes that civil partnerships should continue to be civil and secular, providing an option for all couples that do not wish to go through a formal marriage.

**Conclusion**

The Commission is of the view that the equal right of same sex couples to marry should be guaranteed in law. In this respect, legislation should be sufficiently inclusive, promoting and recognising committed relationships regardless of their sexual orientation. The current evidence suggests that people living in Scotland are in favour of greater equality and better social and cultural inclusion on this issue, whether or not the UK government decides to legislate similarly.

The Commission believes that the principle of equality should inform both marriage and civil partnerships in Scotland. Equality should be aimed, inter alia, to provide equal opportunities for all and the reduction of disadvantage. Therefore, civil partnership should be open to all parties.

The Commission's view is that no religious body or celebrant should be required to register a civil partnership against their will or obliged to solemnise same sex marriages.

SHRC          091211