

ONLINE BRIEFING ON SAME-SEX MARRIAGE

Catholic Bishops' Conference of England and Wales

Key Points

- **This is not about religious belief or gay rights: it is about the meaning of civil marriage for the whole of society**
- **Marriage is a bond of one man and one woman, for life, because that creates the best environment in which to create and raise children**
- **Marriage is not just about the couple, but about the long term common good of the family and society**

Introduction

The Bishops' Conference is gravely concerned about the Government's proposal to introduce same-sex marriage. Archbishops Vincent Nichols and Peter Smith have already set out their concerns in terms of Catholic teaching by a joint letter read in churches before Easter. This is not a debate about religious belief; it is a debate about what marriage means and what is in the best interest of society as a whole.

Mandate?

This policy was not in any party's manifesto and there has been no Green or White Paper. The Prime Minister and Ms Featherstone simply announced that the Government would legislate, subject only to a consultation 'about how we best remove the ban on same-sex couples having a civil marriage, not on whether or not this should happen' (Consultation Doc. 2.8).

There is no mandate for it, yet the Consultation Document says that the Government's response

'will be based on a careful consideration of the points made ... not the number of responses received' (*ibid.* p.2 Next Steps) .

This is a profoundly undemocratic approach to such a fundamental social change. The policy does not have popular support: by the end of April 2012 over 487,000 people had signed a petition opposing the change.

A recent survey found that 70% of adults in Britain agree that 'Marriage should continue to be defined as a life-long exclusive commitment between a man and a woman'. Source: ComRes on-line poll of 2,000 GB adults weighted for demographic representation, February 2012¹.

Necessity?

No convincing answer has been given to the question: "What is the problem to which this new law is the solution?"

All legal and social rights sought by same-sex couples were provided by the Civil Partnerships Act 2004. Jacqui Smith MP, then the Minister responsible, made Parliament's intention clear at 2nd Reading, saying that the Bill's intention was to

'mirror as fully as possible the rights and responsibilities enjoyed by those who can marry, and that uses civil marriage as a template for the processes, rights and responsibilities that go with civil partnership' (Hansard 9 Nov. 2004 col. 776).

She added:

"The whole point, however, is that civil partnership is not civil marriage, for a variety of reasons, such as the traditions and history—religious and otherwise—that accompany marriage. It is not marriage, but it is, in many ways—dare I say it?—akin to marriage."(col.776)

Effect?

The most important effect of the proposed change is to redefine marriage for everyone. Law helps to shape and form social and cultural values. To change the meaning of marriage in this way is a profoundly serious matter.

Until now marriage has always included the possibility of children. The United Nations Human Rights committee has stated that the right to marry "implies, in principle, the possibility to procreate". (UN Human Rights committee comment no 19). The relationship of a same-sex couple does not have this inherent possibility of creating children.

Yet children are not even mentioned in the consultation document. By removing them from any understanding of marriage, the nature of the institution is changed for everyone: every faithful married couple would have the public meaning of their bond retrospectively changed by this legislation. Research shows that a married mother and father provide the best circumstances in which to bring up a child. That is why society has recognised marriage as a special state: because it meets society's needs. These changes would take us into a world where we no longer think that the best upbringing of children should be recognised or supported in law by society. That is profoundly disturbing and has consequences we can only guess at.

¹ <http://www.comres.co.uk/poll/617/coalition-for-marriage-marriage-attitudes-survey.htm>.

In his recent submission on this issue to an Australian Senate Committee, Cardinal George Pell wrote:

“When we equate same-sex relationships with marriage, it further undermines our understanding of family by wrongly implying that biological connectivity of children with their parents and siblings is not important. In addition, it mistakenly says that having both a mother and a father is an unnecessary and superfluous duplication. Contrary to everything we intuitively and sociologically know about effective parenting, it adds further confusion by saying that mothers can ‘father’ just as well as men, and that fathers can ‘mother’ just as well as women.” (Cardinal Pell page 5)

Separation of religious and civil marriage?

The Government insists that there is a distinction between civil marriage and religious marriage, and that their proposals will not affect what happens in Churches.

This is a misunderstanding. Marriage is a natural institution, and one that pre-dates organised religion and the state. The concern of the Church is first and foremost about preserving the meaning of marriage as such for the common good of society.

Secondly, there is the important issue of religious freedom and what happens in Churches. When a Catholic priest marries a couple, he does so as a person authorised by the Registrar General to conduct a wedding in the absence of a registrar, including the function of signing the register of marriage. This is a ‘public function’ and it would be undermined if a court were to determine that if a Catholic priest is to be so authorised, he must act in accordance with the wider public sector equality duty and thus be ready to marry same-sex couples. Unless there are explicit safeguards to protect the position, we could face the necessity of separating marriage as a religious ceremony from the process which confers the rights of marriage in civil law.

Practical consequences?

A clear risk of such legislation is that it would restrict freedom of speech as much as freedom of religion. Unless there are very clear and effective safeguards, it is difficult to see how it would be possible in common discourse or school teaching to maintain the unchanging Catholic view that marriage can only be between a man and a woman without the risk of being accused of ‘hate-speech’ (the criminal offence of harassment under the Public Order Act). Although the Human Rights Act provides explicitly for both freedom of speech and freedom of religion, the courts have tended to regard homosexual rights as necessarily trumping religious rights whenever the two are in conflict; any ‘safeguards’ would have to be absolutely explicit to prevent subsequent re-interpretation by the courts.

Human Rights

The ECHR does not require member states to provide access to marriage for same-sex couples, and ‘if a State chose to provide same-sex couples with an alternative means of recognition, it

enjoyed a certain margin of appreciation regarding the exact status conferred' (Gas & Dubois v. France 15 March 2012²; Schalk & Kopf v. Austria 24 June 2010³). However, if the state provides access to the same status, i.e. marriage, we should not necessarily expect a 'margin of appreciation regarding the exact status conferred': if the issue were challenged (see below, *Ferguson and others*), the European Court might well conclude that if marriage is available to all, it must be provided on the same basis for heterosexual and homosexual couples, i.e. in religious premises as on other premises. This is an evolving area of European law and no one can predict future judgements, but by legislating for same-sex marriage, the Government would be exposing marriage on religious premises to a level of risk over which it could have no control. At the very least, it would seem that the Government's intention to exclude religious marriage from the scope of the new law would be open to challenge in the European Court of Human Rights.

Financial risks

In *Ferguson and others v. United Kingdom*⁴ an application has been made to the European Court of Human Rights concerning four heterosexual couples seeking civil partnerships and four homosexual couples seeking marriage, arguing that both exclusions are contraventions of the ECHR. If the Court agrees, then the Government's decision that it will not open up civil partnerships to heterosexual couples will be null and void. There are no reliable figures of how many unmarried heterosexual couples would seek civil partnerships, but common sense says that many in long-term stable relationships might welcome the chance to secure inheritance and other legal rights through civil partnerships – in the Netherlands two thirds of civil partnerships are now for heterosexual couples. The potential cost to the Treasury of this change must be a source of concern at a time of austerity. In October 2010 Ben Summerskill told the Lib Dem party conference that he estimated the cost to the Treasury as £5 billion over 10 years.⁵ Yet the Government's Impact Assessment does not even consider the potential financial implications of heterosexual couples having a right to a civil partnership. No rational decision can be taken on this proposal without a full understanding of the potential costs.

Religious liberty

While most major religious groups in Britain have expressed strong opposition to same-sex marriage, a few, such as the Quakers, are supportive. If the Government's aim is to protect religious liberty, it is difficult to see how it can reconcile that with preventing by law some religious groups from doing what they wish. Various commentators and the Labour Party have already said that they would wish to see a permissive power for religious bodies to celebrate same-sex marriage, and with the provisions allowing civil-partnerships on religious premises providing an obvious model, it is inevitable that amendments to this effect would be tabled in Parliament. Once again, the Government could not guarantee that its stated policy could be delivered by the Bill it might introduce.

² <http://www.coe.int/t/dghl/standardsetting/media/Article%208/Gas%20and%20Dubois%20v.France.pdf>

³ <http://cmiskp.echr.coe.int/tkp197/viewhbkm.asp?sessionId=80038299&skin=hudoc-en&action=html&table=F69A27FD8FB86142BF01C1166DEA398649&key=6527&highlight=>

⁴ <http://www.petertatchellfoundation.org/sites/files/Equal-Love-Application.pdf>

⁵ <http://www.independent.co.uk/news/uk/home-news/stonewall-is-split-by-row-about-samesex-marriages-2095468.html>

Future developments

The Government defends same-sex marriage on the basis that marriage is a state recognising love and commitment. Once this principle is established by law, it is inevitable that other relationships involving love and commitment will also seek recognition as marriage. This is not speculation: Canada's decision to allow same-sex marriage was swiftly followed by a legal challenge claiming that the state's law on marriage discriminated unfairly against polygamy.

Legislating for ambiguity

At 2.16, the Consultation Document notes that the concepts of consummation and adultery would apply equally to same-sex couples. But instead of considering how the law should define these issues for same-sex couples, it simply abandons the matter to future case law. Same-sex couples could then marry, without being aware of whether or not their marriage had been consummated (and was therefore complete in law) or whether their conduct with a third party did, or did not, amount to adultery. This is an abdication of the proper responsibility of a legislator to deliver clarity, rather than ambiguity by statute law. If the Government wants to say that same-sex couples can marry, then it has to be clear about what marriage will mean for them.

Government assurances?

At the time of the Civil Partnerships Bill (2004) the country was assured that this measure met all needs of the same-sex community. That assurance lasted a mere eight years. There can be no confidence that any assurances to protect religious rights given in the course of a same-sex marriage Bill will not be swept aside in the same cavalier fashion in a few more years. The Government's protestations that religious marriage will not be affected are profoundly unconvincing.

Conclusion

This debate is about the meaning of marriage for the whole of society. Marriage is not just about the couple. It has always been about a life-long bond between a man and a woman because that provides the best environment for the creation and upbringing of children: it is for the common good of society. Same-sex couples in our democracy enjoy the legal right to live as they wish, but that should not result in the meaning of marriage being changed for everyone else.

If the Government introduces legislation for same-sex marriage, it will bring marriage within the scope of a wide range of legal challenges as to its meaning, limitations, and religious aspects. No one can have any idea of the eventual outcome and there can be no guarantee that the Government's policy intentions (and any religious exemptions) will survive that process. It would be profoundly irresponsible to embark on such an uncertain, but irreversible social experiment.

In his address to a region of the USA Bishops Conference in March 2012, Pope Benedict XVI said:

"defending the institution of marriage as a social reality is ultimately a question of justice, since it entails safeguarding the good of the entire human community and the rights of parents and children alike."