

**Now the Dust has Settled: The Marriage and Civil Partnership (Scotland) Act
2014**

by

Kenneth McK. Norrie

Strathclyde Law School

Introduction

On February 4, 2014, the Scottish Parliament (in a free vote) passed the Marriage and Civil Partnership (Scotland) Act 2014 by 105 votes to 18 – which is just shy of six votes in favour for every one against. Of the countries that have, so far, opened marriage to same-sex couples, only Iceland (where the vote in favour was unanimous) and Sweden (where the vote in favour was 11 times that of the vote against) attained a larger proportion of parliamentary support. This broad parliamentary consensus might appear surprising given the fierceness of the debate the Bill generated in the media, but it should be remembered that if religious arguments were excluded from the general media coverage of the issue there was virtually no call to deny equal marriage rights to same-sex couples. The power of religion to influence public policy and legislation has been proved to be minimal in present-day Scotland, and the choice of this issue by faith-based organisations as the means to assert influence may well come to be seen as counter-productive.

This article has two main purposes. It seeks, first, to explore why opponents to same-sex marriage, who campaigned long and hard against what became the Marriage and Civil Partnership (Scotland) Act 2014, ultimately failed to prevent its passing. Secondly, and more prosaically, it seeks to explain how, precisely, this Act has changed family law in Scotland. The overall theme will be that the changes should be seen in terms of the completion of a long-term project to make marriage gender-neutral – and as such are far less threatening than opponents perceived, and that a modern secular society could have done no more to accommodate their concerns.

I. WHY OPPONENTS LOST THE ARGUMENT

The Moral Argument

The fundamental proposition upon which gay and lesbian claims to equality are based is that sexual orientation is morally neutral, that gay and lesbian people are no worse (nor any better) than non-gay and non-lesbian people. An increasing majority of the British population holds this belief,¹ though it is by no means universally accepted: its denial today is traced almost exclusively to one source, religious doctrine. As Kay Goodall puts it,² religion is “the only powerful current ethical framework in Western states which holds sexual orientation to be a relevant factor by which to make fundamental judgments about the worth of individuals”. Both Christian and Islamic theology can point to scriptural authority for holding homosexuality to be a sin³ and the conclusion that same-sex relationships are, therefore, less worthy of the law’s nurturing than opposite-sex relationships is, from that starting point, entirely rational. If that is so then it should barely matter what structural design the law puts in place for same-sex couples and opposition to decriminalisation, or civil partnership, or adoption rights, or the extension of non-discrimination norms to sexual orientation should be no less vigorous than opposition to same-sex marriage. In the event, the opposition to same-sex marriage in the UK and elsewhere has been substantially greater than that shown to civil partnership, or employment protection, or general discrimination law, which suggests that “marriage” is perceived as something more than a means of legal regulation of family relationships.

¹ See 28th *British Social Attitudes Report*, National Centre for Social Research, 2010, table 2.6. See also the breakdown of these statistics offered in the Stage One Debate on the Bill that became the Marriage and Civil Partnership (Scotland) Act 2014: *Official Report* November 20, 2013, at col. 24641

² “Challenging Hate Speech: Incitement to Hatred on Grounds of Sexual Orientation in England, Wales and Northern Ireland” (2009) 13 *Int. J. Human Rights* 211 at pp. 215-216.

³ In the Bible, the disapproval of same-sex relationships is sometimes direct and harshly unequivocal (as in Leviticus 18:22 and 20:13), sometimes opaque but suggestive (Romans 1:26-27), and sometimes allegorical (as with Lot’s offer to sacrifice his daughters to gang rape to save the angels from male rape: Genesis 19:8). Lot, curiously enough, is also the medium of Allah’s disapproval of homosexuality in the Koran 7:81 (Trans. Sahih International).

Those who adhere to an ethical framework built upon religious doctrine have the greatest of difficulty in persuading law and policy makers that scriptural authority is a sufficient foundation for law reform (or its resistance) in a secular democracy.⁴ Recognising this, few of the published responses from religious bodies to the Scottish and the British consultations on opening marriage to same-sex couples⁵ restricted themselves to asserting scriptural authority to justify their opposition.⁶ Some, such as the Roman Catholic Church, explicitly deny the underlying proposition of moral neutrality⁷ but even they, as well as those who accepted (or at least conceded) that proposition, tended to focus on the social or political harm that they conceived would result from allowing same-sex marriage. However, any organisation seeking to protect itself from having rules contrary to its beliefs imposed upon it renders itself vulnerable if at the same time it argues that its own beliefs should be embodied in legal rules to be imposed on everyone else. This, together with the vastly diminished support that the denial of moral neutrality of sexual orientation attracts today, meant that the moral arguments put forward by religious organisations simply had no purchase, with either the public or the Scottish Parliament.

The Immutability Argument

⁴ In *McFarlane v. Relate (Avon) Ltd* [2010] EWCA Civ 880, Laws LJ at paras. 22-25 provides one of the most eloquent defences of secular reasoning to be found in the British law reports, but this is by no means a modern phenomenon: see *Bowman v. Secular Society* [1917] AC 406, especially Lord Sumner at pp. 454 and 464-465.

⁵ *The Registration of Civil Partnerships; Same Sex Marriage: A Consultation*, Scottish Government September 2011; *Equal Civil Marriage: A Consultation*, Government Equalities Office, March 2012. Responses to the Scottish consultation may be found at www.scotland.gov.uk/Publications/2012/07/9221; responses to the English consultation have been accessed via the websites of individual institutional respondees.

⁶ Only those religious organisations that adopt an absolutist position, preferencing their own interpretations of God's law to state law, felt able to do so. For example, the Free Church of Scotland (Continuing) issued a press statement to accompany its response to the Scottish consultation, accessed from www.fccontinuing.org: "We submit that there can be no equality between heterosexual marriage based on a natural attraction and homosexual unions based on what the Bible terms 'vile affections' (Romans 1:26)". The Muslim Council for Scotland explained in the introduction to their response: "Islam does not condone homosexual behaviour in any shape or form, therefore conducting such ceremonies on the religious premises of Muslims is totally unacceptable to the entire Muslim community. Any moves in this direction will be resisted by the community with all the vigour at their disposal."

⁷ In a press release issued on 25th March 2012, the Catholic Archbishop of Glasgow justified his opposition to same-sex marriage because it "asserts the moral equivalence between marriage and same-sex unions, contrary to the virtue of chastity": Scottish Catholic Media Office, *Press Releases*.

A common theme running through many of the religious responses to the Consultations of the UK and the Scottish Governments is the (surprisingly parochial) argument that marriage has been long understood to involve one man and one woman, and as such it is an immutable institution that is simply outwith governmental competence to change.⁸ This is the ostensibly theological (though tendentious) point that the definition of marriage is set, either by nature or by the Judeo-Christian God⁹ and so cannot be changed by legislative action of men.¹⁰ The Church of England, for example, “dispute the right of any government to redefine an ages-old institution in the way proposed”.¹¹ The obvious answer to this, of course, is that insofar as marriage is a legal institution designed for legal purposes, it is open to law-makers to redesign that institution, as it has done many times in the past, even to the extent of altering its essential nature.¹² Renata Grossi points out that social understandings of what marriage is actually for has changed throughout history. She suggests that the same-sex marriage debate pits the idea of marriage as a relationship for procreation against the idea of marriage as a relationship for love. Romantic love as the foundation of marriage, she points out, was until the mid-19th century regarded as dangerously radical for subverting society’s expectations and allocations of roles, but today of course love is perceived (at least in the developed world) as the only satisfactory basis for marriage.¹³ Marriage as an institution has always served social purposes, and as these purposes change so too does the institution. Asserting the immutability of marriage is to ignore the reality of social evolution as a driver of legal change.

⁸ The same point was made by Elaine Smith, MSP, in the Stage One Debate, *Official Report* November 20, 2013 at col. 24654.

⁹ The God of Islam, in most Islamic traditions, defines marriage differently and at least contemplates polygyny within that definition: see R. Arshad *Islamic Family Law* (Sweet and Maxwell, 2010). Indeed, given that Abraham had many wives (Genesis 16:3 and 25:1) the God of Abraham had a definition of marriage that did not exclude polygamy – though social practice changed that definition very early for two of the three Abrahamic religions

¹⁰ The immutability argument tends to be emphasised by the more hierarchical denominations of Christianity. Those with a flatter membership structure, while opposing same-sex marriage on doctrinal grounds, often accept that their members have the capacity to change their doctrinal beliefs: see for example the responses to the Scottish Government’s consultation of the Church of Scotland and the Methodist Church in Scotland.

¹¹ Church of England’s *Response to the Government Equalities Office Consultation “Equal Civil Marriage”* June 2012, at para 8.

¹² For example, an indissoluble union is of a very different nature from one that, with more or less ease, can be escaped from by the parties.

¹³ “The Meaning of Love in the Debate for Legal Recognition of Same-Sex Marriage in Australia” (2012) 8 *Int. J. Law in Context* 487.

The Definition Argument

In truth, marriage as a legal institution is as malleable as the law makes it, and the law may use whatever word it chooses to describe that institution. While the law will usually seek to use words in their every-day, social, meaning, this is not always possible – if for no other reason than that every word in the English language has more than one meaning. The word “marriage” is not so uniquely unambiguous that it must be off-limits to legislators. Words, as well as institutions, can develop meanings different from, even opposite to, what they were understood to mean in an earlier age. The word “gay” itself is a pertinent example, for only in the last fifty years or so has it come to mean, entirely unambiguously, homosexual, thus depriving (it might be thought) the English language of a useful little word to describe carefree and lighthearted joy.¹⁴ The word “marriage” centuries ago moved away, in one of its meanings, from its etymological roots (“matrimony”, or the office of mother¹⁵) to become the relationship itself. The word in the modern world is used to describe a huge variety of different institutions and states of being, including relationships involving more than two people, relationships irrespective of gender mix, and relationships where the age and consent of the parties is neither here nor there: they may well be marriages of which we disapprove but we would seldom say, as Lord Penzance said in *Hyde v. Hyde*¹⁶ that, whatever these relationships are, they are not “marriage”. And the word of course has meanings other than that of a conjugal relationship: as a unity of purpose (“a marriage of minds”) or as a commitment (“married to your job”) or (nautically) to splice a rope, or marry its strands. To a particular type of religious believer, “marriage” is a pact with God, or a sacrament; to a non-believing secularist a marriage is a civil contract that carries various legal consequences. All of this shows that the word has a variety of social as well as legal and religious meanings, and that neither lawyers nor theologians can claim exclusive rights to it. If the word does not belong to the Judeo-Christian God, the only question is whether the law should give its imprimatur to a wider meaning

¹⁴ This remains the first meaning of the word offered by the *Shorter Oxford English Dictionary* (6th edn, 2007), before moving through “immoral”, “fine”, “showy” and even the Scots “gey” (or “gay”, meaning fairly, pretty much) before the seventh meaning: “of or pertaining to homosexuals”.

¹⁵ See Hays’ *Lectures on Marriage* (1533, reprinted by the *Stair Society* vol. 24, 1967) at p. 15.

¹⁶ [1866] LR 1 PD 130 at 133.

than the word has hitherto been legally accorded in the past. The answer to that question must be found in law or social policy, not theology.

Complementarianism

Professor Lynn Wardle, a US commentator on family law based at the Brigham Young University in Utah, sees marriage as an institution that mediates the relationship between the genders.¹⁷ Wardle considers that both genders “make essential (and complementary) contributions to the crucial social institutions of marriage and the family”, because men and women “are inherently and categorically different in profound and complementary ways (equal but different)”.¹⁸ This is part of his secular argument that the very purpose of marriage is to provide a mechanism to deal with that difference, but it has very clear – and very deep – religious roots. Both the Roman Catholic Church and the Church of England, which share an historical antipathy to women in positions of leadership, found on a *weltanschauung* in which women play (and should play) a different role in life to that played by men. They claim that the role played by women is “equal” to that played by men (though of course it never really works out that way¹⁹). The Roman Catholic Bishops’ Conference for England and Wales, responding to the British Government’s consultation, made much of their conception of a world divided into two genders, equal in status (except in terms of leadership) but with different roles to perform in life. Marriage is the living expression of this difference:

“The relationship constituted by the institution of marriage is distinct from all other human relationships. Its unique distinguishing characteristics centre on

¹⁷L. Wardle, “The Institution of Marriage and Other Domestic Relations” (2009) 3 Amsterdam Law Forum, 160; “The Attack on Marriage as the Union of a Man and a Woman” (2008) 83 North Dakota Law Review 1365.

¹⁸ Wardle (2009) at pp. 162-163.

¹⁹ As Frances Raday puts it: “Although the concept of equality in the image of God is entrenched in the source books of the three monotheisms, they nevertheless actively promote gender hierarchy in the religious community and most especially in the context of family”: “Sacralising the Patriarchal Family in the Monotheistic Religions: ‘To No Form of Religion is Woman Indebted for One Impulse of Freedom’” (2012) 8 Int. J. Law in Context 211 at 211.

the biological complementarity of male and female and on the possibility of children.”²⁰

They concluded from this that the law should continue to grant special privileges to male-female couples (implicitly, so long as they “marry” in the legal sense) since it is to the good of society (by being for the good of children) that individuals design their lives in male-female (implicitly, “married”) units (whether or not they themselves have children).

The Church of England also put complementarianism at the heart of its response to the British Government’s consultation. Marriage, they said, benefits society in many ways, not only by promoting mutuality and fidelity, but also by acknowledging an underlying biological complementarity which, for many, includes “the possibility of procreation”.²¹ Further, and reflecting the point that lies at the heart of Wardle’s position,

“marriage has from the beginning of history been the way in which societies have worked out and handled issues of sexual difference. To remove from the definition of marriage this essential complementarity is to lose any social institution in which sexual difference is explicitly acknowledged”.²²

There is of course a very long theological tradition that takes from scripture a divinely ordained separation of the roles of the genders, where it is the male role to lead and the female role to support.²³ The genders are of equal worth, but are different – they have (it is said) complementary roles. The very structure of many churches, the Roman Catholic Church most obviously, reflects this complementarianism and it underpins the continued opposition in, for example, the Church of England to women

²⁰ *Response from the Catholic Bishops’ Conference of England and Wales to the Government Consultation on “Equal Civil Marriage”*, June 2012, at para. 17. So too the (Roman Catholic) Bishops’ Conference of Scotland placed complementarity at the heart of its argument. At the Stage One debate, their view is reported (*Official Report*, November 20, 2013, col. 24636) as describing complementarity as “the inherent essence” of and “rational basis” for marriage. The Muslim Council of Scotland made the same point when it responded to the Scottish Consultation: “Marriage is recognised in all ages and cultures as a lifelong commitment between man and woman, complementing each other. Marriage brings together men and women, to raise children who descend from a known father and a known mother”. Nigel Don MSP was the only speaker in the Stage One debate who explicitly used complementarianism (traced to Christian doctrine) to found his opposition to the Bill: *Official Report*, November 20, 2013, col. 24664.

²¹ n.11 above at para.6.

²² n.11 above at para.11.

²³ At Genesis 3: 16 God says to Eve, “thy desire shall be to thy husband, and he shall rule over thee”; 1 Timothy 2:12 has St Paul instructing Timothy: “I do not permit a woman to teach or to assume authority over a man”.

in leadership roles such as bishops.²⁴ Applying complementarian theology to marriage allows that institution to be one that both reflects *and demands* different gender roles.

The problem with this argument, and the reason for its lack of purchase today, is that both the law and society as a whole long ago moved away from requiring or expecting different roles to be performed by the two genders within marriage. There is no doubt that Scots law once embraced the scripturally mandated doctrine of complementarity, and thereby reinforced gender differences through the consequences of marriage. So Erskine could write: “The husband acquires by the marriage a power over both the person and estate of the wife”.²⁵ Even as late as the middle years of the 20th Century it could still be written that: “The husband as the *dignior persona* is the head of the house. As his duty is to love and cherish his wife, so hers is to love and obey him. She comes under obligation to follow his fortunes, to live where he chooses, in all things lawful to obey him. And this headship of the family is so inherent in the nature of marriage that an agreement by the husband to renounce it would be void”.²⁶ The influence of biblical descriptions of the husband’s duty to love, as Christ loved his church, and the wife’s duty to obey,²⁷ is obvious. Today, however, after a long struggle,²⁸ marriage in its legal consequences reflects the social understanding that relations between the genders should be based on equality and partnership, not domination and dependency. Gender equality itself, embraced by most sections of British society, is the rejection of the idea that men and women have different roles to play, either within marriage, in the workplace or in the public sphere: rather it demands the same opportunities (including leadership roles) for everyone irrespective of gender (or indeed of gender-history).

Neither the Roman Catholic Church nor the Church of England sought to have the consequences of marriage restored to a complementarian Shangri La, and the major weakness of the complementarian argument is that even religious traditionalists tend

²⁴ The Scriptural authority for preventing women from being priests or, if priests, preventing them from becoming bishops is often traced to 1 Corinthians 14:34, where St Paul instructed the Corinthians that “women should remain silent in churches. They are not allowed to speak, but must be in submission, as the Law says”.

²⁵ *Institute of the Law of Scotland* (1773), at I, vi, 19.

²⁶ *Walton on Husband and Wife* (3rd edn, 1951, by WER Hendry and AM Johnston) at p. 190.

²⁷ As for example in *Ephesians* 5.25.

²⁸ See n.39 below and accompanying text.

to limit it to two realms only: church governance and entry into marriage. The challenge for traditional theologians, which no response to the Governments' consultations rose to, is to explain why complementarianism should continue to govern eligibility to marry but not the consequences of marriage. Traditional marriage may well have been unable to accommodate same-sex couples because of the complementarity inherent in the patriarchal power-structure which for many centuries was underpinned by the law's design of marriage, but modern marriage, as understood (and wanted) by the vast majority of the population in the western world as a partnership of equals, can accommodate same-sex couples just as readily as opposite-sex couples. And it is good social policy for the law, through its design of all aspects of marriage, to encourage that more modern view of relationships. The Marriage and Civil Partnership (Scotland) Act 2014 does precisely this – and no more.

Marriage as Message

“There can be no doubt”, says Cass Sunstein, “that law, like action in general, has an expressive function. Some people do what they do mostly because of the statement the act makes; the same is true for those who seek changes in law. Many debates over the appropriate content of law are really debates over the statement that law makes, independent of its (direct) consequences.”²⁹ This is especially true of debates on laws affecting gay men and lesbians, and same-sex couples. We just need to remember the so-called “section 28” of unhappy memory,³⁰ whose substantive meaninglessness³¹ was never its point, which was to restore a legislative declaration of homosexual inferiority, which had been removed from the statute book by the decriminalisation of gay sex. The desire to retain that message was what motivated those who were so virulently opposed to the repeal of section 28, and it has since motivated their opposition to the Civil Partnership Act 2004, the new adoption legislation, and both the (English) Marriage (Same Sex Couples) Act 2013 and the Marriage and Civil Partnership (Scotland) Act 2014. The irony is that it is the

²⁹ “On the Expressive Function of Law” (1996) 144 U.Penn. L.R. 2021 at 2026.

³⁰ Section 28 of the Local Government Act 1988, inserting a new s.2A into the Local Government Act 1986, prohibiting local authorities from “promoting homosexuality as a pretended family relationship”.

³¹ See Norrie, “Symbolic and Meaningless Legislation” (1988) 33 JLS 310.

power of Message that provides the strongest argument in favour of same-sex marriage.

It has been the message carried by the opening of marriage to same-sex couples that has persuaded many judges around the world that equality is insufficiently achieved by the law providing a functionally equivalent institution to marriage which lawyers call “civil partnership”. The point was first accepted by the Supreme Judicial Court of Massachusetts, which had been explicitly asked by the state whether constitution-mandated equality would be achieved by a civil union (civil partnership) regime that carried the same legal rights and responsibilities as marriage. In *Opinion of the Justices*,³² the Court held that a civil partnership model simply would not do.

“The bill’s absolute prohibition of the use of the word ‘marriage’ by ‘spouses’ who are the same sex is more than semantic. The dissimilitude between the terms ‘civil marriage’ and ‘civil union’ is not innocuous; it is a considered choice of language that reflects a demonstrable assigning of same-sex, largely homosexual, couples to second-class status ... [T]he question the court considered in *Goodridge*³³ was not only whether it was proper to withhold tangible benefits from same-sex couples, but also whether it was constitutional to create a separate class of citizens by status discrimination, and withhold from that class the right to participate in the institution of civil marriage, along with its concomitant tangible and intangible protections, benefits, rights, and responsibilities.”³⁴

The same conclusion was reached by Sachs J in the Constitutional Court of South Africa in *Fourie v. Minister for Home Affairs*,³⁵ which led directly to the opening of marriage in South Africa.³⁶

“The exclusion of same-sex couples from the benefits and responsibilities of marriage ... is not a small and tangential inconvenience resulting from a few surviving relicts of societal prejudice destined to evaporate like the morning

³² (2004) 802 NE 2d 565.

³³ (2003) 798 NE 2d 941.

³⁴ (2004) 802 NE 2d at 570. Numerous courts in the US have made similar comments, before and especially after the Supreme Court’s decision in *United States v Windsor* 570 US 12 (2013).

³⁵ 2006 (1) SA 524.

³⁶ Civil Union Act No. 17 of 2006. See P. De Vos and J. Barnard, “Same Sex Marriage, Civil Union and Democratic Partnerships in South Africa: Critical Reflections on an On-going Saga” (2007) 124 SALJ 795.

dew. It represents a harsh if oblique statement by the law that same-sex couples are outsiders, and that their need for affirmation and protection of their intimate relations as human beings is somehow less than that of heterosexual couples”.³⁷

What all of this means is that while it may well be true that opening the institution of marriage to same-sex couples will not create much substantive legal effect beyond that already achieved by civil partnership and a strict compliance with the equality legislation, the real importance of the Marriage and Civil Partnership (Scotland) Act 2014 lies in its symbolic effect, by giving out a signal, stronger even than that afforded by the Civil Partnership Act 2004 or the equality legislation – that gay people are no better and no worse than non-gay people. This point is made time and again in the Scottish Parliamentary debates and was clearly a powerful factor there.³⁸

So, the real reason why opponents to same-sex marriage failed in their quest to prevent its introduction lies not in the relative weakness of their arguments but primarily in the fact that the message they wished marriage to carry – that opposite-sex couples are superior to same-sex couples – is no longer a message acceptable to the Scottish Parliament, the courts or society as a whole. Proponents of same-sex marriage won the argument not on their claims to substantive equality but because the message they seek to give is the more important one, and is accepted by most people in modern, secular (if western) societies: contrary to many traditional religious doctrines, sexual orientation is not an appropriate basis upon which to make any judgment as to the worth of an individual, or how he or she chooses to conduct his or her private and family life.

³⁷ 2006 (1) SA 524 at para. [71].

³⁸ See the State One debate, , *Official Report*, November 20, 2013 speeches by, amongst others, Jackie Baillie MSP, at col. 24640, Ruth Davidson MSP, at col. 24646, Jim Hume MSP, at col. 24658, and Alex Neil, MSP (and Cabinet Secretary), at col.24694. At the Stage Three Debate, Alex Neil, MSP, was even more explicit: “This legislation sends a powerful message to the world about the kind of society that we in Scotland are trying to create”: *Official Report*, February 4, 2014, at col.27343.

II. THE MARRIAGE AND CIVIL PARTNERSHIP (SCOTLAND) ACT 2014

Headline Effects

The primary effect of the Marriage and Civil Partnership (Scotland) Act 2014 is, of course, to allow same-sex couples to marry instead of registering a civil partnership, but there are three other major effects. First, just as the Act changes some of the rules of marriage (in particular eligibility), so too has it changed some of the rules of civil partnership (though not, some may consider oddly, the rules of eligibility, which remain gendered). No longer is civil partnership to be a wholly secular institution with no religious implication or involvement, for the Act will allow civil partnership to be created in the same way as marriage is created – either by registration at the hands of the district registrar, or by registration through religious ceremony. Secondly, religious organisations lose their monopoly over non-registrar creation: instead of “religious marriage”, created by celebrants who belong to “religious bodies”, there is to be “religious or belief marriage” and “religious or belief civil partnership”, created by celebrants who belong to “religious or belief bodies”. All religious organisations are, already, belief bodies but the expanded concept will now include non-religious bodies such as the Humanist Society Scotland. Thirdly, and following on from this, there are to be greater controls than before on which religious and belief bodies are eligible to provide celebrants for either marriage or civil partnership: such bodies (other than the Church of Scotland) will need to satisfy specified “qualifying requirements” before being able to do so. In this way, it is hoped that Scots law will be more robust than previously in identifying, before any ceremony, sham and forced marriages and civil partnerships.

Making Marriage Gender-Neutral

In many respects the most straight-forward part of the Marriage and Civil Partnership (Scotland) Act 2014 is that which opens marriage to same-sex couples. This is because that opening is the last, and relatively small, step in a process that began well over 100 years ago to turn away from the conception of marriage as a

relationship between unequals, where the roles socially expected and legally reinforced were very different for husbands than for wives.³⁹ By the turn of the 21st century there were virtually no rules within marriage that differentiated between spouses on the basis of gender – other than the eligibility rule that only men could marry women, and only women could marry men. Removing that rule therefore had little consequence elsewhere in marriage law.

Same-sex marriage is achieved through two amendments. First, a definition of “marriage” is inserted into s.26 of the Marriage (Scotland) Act 1977 to mean “marriage between persons of different sexes and marriage between persons of the same sex”,⁴⁰ and it further provides that the word “marriage” and related expressions in any enactment, whether passed or made subsequent or prior to the 2014 Act, are to be interpreted to include marriages between persons of different sexes and marriages between persons of the same sex;⁴¹ so too are references in any document unless it otherwise specifies.⁴² “Widow”, for example, will include a woman whose marriage to another woman ended with the other woman’s death.⁴³ Secondly, s.5(4)(e) of the Marriage (Scotland) Act 1977 is repealed⁴⁴: that was the provision that created an impediment to marriage (and imposed a duty on the district registrar to ensure the marriage does not go ahead) if “both parties are of the same sex”.⁴⁵ Consequentially, the rule in s.5(4)(f) of the 1977 Act that domiciliary incapacity imposed on one or both of the prospective parties by a foreign legal system amounts to a bar to marriage in Scotland is modified so that any domiciliary

³⁹ The Married Women’s Property (Scotland) Acts 1881 and 1920, the Guardianship of Infants Act 1925 and the Law Reform (Husband and Wife) (Scotland) Act 1984 are only the highlights of this movement. These developments are traced in detail by Clive, *Husband and Wife* (4th edn. 1997) who, at para.01.019, says that the changes since 1830 in the legal consequences of marriage “amount to nothing less than the legal emancipation of the married woman”.

⁴⁰ 2014 Act, s.4(13). An identical definition is added to the Interpretation and Legislative Reform (Scotland) Act 2010 so that the definition applies to legislation beyond the Marriage (Scotland) Act 1977: 2014 Act, s.4(15).

⁴¹ 2014 Act, s.4(1) and (5).

⁴² 2014 Act, s.4(11) – (13).

⁴³ 2014 Act, s.4(12).

⁴⁴ 2014 Act, s.2(9).

⁴⁵ It is interesting to note that prior to 1977 there was no such rule – at least not one expressed in statute. Scots law has never contained a statutory definition of marriage and it was only in the 1970s, when gay and lesbian people became more visible and began to assert their rights, that it was deemed necessary to exclude a possibility that had never seriously been raised before.

incapacity will be ignored if it is based only on the parties to the proposed marriage being of the same sex.⁴⁶

Gender neutrality of marriage is furthered in a number of other ways. First, in order to save the additional complexities in describing the forbidden degrees of marriage in gendered terms, schedule 1 to the 1977 Act has been substantially simplified. Presently it lists in Column One all the female relatives that a man may not marry and in Column Two all the male relatives that a woman may not marry: these columns are replaced, without substantive change, by a single column in which the relevant terms are expressed (mostly) in gender-neutral terms. So while, for example, the existing law prohibits a man from marrying his mother and a woman from marrying her father, the new law will (more straight-forwardly) prohibit a person from marrying their parent.⁴⁷

Secondly, s.3 of the 1977 Act, which requires notice of intention to marry to include “in the case of a widow or widower, the death certificate of the former spouse”, is amended so that it now reads: “if the person has previously been married and the marriage ended on the death of the other party to that marriage, the death certificate of that other party”.⁴⁸ In truth, s.3 could have been worded thus even before marriage was opened to same-sex couples and the change is terminological rather than substantive. More substantive is the amendment to s.3(5) of the 1977 Act which requires a party not domiciled in any part of the United Kingdom to submit with the notice of intention to marry a certificate of no legal incapacity, issued by a competent authority in the state of the party’s domicile. That requirement has always been subject to a number of provisos, and the 2014 Act adds a new one: that no such certificate has been issued only be reason of the fact that the parties to the intended marriage are of the same sex.⁴⁹ This has the same effect as the amendment to s.5(4)(f), discussed above: domiciliary incapacity based only on the

⁴⁶ 2014 Act, s.2(b).

⁴⁷ 2014 Act, s.1, amending s.2 of the Marriage (Scotland) Act 1977 and replacing Sched.1 thereto. Only nephews and nieces do not have a gender-neutral collective term, so the concept is rendered in the new list in Sched. 1 as “nephew or niece” (2014 Act, s.1(3)). “Spouse” is defined in gendered terms for opposite-sex marriages, and to mean “one of the parties to the marriage in relation to the other” for same-sex marriages: 2014 Act, s.1(2)(c), inserting a new s.2(1C) into the 1977 Act. Identical amendments are made to the Civil Partnership Act 2004 (notwithstanding that civil partnership remains gender-specific): 2014 Act, s.24(3) amending s.86 of, and s.24(22) amending Sched.10 to, the Civil Partnership Act 2004.

⁴⁸ 2014 Act, s.3(2).

⁴⁹ 2014 Act, s.3(2)(c), amending 1977 Act, s.3(5).

domicile's non-recognition of same-sex marriage will not prevent such a marriage taking place in Scotland.

Thirdly, the existing legal requirements (applicable in religious, and now belief, marriage ceremonies) (i) that the parties make a declaration that they accept each other as “husband and wife” and (ii) that the celebrant declare the couple now to be “husband and wife”⁵⁰ become options. As an alternative, the declarations may now be that they accept each other “as spouses” (or as both husband and wife and/or as spouses) and that the couple “are then married” (or are both then husband and wife and/or then married).⁵¹ This ensures that religious or belief bodies who do not wish to acknowledge the gender-neutrality of marriage (and who will not offer same-sex marriage ceremonies) may continue, but are not required, to use gender-specific language in their own ceremonies.

Fourthly, one of the very few gender-specific consequences of marriage that survived into the 21st century – that a wife could not be guilty of resetting goods stolen by her husband⁵² – is abolished.⁵³ That rule could not apply to same-sex couples since it was based on a gendered power structure previously inherent in marriage and while the Bill as presented limited the rule to opposite-sex marriages, after further consideration it was accepted that the better approach was simply to abolish the rule completely, so expunging from Scottish marriage law the last remnant of a legal power imbalance in marriage.⁵⁴

Two related gendered rules, those concerning impotence and adultery, survive unaltered notwithstanding that they are defined by the common law in entirely gender-specific terms. The rule that a marriage is voidable if one of the parties is incurably impotent is explicitly stated to have effect only in relation to marriage

⁵⁰ There are no equivalent requirements for civil marriages, though typically solemnisations by the district registrar take a similar form.

⁵¹ 2014 Act, s.13(2)(f)(ii) and (iii), amending s.9(3) of the 1977 Act: these options are limited, of course, to marriages involving couples of the opposite sex (2014 Act, s.13(2)(f)(i) and (iv), amending s.9(3) of the 1977 Act). The gender-neutral formula set out in the 2014 Act, s.13(2)(g), inserting a new s.9(3A) into the 1977 Act, will be used for same-sex marriages.

⁵² See *Smith v Watson* 1982 S.L.T. 359.

⁵³ 2014 Act, s.7(1). The abolition applies only in relation to things done after the day on which s.7 comes into force: s.7(2).

⁵⁴ Government Amendment 8, accepted at Stage Two: *Official Report* Equal Opportunities Committee December 19, 2013, cols.1701-2.

between persons of different sexes.⁵⁵ Adultery (the only ground for divorce not replicated in the Civil Partnership Act 2004 as a ground for dissolution) is explicitly stated to have the same meaning for same-sex marriage as it does for opposite-sex marriage.⁵⁶ The hetero-specificity of adultery is not altered in any way but it will apply (unlike impotence) to all marriages irrespective of gender-mix. This means that a married person who has sexual intercourse with a person of the opposite sex may be divorced for adultery by either their opposite-sex or their same-sex spouse; a party to a civil partnership may not have the partnership dissolved on that basis. (Likewise, a married person who has sexual relations with a person of the same sex may not be divorced for adultery, by either their opposite- sex or their same-sex spouse, because sexual activity of that nature does not amount to adultery – though it may found the unreasonable behaviour ground for all couples in either type of relationship).

Conversion of Civil Partnership into Marriage

It is likely that many couples who registered their civil partnership under the Civil Partnership Act 2004 would have preferred marriage, had it been available to them; it may also be expected that some couples who, in the future, register their relationship as a civil partnership (notwithstanding that marriage is now available to them) will change their minds and wish to be a married couple instead of civil partners. The Marriage and Civil Partnership (Scotland) Act 2014 provides two methods of conversion and both apply irrespective of whether the civil partnership was registered before or after the coming into force of the Act. First, there is to be an administrative process the details of which will be contained in regulations made by the Scottish Ministers.⁵⁷ Secondly, the civil partners may, quite simply, get married⁵⁸: in other words, an exception has been created to the otherwise universal rule that a person in a marriage or civil partnership is ineligible to marry or enter a

⁵⁵ 2014 Act, s.5(1).

⁵⁶ 2014 Act, s.5(2), inserting a new s.1(3A) into the Divorce (Scotland) Act 1976.

⁵⁷ 2014 Act, s.10. In England and Wales, the equivalent regulations are being drafted as this article is being written, and will take effect some time after the rest of the Marriage (Same Sex Couples) Act 2013 comes into force (March 29, 2014).

⁵⁸ In England and Wales, only the administrative route is available (Marriage (Same Sex Couples) Act 2013, s.9) and there is no equivalent to the marriage route.

civil partnership.⁵⁹ This option was achieved in the 2014 Act by qualifying the rule in s.5(4)(b) of the Marriage (Scotland) Act 1977, that there is an impediment to marriage if either or both of the prospective parties are already married or in a civil partnership, by adding in the words: “other than a qualifying civil partnership”.⁶⁰

Both methods of conversion – the administrative route and the marriage route – are available only to couples in a “qualifying civil partnership”. This is one that was registered in Scotland (subject to the exception mentioned in the footnote) and has not been dissolved, annulled or ended by death.⁶¹ The Bill as presented went no further and the requirement that the civil partnership be registered in Scotland would have the effect of disallowing the conversion to marriage of any civil partnership registered outwith Scotland, whether by the administrative route or the marriage route. So, for example, Scottish domiciliaries who had registered their civil partnership while on holiday abroad, or in England, would be ineligible to marry (or to convert their civil partnership to marriage by the administrative route), as would foreign nationals (or indeed couples originally domiciled in England) who came to live in Scotland after entering a civil partnership in their home country. Arguments based on potential non-recognition abroad of the converted marriage were insufficient to justify this limitation (since same-sex marriages will be denied recognition in many of the countries of the world in any case) and at Stage Two the Bill was amended⁶² to give Scottish Ministers power to modify the meaning of “qualifying civil partnership” to include those registered elsewhere than in Scotland.⁶³

⁵⁹ Parties marrying each other while married to each other is not entirely unknown in Scots law: s.20 of the Marriage (Scotland) Act 1977 permits this to happen when the original marriage took place abroad and the couple are unable to prove the validity of that foreign marriage.

⁶⁰ Marriage (Scotland) Act 1977, s.5(4)(b), as amended by 2014 Act, s.8(3)(a). Notice of intention to marry, as governed by s.3 of the 1977 Act, must in these circumstances include an extract civil partnership certificate: 2014 Act, s.8(2), inserting a new s.3(2)(bb) into the 1977 Act.

⁶¹ Marriage (Scotland) Act 1977, s.5(6), as inserted by 2014 Act, s.8(3)(b). A civil partnership registered outside the UK under an Order in Council made under the Civil Partnership Act 2004 will be treated as having been registered in Scotland (and so eligible for conversion to marriage through a marriage ceremony) if Scotland had been elected as the relevant part of the UK under the Order and details of the civil partnership have been sent to the Registrar General for Scotland: 1977 Act, s.5(7), as so inserted.

⁶² *Official Report* Equal Opportunities Committee, December 19, 2013, Col. 1710.

⁶³ 2014 Act, s.9.

Whether the civil partnership has been converted to marriage by the administrative route or by the marriage route, the civil partnership is brought to an end⁶⁴ and the couple are treated for all purposes as having been married from the date of the registration of the civil partnership.⁶⁵ So, unless the contrary is expressed in any enactment,⁶⁶ the rights and liabilities that accrued to the civil partnership (which will nearly always be the same as the rights and liabilities accruing on marriage) will be preserved. This is explicitly so in relation to a decree of aliment made under s.3 of the Family Law (Scotland) Act 1985 under which one member of a civil partnership is obliged to pay aliment to the other: the decree continues in effect and is exigible against the defender even although its terms refer to a civil partnership that is now terminated.⁶⁷ Likewise in respect of an order regulating occupancy of the family home made under s.103(3) or (4) of the Civil Partnership Act 2004: that order will continue in effect after the termination of the civil partnership by its conversion to marriage as if it had been made under s.3(3) or (4) of the Matrimonial Proceedings (Family Protection) (Scotland) Act 1981.⁶⁸ Section 11(7) and (8) of the 2014 Act are for the avoidance of doubt only.

There is no provision allowing a same-sex couple who marry to convert that relationship into a civil partnership. This is presumably for the same reason as civil partnership is not available to opposite-sex couples: marriage is the law's preferred mechanism for regulating domestic relationships and choice is not to be extended in such a way as might diminish the numbers of people entering marriage.

Who May Solemnise Marriage and Civil Partnership

While the non-parliamentary opposition to opening marriage to same-sex couples was based almost entirely on religious arguments, it was apparent from an early stage that these arguments would have little effect in the parliamentary debates and, recognising that they were likely to be on the losing side of the major question, the

⁶⁴ 2014 Act, s.11(9) amends s.1 of the Civil Partnership Act 2004 as it applies in Scotland by adding marriage between the parties to the list of means by which a civil partnership is terminated (the others being death, dissolution or annulment).

⁶⁵ 2014 Act, s.11(2)(a) and (b).

⁶⁶ 2014 Act, s.11(4) – (6).

⁶⁷ 2014 Act, s.11(7).

⁶⁸ 2014 Act, s.11(8).

parliamentary opposition focused their arguments on the fear that the protections for religious sensitivities were not drawn strongly enough in the Bill as originally presented.⁶⁹ The major concession made to religious sensitivities in the Marriage and Civil Partnership (Scotland) Act 2014 is a series of provisions designed to ensure that neither organisations nor individuals who are opposed to the legal recognition of same-sex relationships will be obliged to be involved in their legal creation. This protects organisations and individuals from any legal obligation to act contrary to their own doctrinal beliefs, while at the same time ensuring that the doctrinal beliefs of one body are not imposed on other bodies with different beliefs, or on society as a whole: this is as much protection as religious bodies and individuals can rationally expect in a secular, inclusive, society.⁷⁰ The relevant provisions apply to all same-sex relationships whether formalised as marriage or as civil partnership and they amend ss.8, 9 and 12 of the Marriage (Scotland) Act 1977 and the equivalent provisions in the Civil Partnership Act 2004, governing who may be authorised to solemnise, respectively, marriage and civil partnership.

Amendments to Section 8 of the 1977 Act

The existing rules for specifying who may solemnise marriages contained in s.8(1) of the 1977 Act will now apply only to opposite-sex marriages.⁷¹ At the same time, however, these rules are modified in three ways. First, they will now apply to officials “of a religious or belief body” instead of, as before, officials of “a religious body” only.⁷² Humanist celebrants (for example) may now, therefore, be authorised as

⁶⁹ See for example the contribution to the Stage One Debate of John Mason, MSP, *Official Report*, November 20, 2013, at col.24652- 4 and the amendments he proposed (unsuccessfully) at Stage Three (*Official Report* February 4, 2014, cols.27289 and 27297).

⁷⁰ Further amendments to the Bill were proposed at Stage Two by John Mason, MSP, but rejected, which would have enshrined the right of any individual to express opposition to same-sex marriage: it was considered that existing protections of freedom of expression – with their necessarily limitations – were sufficient: see *Official Report*, Equal Opportunities Committee December 19, 2013, cols.1716-25. The 2014 Act provides at s.16 that “For the avoidance of doubt, nothing in this Part so far as it makes provision for the marriage of persons of the same sex and as to the persons who may solemnise such marriages affects the exercise of (a) the Convention rights to freedom of thought, conscience and religion, (b) the Convention right to freedom of expression, or (c) any equivalent right conferred by rule of law”.

⁷¹ 2014 Act, s.12(2)(a), amending s.8(1) of the Marriage (Scotland) Act 2014.

⁷² 2014 Act, s.12(2)(a)(ii). Section 12(4) of the 2014 Act amends s.26 of the 1977 Act by substituting for the definition of “religious body” a new definition of “religious or belief body”: “an organised group of people (a) which meets regularly for religious worship or (b) the principal object (or one of the principal objects) of which

members of a belief body to solemnise marriages under s.8(1).⁷³ Secondly, the rule in s.8(1)(a)(i) of the 1977 Act that ministers of the Church of Scotland are automatically, without further authorisation, marriage celebrants is expanded so that the rule now applies also to Church of Scotland deacons.⁷⁴ Thirdly, and most significantly, the power of Scottish Ministers to prescribe religious bodies (other than the Church of Scotland) whose officials may act as celebrants without further authorisation is to be limited and, in future, Scottish Ministers may prescribe a body only if that body requests them to do so and they are satisfied that the body meets the qualifying requirements.⁷⁵ In this way Scottish Ministers have taken more control over which bodies are suitable to provide marriage celebrants. The right and duty of district registrars to solemnise opposite-sex marriages⁷⁶ remains unaffected.

New rules, replicating (with two important differences) the amended rules just discussed in relation to opposite-sex marriage are created for marriages involving same sex couples.⁷⁷ The most important replicated rules are the requirements that the religious or belief body requests to be prescribed, and that the body satisfies the qualifying requirements.⁷⁸ In this way, only suitable religious or belief bodies that themselves wish to conduct same-sex marriage ceremonies may be authorised to do so. The two differences from the rules relating to opposite-sex marriage are as follows. First, there is no automatic right for ministers (or, now, deacons) of the Church of Scotland to solemnise marriages between same-sex couples. That religious organisation has no special place in Scots law in relation to same-sex marriage equivalent to its special place in relation to opposite-sex marriage and it must seek to be prescribed as authorised to solemnise same-sex marriage in the

is to uphold or promote philosophical beliefs and which meets regularly for that purpose". An identical definition is inserted into s.135 of the Civil Partnership Act 2004 by s.24(21)(c) of the 2014 Act.

⁷³ As opposed to individual authorisations under s.12.

⁷⁴ 2014 Act, s.20, amending s.8(1)(a)(i) of the 1977 Act.

⁷⁵ 1977 Act, s.8(1A), as inserted by 2014 Act, s.12(2)(b). The qualifying requirements will be specified in regulations but the Cabinet Secretary, Alex Neil, MSP, in the Stage One debate indicated that they will be designed to ensure that marriages are not conducted as a profit-making business, and that prescribed bodies are aware of the dangers of forced and sham marriages: *Official Report*, November 20, col.24631. These were the policy objectives specified in the Policy Memorandum published with the Bill (SP Bill 36) 2013 at paras.65 – 67.

⁷⁶ 1977 Act, s.8(1)(b).

⁷⁷ 1977 Act, s.8(1B) – (1G), as inserted by 2014 Act, s.12(2)(b).

⁷⁸ 2014 Act, s.12(2)(b), inserting a new s.8(1C) into the 1977 Act in identical form to the new s.8(1A) in respect of opposite-sex marriages.

same way as any other religious or belief body.⁷⁹ Secondly, in order to ensure that no organisation or individual member of a religious or belief body is legally obliged to be actively involved in the creation of a same-sex marriage, it is explicitly stated that nothing in the new s.8(1B)(a) or (1C)(a):

- (a) imposes a duty on any religious or belief body to make a request to become a prescribed body;
- (b) imposes a duty of any such body to nominate under s.9 any of its members to be registered as empowered to solemnise marriages between persons of the same sex;
- (c) imposes a duty of any person to apply for temporary authorisation under s.12 to solemnise marriages between persons of the same sex; or
- (d) imposes a duty of any person who is an approved celebrant in relation to marriages between persons of the same sex to solemnise such marriages.⁸⁰

The first-mentioned provision allows a religious or belief body to request under s.8(1) to be authorised to solemnise opposite-sex marriages, without being obliged also to request authorisation to solemnise same-sex marriages. The last-mentioned provision is of some importance since it is one of the strands of individual protection that goes beyond institutional protection. A religious or belief body that accepts the legitimacy of same-sex marriage may have requested and been prescribed as entitled to solemnise marriage between persons of the same sex, but this provision allows any member of that body to refuse to participate in that which his own organisation permits. This will avoid ministers from being obliged to leave their church if their church drops its opposition to same-sex marriage/civil partnership: internal debates may, in other words, be had without the risk of schism (a risk that Presbyterian churches have historically been particularly vulnerable to). The other major strand of individual protection is that the Equality Act 2010 may not be used to challenge any individual minister's refusal to be involved in the solemnisation of a

⁷⁹ The Church of Scotland currently has no intention of seeking to be a prescribed body for this purpose, but its response to the Scottish Government's consultation explained the process that would need to be undergone for the Church to change its doctrinal position.

⁸⁰ 2014 Act, s.12(2)(b), inserting a new s.8(1D) into the 1977 Act. District registrars, being authorised under s.8(1B)(b), are not included in this conscientious exemption. At Stage Two Siobhan McMahon, MSP, unsuccessfully proposed an amendment to extend to district registrars and other public sector employees the right to opt out on conscientious grounds of any involvement with same-sex marriage solemnisation: *Official Report* Equal Opportunities Committee December 19, 2013, cols.1725-33.

same-sex marriage, for that Act is to be amended by the UK Government (it being a reserved matter⁸¹) to extend the religious exemptions from the equality imperative to individuals as well as organisations.⁸²

Amendments to Section 9 of the 1977 Act

Section 9 of the 1977 Act allows for the registration of persons nominated as celebrants by religious bodies even although the religious body is not prescribed under s.8 (and is not the Church of Scotland). Following the approach to the amendment of s.8, the 2014 Act limits the existing rules in s.9 of the 1977 Act to marriages between persons of different sexes,⁸³ while varying these existing rules in two ways. First, the 2014 Act expands s.9 beyond “religious bodies” and allows the nomination of members of any “religious or belief body” which is not prescribed under s.8 (and is not the Church of Scotland) to be registered as empowered to solemnise marriages.⁸⁴ Secondly, the Registrar General is given the new power to reject the nomination if the nominating body does not meet the “qualifying requirements”.⁸⁵ Again following the structure of the amended s.8, entirely new rules are created for same-sex marriages, with a new s.9(1A) being inserted into the 1977 Act with the same effect as the existing rules (as amended) for opposite-sex marriages.⁸⁶ The only two differences are (i) that it is explicitly specified that nothing in s.8 (as amended) obliges any religious or belief body to nominate any of its members under s.9 to be registered as empowered to solemnise marriages between

⁸¹ Scotland Act 1998, Sched.5, section L2. Section 104 of the 1998 Act allows UK ministers to amend reserved matters by Order.

⁸² This was deemed necessary since the Equality Act 2010 contains in Schedule 23 exemptions for religious organisations where the equality requirements in the Act relating to sexual orientation would conflict with the doctrines of the organisation or with the strongly held convictions of a significant number of the organisation’s members. But this provides no exemption for an individual whose beliefs conflict with his or her own organisation’s support for sexual orientation equality. The amendments to the 2010 Act will replicate for Scotland (though not precisely) the provision now contained in s.2(6) of the Marriage (Same-Sex Couples) Act 2013. They will provide protection not only to the celebrant but also to other persons who play an integral part in the religious or belief aspects of the ceremony. This might include an organist, but would not include (for example) a chauffeur.

⁸³ 2014 Act, s.13(2)(a)(ii), amending s.9(1) of the 1977 Act.

⁸⁴ 2014 Act, s.13(2)(a)(i), amending s.9(1) of the 1977 Act.

⁸⁵ 2014 Act, s.13(2)(d), inserting a new para (e) into s.9(2) of the 1977 Act. “Qualifying requirements” are those set out in regulations made by the Scottish Ministers: s.13(2)(e), inserting a new s.9(2A) – (2C) into the 1977 Act.

⁸⁶ 2014 Act, s.13(2)(b), inserting a new s.9(1A) into the 1977 Act.

persons of the same sex,⁸⁷ and (ii) that there is no exclusion of the Church of Scotland from nominating celebrants.⁸⁸ The register of celebrants that the Registrar General is obliged to keep under s.9(5) of the 1977 Act must now be in two parts, the first part containing the details of persons nominated by religious or belief bodies to solemnise opposite-sex marriages and the second part containing these details of persons nominated to solemnise same-sex marriages.⁸⁹

Amendments to Section 12 of the 1977 Act

Section 12 of the Marriage (Scotland) Act 1977 allows for the temporary authorisation of celebrants who are not otherwise able to act as celebrants under the provisions in ss.8 or 9. As originally enacted, s.12 allowed the Registrar General to authorise “any person” to solemnise either a specified marriage or marriages, or marriages during a specified period of time. The Marriage and Civil Partnership (Scotland) Act 2014, however, restricts the ability of the Registrar General, who may now authorise only members of a “religious or belief body” which meets the qualifying requirements:⁹⁰ again, the Registrar General is given more control over celebrants than he had before, irrespective of the gender mix of the marriage in question. The authorisation of an individual under s.12 of the 1977 Act (as amended) may be granted in relation to (a) only marriages between persons of different sexes, (b) only marriages between persons of the same sex, or (c) both;⁹¹ and authorisation to solemnise marriages between persons of the same sex may only be granted if the person is a member of a prescribed body or the body has nominated members to solemnise same-sex marriages.⁹² No-one is obliged to apply for temporary authorisation.⁹³

⁸⁷ 2014 Act, s.12(2)(b), inserting a new s.8(1D)(b) into the 1977 Act.

⁸⁸ Indeed, the Church of Scotland may find it politically easier to nominate individuals under the new s.9(1A) than to seek to be prescribed as an institution under the new s.8(1B).

⁸⁹ 2014 Act, s.13(2)(j), inserting a new s.9(5ZA) into the 1977 Act.

⁹⁰ 2014 Act, s.14(2)(a), amending s.12(1) of the 1977 Act; and 2014 Act, s.14(2)(b), inserting a new s.12(1A) into the 1977 Act.

⁹¹ 2014 Act, s.14(2)(b), inserting a new s.12(1B) into the 1977 Act.

⁹² 2014 Act, s.14(2)(b), inserting a new s.12(1C) into the 1977 Act.

⁹³ 2014 Act, s.12(2)(b), inserting a new s.8(1D)(d) into the 1977 Act.

Amendments to the Civil Partnership Act 2004

Since civil partnership was originally conceived as the functional equivalent to civil marriage, there was no need for the Civil Partnership Act 2004 to replicate the rules concerning the authorisation of non-registrar celebrants. However, the Marriage and Civil Partnership (Scotland) Act 2014 reconstructs civil partnership into the functional equivalent of all marriage and not just civil marriage: civil partnership may now be created by religious or belief ceremony as well as civil registration.⁹⁴ It was necessary, therefore, to create rules, equivalent to those in ss.8, 9 and 12 of the Marriage (Scotland) Act 1977, for the authorisation of non-registrar civil partnership celebrants. These are to be found in s.24 of the Marriage and Civil Partnership (Scotland) Act 2014, which inserts new ss.94A – 94E into the Civil Partnership Act 2004.⁹⁵ Civil partnership being limited to same-sex couples, the insertions into the 2004 Act replicate only the new rules applicable to marriages for same-sex couples as inserted into the Marriage (Scotland) Act 1977 by the 2014 Act. So the new s.94A of the 2004 Act, in specifying who may register a civil partnership, is in the same terms as the new s.8(1B) of the 1977 Act;⁹⁶ the new s.94B of the 2004 Act, in allowing the registration of nominated persons and celebrants, is in the same terms as the new s.9(1A) of the 1977 Act;⁹⁷ and the new s.94E of the 2004 Act, which allows for the temporary authorisation of celebrants, is in similar terms to s.12 of the 1977 Act, as amended. Civil registration of civil partnership⁹⁸ is unaffected by these changes and remains available as an alternative to religious or belief registration.

Place of Marriage and Civil Partnership

⁹⁴ 2014 Act, s.24(2), amending s.85 of the Civil Partnership Act 2004. Other parts of s.24 insert into the 2004 Act provisions analogous to those relating to religious marriage in ss.6-16 of the Marriage (Scotland) Act 1977, and s.24(19) inserts into s.100 of the 2004 Act offences analogous to those in s.24 of the 1977 Act.

⁹⁵ 2014 Act, s.24(13).

⁹⁶ There is one curious terminological difference. The new s.8(1B) talks of “a minister, clergyman, pastor, priest or other celebrant of a religious or belief body” while the new s.94A talks of “a celebrant of a religious or belief body”. Ministers and priests may now register civil partnerships, but the legislation does not advertise this loudly.

⁹⁷ Likewise, the new s.94C of the 2004 Act replicates the existing s.10 of the 1977 Act and the new s.94D replicates the existing s.11.

⁹⁸ This being the term for registration by district registrar: 2004 Act, s.94A(4), as inserted by 2014 Act, s.23(13)

The place at which a marriage ceremony is permitted to be conducted has never been a matter of much concern in Scots law, where the control mechanism has traditionally lain more in whom is authorised to celebrate the marriage than where it might be done.⁹⁹ It has always been possible to conduct a religious marriage ceremony anywhere in Scotland that has been agreed to by the parties and the celebrant. Civil marriage, on the other hand, when introduced in 1939 could be solemnised (with only minor exceptions) at the registration office of the relevant local authority.¹⁰⁰ That remained the rule until the Marriage (Scotland) Act 2002 amended the Marriage (Scotland) Act 1977 by giving Scottish Ministers authority to permit registrars to solemnise civil marriages in any place that had been approved by the relevant local authority¹⁰¹: the system for approval was established shortly thereafter¹⁰² and that system in its original form prohibited approval of a place if the use of that place for civil marriage would be incompatible with a religion or religious practice to which the place has a connection.

When the Civil Partnership Act 2004 came into force the registration of civil partnership at any place with a present or previous religious connection was prohibited, irrespective of civil partnership's compatibility or otherwise with the religion with which the place was associated.¹⁰³ This created an inconsistency between civil partnership and civil marriage. The response of the Scottish Government was to amend the 2002 Regulations for civil marriage and to apply to marriage the more restrictive rule already applicable to civil partnership.¹⁰⁴

The Marriage and Civil Partnership (Scotland) Act 2014 substantially simplifies s.18 of the 1977 Act and civil marriages may now be solemnised at a registration office, at

⁹⁹ This is to be compared with English law where religious marriages and civil marriages have long been subject to limitations on venue. For religious marriages the issue was recently explored in detail in the Supreme Court which was faced with the question of whether Scientology was a "religion" for the purposes of the Places of Worship Registration Act 1855 and so able to offer marriage ceremonies on its own premises: *R (on the Application of Hodkin) v Registrar General of Births, Deaths and Marriages* [2013] UKSC 77.

¹⁰⁰ Marriage (Scotland) Act 1939; Marriage (Scotland) Act 1977, s.18.

¹⁰¹ Marriage (Scotland) Act 1977, s.18A, as inserted by Marriage (Scotland) Act 2002, s.1(3).

¹⁰² Marriage (Approval of Places) (Scotland) Regulations 2002 (SSI 2002/260).

¹⁰³ Civil Partnership Act 2004, s.6 (for England and Wales), s.93 (for Scotland). There is a different rule for Northern Ireland in s.144.

¹⁰⁴ Marriage (Approval of Places) (Scotland) Amendment Regulations 2005 (SSI 2005/657), reg 2, amending reg 7 of the 2002 Regs.

an “appropriate place” (rather than an approved place), or in Scottish waters.¹⁰⁵ The rules for approval of places are repealed for civil marriage,¹⁰⁶ and replaced with a general prohibition on civil marriage being solemnised or registered in religious premises;¹⁰⁷ this prohibition is applied to civil registration of civil partnership by similar amendments to the Civil Partnership Act 2004.¹⁰⁸ The overall effect is that instead of the local authority having the burden of determining whether to approve a place as suitable for civil marriage or civil partnership, the district registrar is to determine in each case whether the proposed place of marriage or civil partnership is appropriate – which it will not be if it is “religious”, as defined. There has never been any statutory limitation on where a religious marriage may take place, and it may be assumed (in the absence of any statutory provision to the contrary and because all rules relating to religious marriage are extended to “religious and belief” marriage) that there is similarly no limitation on where a belief marriage (or belief civil partnership) may be solemnised. In sum, religious premises (as defined in the 1977 Act) may be used for religious marriages and religious registration of civil partnerships, and also for non-religious belief marriages or civil partnerships, but may not be used for civil marriages or the civil registration of civil partnerships.

Other Changes to Marriage and Civil Partnership Law

Bigamy

The common law offence of bigamy “consists in the contraction of a formally valid second marriage by a person who is a party to a prior subsisting valid marriage”;¹⁰⁹ s.100 of the Civil Partnership Act 2004 creates an equivalent (if unnamed) offence of registering a civil partnership while already married or in a civil partnership. It was, however, unclear whether the common law would extend the offence of bigamy to include marrying while in a civil partnership. Section 28 of the Marriage and Civil

¹⁰⁵ 2014 Act, s.21(2)(a), amending s.18(1) of the Marriage (Scotland) Act 1977; 2014 Act, s.24(10)(a), amending s.93 of the Civil Partnership Act 2004.

¹⁰⁶ 2014 Act, s.21(3), repealing s.18A of the Marriage (Scotland) Act 1977.

¹⁰⁷ 2014 Act, s.21(2)(b), inserting a new s.18(1A) into the Marriage (Scotland) Act 1977. “Religious premises” are defined to mean premises which “(a) are used solely or mainly for religious purposes or (b) have been so used and have not subsequently been used solely or mainly for other purposes”.

¹⁰⁸ 2014 Act, s.24(10)(b), amending s.93 by inserting a new s.93(1A) and repealing s.93(2) and (3).

¹⁰⁹ Gordon, *Criminal Law*, (3rd edn. by MGA Christie 2001) at para.45.02.

Partnership Act 2014 therefore abolishes the common law offence completely,¹¹⁰ amends the 2004 Act so that the crime is committed when a person “purports to register” (instead of, as originally passed, “registers”) a civil partnership while already married or in a civil partnership,¹¹¹ and creates a new offence (applicable of course irrespective of the genders of the parties) of purporting to enter into a marriage with another person knowing that either or both is already married to or in a civil partnership with someone else.¹¹² Consequentially, the reference to the crime of bigamy in s.13 of the Presumption of Death (Scotland) Act 1977, which provides a defence to the charge when the spouse of the accused has been missing for at least seven years, is amended and the defence now applies to both the new offence and the offence in s.100 of the Civil Partnership Act 2004.¹¹³

Marriage by Cohabitation with Habit and Repute

This common law doctrine was mostly abolished by the Family Law (Scotland) Act 2006, though it might still apply to save marriages contracted (ineffectually) abroad if various conditions are met.¹¹⁴ There was no statutory equivalent that could be utilised to save civil partnerships registered (ineffectually) abroad, nor any guarantee that a same-sex couple who married (ineffectually) abroad would be able to rely on the common law doctrine. This meant that the limited saving in 2006 of marriage by cohabitation with habit and repute offered a potential benefit to opposite-sex couples only. This discrimination is removed, though not wholly, by s.4(6) of the Marriage and Civil Partnership (Scotland) Act 2014, which provides that:

“In so far as being (or having been) married or in a purported marriage is relevant for the operation of any rule of law, the rule of law applies equally in relation to marriage or purported marriage to a person of a different sex and marriage or purported marriage to a person of the same sex”.¹¹⁵

¹¹⁰ 2014 Act, s.28(3).

¹¹¹ 2014 Act, s.28(2), amending s.100 of the Civil Partnership Act 2004.

¹¹² 2014 Act, s.28(1), inserting new s.24(A1) and (A2) into the Marriage (Scotland) Act 1977.

¹¹³ 2014 Act, s.28(4).

¹¹⁴ See Family Law (Scotland) Act 2006, s.3(3) and (4).

¹¹⁵ The references to “a purported marriage” were added by Government amendment at Stage Two.

The effect of this is to extend the law of marriage by cohabitation with habit and repute to same-sex couples who have married (ineffectually) abroad (so long as the other conditions in s.3 of the Family Law (Scotland) Act 2006 are satisfied). There remains a gap in the law, however, in that a civil partnership (ineffectually) registered abroad is not saved by any equivalent rule, and since a civil partnership contracted abroad is unlikely to be regarded in Scotland as a “purported marriage” within the meaning of s.4(6) of the 2014 Act,¹¹⁶ same-sex couples’ relationships will remain more vulnerable than those of opposite-sex couples. The eventual abolition in Scotland of civil partnership will not resolve this problem unless, at the same time, all overseas civil partnerships are treated for all purposes of Scots law as marriages.

Evidence of Nationality

In an entirely new provision, applicable irrespective of the gender-mix of the parties, the district registrar is given the power to require persons submitting a marriage notice or a civil partnership notice to provide specified evidence¹¹⁷ of the nationality of each of the parties to the marriage.¹¹⁸ The intent behind this provision was to allow the verification of the information provided on the marriage and civil partnership notice forms, to monitor where couples marrying or registering a civil partnership in Scotland come from in terms of national patterns and trends, to combat sham and forced marriages, and to enable the district registrar to remind any non-UK nationals that they may wish to take steps to ensure that the marriage or civil partnership is recognised in their own country.¹¹⁹

Notice Periods

Prior to the 2014 Act coming into force, persons intending to marry or register a civil partnership were obliged to give 14 days notice: this was achieved by prohibiting the

¹¹⁶ And will not be regarded as a civil partnership under the Civil Partnership Act 2004 if ineffectual in the place of registration: 2004 Act, s.214.

¹¹⁷ To be specified in Guidance issued by the Registrar General.

¹¹⁸ 2014 Act, s.17(2), inserting into s.3 of the 1977 Act new subss.(4A)-(4C); 2014 Act, s.25, inserting into s.88 of the Civil Partnership Act 2004 new subss.(8)-(10).

¹¹⁹ Policy Memorandum, attached to Marriage and Civil Partnership (Scotland) Bill (SP Bill 36) 2013, para [47].

district registrar from issuing the marriage or civil partnership schedule within 14 days of the registrar's receipt of the marriage or civil partnership notice,¹²⁰ or from issuing a certificate of non-impediment to marriage or civil partnership outside Scotland within 14 days of receipt of the marriage or civil partnership notice,¹²¹ or from solemnising a marriage or registering a civil partnership within 14 days of that receipt.¹²² The Marriage and Civil Partnership (Scotland) Act 2014 extends these 14 day periods to 28 days.¹²³ This is designed to give the district registrar more time to ensure the proposed marriage or civil partnership is not sham or forced.

Jurisdiction

The Domicile and Matrimonial Proceedings Act 1973 governs jurisdiction of the sheriff court in actions for declarator of nullity of marriage¹²⁴ and the Marriage and Civil Partnership (Scotland) Act 2014 Act extends that jurisdiction to include actions for declarator of marriage.¹²⁵ This has the effect of resolving a potential inconsistency between the Family Law (Scotland) Act 2006, s.4 of which removed the exclusion of sheriff court jurisdiction to deal with actions of declarator of marriage and nullity of marriage,¹²⁶ and s.8 of the 1973 Act which conferred jurisdiction on the sheriff to hear actions for declaratory of nullity of marriage but was silent in respect of declarators of marriage. The rules in the 1973 Act, as amended, apply only to opposite-sex marriage,¹²⁷ and Schedule 1 to the 2014 Act sets out the general jurisdiction rules for proceedings relating to same-sex marriages. These rules are similar to those relating to opposite-sex marriages, and Scottish Ministers are given the power to make regulations dealing with couples one or both of whom are from an EU member state, and in particular to make provision corresponding to that made by

¹²⁰ 1977 Act, s.6(4); Civil Partnership Act 2004, s.94.

¹²¹ 1977 Act, s.7(2); Civil Partnership Act 2004, s.97(4).

¹²² 1977 Act, s.19(1); Civil Partnership Act 2004, s.90(2).

¹²³ 2014 Act, s.18(2), amending ss.6, 7 and 19 of the 1977 Act; 2014 Act, s.24(7), (8), (12) and (18) amending ss.90, 91, 94, 97 respectively of the Civil Partnership Act 2004.

¹²⁴ Domicile and Matrimonial Proceedings Act 1973, s.8.

¹²⁵ 2014 Act, s.23(2). The conditions to be satisfied for jurisdiction are set out in 2014 Act, s.23(3), inserting a new s.8(2ZA) into the 1973 Act.

¹²⁶ Contained in s.5(1) of the Sheriff Courts (Scotland) Act 1907.

¹²⁷ 2014 Act, Sched. 1 para 1(2).

Council Regulation (EC) No 2201/2003 in relation to jurisdiction and the recognition and enforcement of judgments in matrimonial matters.¹²⁸

Cohabiting Couples

Cohabitants have always been defined by reference to how married couples live their lives (which, until *Ghaidan v Mendoza*¹²⁹ excluded same-sex couples from the rights and liabilities of cohabitation). Same-sex cohabitants have, since the Civil Partnership Act 2004, been defined by reference to how civil partners lead their lives, and have been fully covered in the cohabitation legislation since the Family Law (Scotland) Act 2006. Two definitions for cohabitation, depending upon gender-mix, became unnecessary when same-sex couples acquired the like ability as opposite-sex couples to marry and so s.4(2) and (3) of the Marriage and Civil Partnership (Scotland) Act 2014 provides that any reference in statute to couples who are living together as if husband and wife is to be taken to include two people of the same sex who are not married to nor civil partners of each other. Consequentially, all references to couples who are living together as if they were civil partners are of no further use and so are to cease to have effect.¹³⁰ The dominant domestic relationship for couples of all gender mixes is that of marriage, and cohabitants of any gender mix are now those who live as if married: civil partnership is becoming more and more side-lined as an institution.

Transgender Issues

One of the most substantial complexities created by the law's previous insistence that marriage required an opposite-sex couple and its continuing insistence that civil partnership requires a same-sex couple concerns the interplay between the marriage and civil partnership rules and the rules governing change of gender under the Gender Recognition Act 2004. A major iniquity in the law was that a person in a marriage or civil partnership who changed gender (socially and medically) could not be issued a full gender recognition certificate (hereinafter "GRC") while that

¹²⁸ 2014 Act, Sched.1 para 2.

¹²⁹ [2004] UKSC 30.

¹³⁰ 2014 Act, s.4(4)

relationship was extant: only an interim GRC could be issued, the effect of which was to give a ground for divorce or dissolution.¹³¹ If the parties wished their marriage or civil partnership to continue after one of the parties had changed gender they were therefore obliged to bring their legal relationship to an end (using the interim GRC as the ground for divorce or dissolution). The transgendered individual could then obtain a full GRC from the Gender Recognition Panel, and the parties were then free to re-establish their legal relationship, either as a civil partnership (if they had previously been married) or a marriage (if they have previously been civilly partnered). The need for this undignified clumsiness was removed by the rejection by the Marriage and Civil Partnership (Scotland) Act 2014 of the imperative to keep marriage an exclusively opposite-sex relationship, and so Schedule 2 to the 2014 Act amends the Gender Recognition Act 2004, as it applies to Scotland.¹³² The new rules apply in respect of “protected Scottish marriages” and “protected Scottish civil partnerships”.¹³³

An application for a GRC must, if the applicant is a party to a protected Scottish marriage, include a declaration that the applicant wishes the marriage to continue and either a statutory declaration by the applicant’s spouse that the spouse consents to the marriage continuing after the issue of the GRC or, if the spouse does not so consent, a declaration that no such declaration of consent is included.¹³⁴ The Gender Recognition Panel will issue either a full GRC if the applicant’s spouse has consented to the marriage continuing,¹³⁵ or an interim GRC if the spouse does not so consent.¹³⁶ In that latter case, the person to whom the interim GRC was issued may then apply to the sheriff for a full GRC and, so long as the application was made within 6 months of the interim GRC, the sheriff must issue the full GRC.¹³⁷ The

¹³¹ Divorce (Scotland) Act 1976, s.1(1)(b), as inserted by Gender Recognition Act 2004, Sched. 2(2) para.6; Civil Partnership Act 2004, s.117(2)(b).

¹³² 2014 Act, s.29 and Sched. 2.

¹³³ Defined in s.25 of the Gender Recognition Act 2004, as inserted by 2014 Act, Sched.2 para (2) to mean marriages solemnised and civil partnerships registered in Scotland.

¹³⁴ 2014 Act, Sched.2(3), inserting a new s.3(6D) into the Gender Recognition Act 2004.

¹³⁵ 2014 Act, Sched.2(4), inserting a new s.4(3C) into the Gender Recognition Act 2004.

¹³⁶ 2014 Act, Sched.2(4), inserting a new s.4(3D) into the Gender Recognition Act 2004.

¹³⁷ 2014 Act, Sched.2(5), inserting a new s.4E into the Gender Recognition Act 2004. This new provision was added to the Bill at Stage Two (see *Official Report*, Equal Opportunities Committee, January 16, 2014, col. 1758) and further amended at Stage Three (see *Official Report*, February 4, 2014, cols. 27335-6).

issuing of the full GRC (whether by the Gender Recognition Panel or the sheriff) does not affect the continuity of a protected Scottish marriage.¹³⁸

The spouse of a person who has undergone gender reassignment cannot veto the person's legal change of gender, for the sheriff is obliged to issue the full GRC when requested under these provisions. The interest of the spouse who does not wish their marriage to continue in a gender-mix different from that with which it had started is sufficiently protected by ensuring that the ground of divorce they obtained on the issuing of the interim GRC does not fall when the sheriff issues a full GRC.¹³⁹ The ground for divorce may be used even years after the issuing of the full GRC, and it is to be noted that it might be used by either party: there is no requirement it is the defender who holds the GRC.

When a party to a civil partnership seeks a GRC, that partnership cannot continue since a same-sex relationship is becoming an opposite-sex relationship, which a civil partnership cannot be. So it must still be brought to an end and re-established (if desired) as a marriage. A full GRC can, however, be issued to a party to a civil partnership if, on the same day, a GRC is issued to the other party too.¹⁴⁰

In addition to these changes, Part 2 of Schedule 2 to the Marriage and Civil Partnership (Scotland) Act 2014, added as an amendment at Stage Two,¹⁴¹ provides a "fast track" mechanism for the obtaining of a GRC for individuals who have been living in the acquired gender for six years prior to the commencement of the Act so long as they are party to a protected Scottish marriage or a protected Scottish civil partnership.¹⁴² The limitation of this fast track mechanism to individuals who are in a marriage or civil partnership is based on no principle other than the political requirement that amendments be within the scope of the Bill in which they are

¹³⁸ 2014 Act, Sched.2(10), inserting a new s.11C into the Gender Recognition Act 2004. The parties to the marriage or civil partnership may also renew their marriage or civil partnership after the issuing of a GRC, if they wish to do so, under regulations to be made under s.30 of the 2014 Act.

¹³⁹ 2014 Act, s.31(3), inserting into the Divorce (Scotland) Act 1976 a new s.1(3B) which provides that the ground of divorce in s.1(1)(b) (that an interim GRC has been issued) does not apply where the Gender Recognition Panel has subsequently issued a full GRC but that it will continue to apply if a full GRC is issued by the sheriff under the new s.4E of the Gender Recognition Act 2004.

¹⁴⁰ 2014 Act, Sched.2(4) and (7), inserting a new s.3(3C)(c), s.5C and s.5D into the Gender Recognition Act 2004.

¹⁴¹ Government amendment 74, accepted at Stage Two: *Official Report*, Equal Opportunities Committee January 16, 2014, col.1762.

¹⁴² 2014 Act, Sched.2 (15), inserting a new s.3C into the Gender Recognition Act 2004.

contained: the Gender Recognition Act 2004 was considered amenable to amendment by the 2014 Act only insofar as it affected married or civilly empowered individuals.

III. Conclusion

The Marriage and Civil Partnership (Scotland) Act 2014, being mostly composed of amendments to existing legislation, is not an easy Act to read, but the complexity of its structure must not blind us to the simplicity of its effects. Its primary effect, of course, is to open the institution of marriage to same-sex couples, and the terms of the statute are in large measure consequential upon that simple goal. Though opponents saw, and may continue to see, the opening of marriage as a radical subversion of millennia of tradition, in truth the Act is better seen as part of the end game in the century-long movement towards gender equality within family law. That movement cannot today be seen as remotely radical, or disturbing, or wrong, and the opening of marriage to same-sex couples is far less transformative, in strictly legal terms, than opponents feared. The work in transforming the legal position of gay men and lesbians had mostly been done with the Civil Partnership Act 2004 and the extension of non-discrimination norms to sexual orientation. Scottish family law after 2014 will not operate radically differently from Scottish family law in 2013. More people who want to marry each other will now be able to do so than previously, but that happens every time the forbidden degrees of marriage are loosened. The true significance of the 2014 Act, recognised by many of the speakers in the Scottish parliamentary debates, is not the minor changes in legal rules that it contains but the social message that it broadcasts loud and clear: a person's sexual orientation says nothing about that person's worth. This message is more than one of toleration for gay and lesbian people and for same-sex couples, but it is less than one of celebration for gayness and lesbianism. Quite simply, it is one that declares the moral neutrality, even moral irrelevance, of sexual orientation. Whether one accepts

that the state should by legislation be giving that message depends ultimately on whether one accepts the proposition in the first place.