The Catholic Bishops' Conference of England and Wales

Briefing to Members of Parliament on the Marriage (Same Sex Couples) Bill

Tuesday 29th January 2013

We urge Members to oppose this legislation at Second Reading for the following reasons:

1. THE MEANING OF MARRIAGE MATTERS

This Bill, for the first time in British history, fundamentally seeks to break the existing legal link between the institution of marriage and sexual exclusivity, loyalty, and responsibility for the children of the marriage. If the Bill passes, several previously foundational aspects of the law of marriage will be changed to accommodate same sex couples: the common law presumption that a child born to a mother during her marriage is also the child of her partner will not apply in same sex marriages (Schedule 4, para. 2); the existing provisions on divorce will be altered so that sexual infidelity by one of the parties in a same sex marriage with another same sex partner will not constitute adultery (Schedule 4, para. 3); and non-consummation will not be a ground on which a same sex marriage is voidable (Schedule 4, para. 4).

Marriage thus becomes an institution in which openness to children, and with it the responsibility on fathers and mothers to remain together to care for children born into their family unit, is no longer central to society's understanding of that institution (as reflected in the law). The fundamental problem with the Bill is that changing the legal understanding of marriage to accommodate same sex partnerships threatens subtly, but radically, to alter the meaning of marriage over time for everyone. This is the heart of our argument in principle against same sex marriage.[1]

The existing approach to marriage in British law encourages a particular understanding of marriage and the obligations taken on by those who marry. British law currently provides, for example, that a marriage is between two, rather than several, individuals; that the commitment of husband and wife is meant to last for their lifetime; that there is a sexual aspect to the relationship (in the requirement of consummation for there to be a valid marriage); that the husband is presumed to be the father of the child carried by his wife; and that the partners to the marriage will remain loyal to the relationship to the exclusion of all other sexual partners.

Those elements of the law of marriage are not arbitrary, archaic, or reactionary; they serve to show that marriage has an important and unique function. These provisions cannot be understood unless they are seen as intimately related to the conception and rearing of children. This view is one held particularly strongly by the Catholic Church, but it is not a uniquely religious view.[2] As Bertrand Russell said: *'But for children, there would be no need of any institution concerned with sex .... It is through children alone that sexual relations become of importance to society, and worthy to be taken cognizance of by a legal institution.'*

We recognise that there is an alternative view of what constitutes the 'good' of marriage, and we understand that proponents of same sex marriage often adopt this alternative view, in good faith. Under this alternative view, the 'good' of marriage is that it fosters intimacy and care-giving for dependants, builds trust, and encourages openness, and shared responsibilities.[3] We accept, of course, that these are, indeed, important aspects of marriage. But we believe that marriage is not only the institutional recognition of love and commitment. Marriage, as legally recognised in this country, is also the institutional recognition of a unique kind of relationship in which children are raised by their birth-parents. Even if this is not always possible in practice, the law, by recognising this core understanding of marriage, sends a vital signal to society of an ideal.

We recognise, of course, that British law does not limit marriage to those who intend to have children[4]; nor does it deny marriage to those who are infertile. We also recognise that many same sex couples raise children in loving and caring homes. Nevertheless, marriage has an identity that at its core is distinct from any other legally recognised relationship, no matter how much love or commitment may be involved in these other relationships. Marriage has, over the centuries, been the enduring public recognition of this commitment to provide a stable institution for the care and protection of children, and it has rightly been recognised as unique and worthy of legal protection for this reason. Marriage furthers the common good of society because it promotes a unique relationship within which children are conceived, born and reared, an institution that we believe benefits children.

2. RETAINING MARRIAGE SOLELY FOR OPPOSITE SEX COUPLES IS NOT DISCRIMINATORY

We believe, along with those who support same sex marriage, that the law matters both in terms of the signals that it sends and the effects of those signals on future behaviour. We disagree that the signal that is sent currently, by restricting marriage to opposite sex couples, is one of disparagement of same sex relationships.

The basic argument that is advanced in favour of same sex marriage is one of equality and fairness. But we suggest that this intuitively appealing argument is fundamentally flawed. Those who argue for same sex marriage do so on the basis that it is unjust to treat same sex and heterosexual relationships differently in allowing only heterosexual couples access to marriage. Our principal argument against this is that it is not unequal or unfair to treat those in different circumstances differently. Indeed, to treat them the same would itself be unjust.

The Government, in proposing this change to the law and definition of marriage, has itself not sought complete equivalence between same sex couples and heterosexual couples. We have already shown how significantly the Bill distinguishes between same sex and opposite sex marriages (there is no consummation requirement, there is no common law presumption as to the parenthood of any children, and adultery will not be a ground for divorce). What results in the Bill is a distinct set of differences between opposite sex marriage and same sex marriage. In addition to these differences incorporated in the Bill, civil partnerships will remain an option for same sex couples, but heterosexual couples will not be given access to civil partnerships and the Government has made this decision against the views of the majority in the consultation.[5]

The Government itself recognises, therefore, that it is not necessarily unfair discrimination or a breach of the principle of equality to treat different people differently, if they are different in a relevant way. So too, retaining different institutions in order to serve differing functions is not unfair, but a recognition of relevant differences in the functions served by those institutions.

Catholic teaching, whilst it does not condone same sex sexual activity, condemns unfair discrimination on the basis of sexual orientation. We note that same sex couples already effectively enjoy equivalent legal rights as heterosexual couples by virtue of the Civil Partnership Act 2004. A Civil Partnership in essence entitles a same sex couple to equivalent legal benefits, advantages and rights as heterosexual couples[6] . Therefore the changes proposed in the Bill are not needed in order to provide legal recognition

to and protection for same sex relationships. Our opposition to same sex marriage is not based in discrimination or prejudice; it is based in a positive effort to ensure that the unique social values currently served by marriage carry on being served by that institution in the future.

3. THERE IS NO MANDATE FOR THIS CHANGE AND THE VIEWS OF MANY HAVE BEEN IGNORED

Fundamentally changing the definition of marriage is a major constitutional change and Parliament should not be rushed into making a decision that will have far reaching long-term consequences, many of them unintended. Once this understanding of marriage is fundamentally weakened, its unique value will be lost. The risk, if this Bill becomes law, is that the true meaning of marriage will gradually, over time, be lost, to the detriment of future generations. This Bill, we repeat, will change the meaning of marriage for everyone.

The British public, as a whole, did not seek this change; none of the mainstream political parties promised it in their last election manifestos; there has been no referendum; there was no Green or White Paper; and when the Government launched its consultation it did not ask *whether* the law should be changed, but *how* the law should be changed. There is no clear mandate for this change.

In pressing forward with this Bill the Government has set aside the views of over 625,000 people who signed a petition opposing the change, and effectively ignored the submissions of many others to the Equal Civil Marriage Consultation who also opposed the change. Whilst we accept that there is support for this change among a section of the British public, we believe that such a major constitutional change should not be decided on the basis of simple head counts. In short, we suggest that that there is no public consensus on this issue and that there is not sufficient public demand for so fundamental a change to the definition of marriage.

It is essential that Parliament proceeds with extreme caution before fundamental alterations are made to an institution that provides the primary tried and trusted context in which children are born and raised. We have made it clear that there are major arguments in principle against this change, but even leaving these to one side, any such changes should await considerably more evidence about child bearing and child rearing in the context of same sex unions.

4. THE BILL PAVES THE WAY FOR YET MORE FUNDAMENTAL CHANGE

By fundamentally altering the definition of marriage, the Government will leave the law on marriage vulnerable to even more radical change in the near future, however much the Government protests that this is not its intention. Over the last two decades, the laws have changed continually, despite assurances at each stage that the law would change no further. In 2004, for example, the Civil Partnerships Act was passed and religious organisations were excluded, but this was later changed (after assurances that it would not be) to allow civil partnership ceremonies to be conducted on religious premises. At the time the Civil Partnerships Act was debated there were also assurances that the definition of marriage would not be affected but, only a few years later, the Bill now before Parliament seeks to alter the fundamental meaning of marriage.

If the law is changed and the existing core understanding of marriage is lost, further changes both in Parliament and through the courts can be expected. Previous experience shows that statutory changes to fundamental institutions pave the way for further changes going well beyond what the drafters of the original measure considered desirable, or even conceivable. Slippery slope arguments are often overused, but in this case the evidence is clear: by making these changes, it is more likely that the law and core understanding of marriage will be altered further in the coming years.

5. THE PROPOSED 'SAFEGUARDS' ARE INADEQUATE

The Government's safeguards, although well intentioned, will not provide adequate protection for individuals or religious organisations with conscientious objections to same sex marriage.

(a) The Religious Protection Provision Inadequately Protects Individuals:

The Bill is likely to generate further difficulties and barriers for individuals with conscientious objections to same sex marriage both inside and outside the work place.

The government purports, in Clause 2, to protect individuals from being '*compelled*' to conduct same sex marriages even if their religious organisations have opted-in; but it has failed to protect individuals in *other* circumstances, where the *state* is involved. Carefully tailored protections are needed for individuals who have a conscientious objection to same sex marriage in several other contexts.

For example, such individuals should be able reasonably to express views that relate to same sex marriage without fear of criminal prosecution under public order legislation. Freedom of expression is one of the hallmarks of a democratic society and it is central to achieving individual freedoms. It deserves to be protected explicitly.

The right to freedom of thought, conscience and religion of employees may also be limited as a result of the Bill.[7] Protection should be accorded to those working in the public *and* religious sectors. Individuals should be able reasonably to excuse themselves from activities, or be able reasonably to express views, that relate to same sex marriage without fear of being reprimanded or losing their jobs.[8]

(b) The Religious Protection Provision Inadequately Protects Religious Organisations:

The Prime Minister personally, and the Government in general, have also sought to reassure religious organisations that they will not be required under any circumstances to conduct same sex marriages if they object to them. Clause 2 of the Bill seeks to protect religious organisations in two ways: by providing that religious organisations may not be '*compelled*' to opt-in, and by providing that religious organisations may not be '*compelled*' to conduct same sex marriages. Whilst we welcome the recognition that protections are necessary, we do not consider that these provisions adequately address the problem, because it is entirely unclear what the protection from being '*compelled*' in law means in these circumstances.

As regards Clause 2(1), there remains a significant risk that religious organisations that conduct legally recognised opposite sex marriages (in the civil and religious sense) will be regarded as '*public bodies*' for the purposes of the Human Rights Act 1998 and judicial review. This could result in legal challenge to a decision not to 'opt in', thus limiting the breadth of the discretion of those religious organisations. This is a significant threat and even if such litigation may ultimately be successfully resisted, it would only be after significant costs had been incurred. Religious organisations should not be exposed to such costs, and more explicit protections are therefore needed.

(c) The Implications of the Public Sector Equality Duty Have Not Been Addressed:

A similar problem arises under section 149 of the Equality Act 2010. Most public authorities, such as local authorities, are under a duty to have *'due regard'* to the need to *'advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it.'* In particular, public authorities must have *'due regard'* to the need to *'remove or minimize disadvantages suffered by persons who share a relevant protected characteristic that are connected to that characteristic'*.

The Bill does nothing to prevent public authorities from taking into account a decision by a religious organisation not to opt-in to same sex marriage. The Bill does nothing to prevent religious organisations which do not opt-in to same sex marriage from being treated less favourably by public authorities, for example by refusing to award public contracts or grants to religious organisations. It is not at all clear that Clause 2(1) protects religious organisations from such less favourable treatment.

(d) Interference with the autonomy of other Churches establishes a dangerous precedent:

We have made it clear that the Catholic Church will not be conducting same sex marriages. But our concerns extend beyond the effect of the Bill on the Catholic Church. We are concerned also about the significant inroads that the Bill makes on the internal affairs of other religious organisations, in two respects.

First, Clause 2(3) makes it unlawful for the Church of England to conduct same sex marriages. Whether or not religious organisations wish to provide same sex marriage ceremonies is a decision that must be made by the religious organisations alone. The Bill establishes a dangerous precedent for government interference with other religious organisations.

Second, there is a further problem of principle. Clause 2(2) seeks to allow individuals, connected to a religious organisation which has opted-in to same sex marriages, to refuse to conduct or be present at a same sex marriage ceremony. This will undoubtedly generate conflict and the religious freedom of individuals will (under the Bill) be accorded greater weight than the institutional autonomy of religious organisations. The major effect of this safeguard will be to undermine the traditional institutional autonomy of religious organisations, providing scope for further dispute and division between religious organisations and their members. Were this protection to be accorded to individuals outside the religious sector as well, this interference would be justified. The fact that this is directed only at religious organisations is disturbing.

(e) Sharing Religious Buildings – Creating Future Friction Between Religious Organisations:

Clauses 44 A-D of Schedule 1 will generate friction between religious organisations and damage inter-faith relations. This provision is likely to lead to division between religious organisations that share buildings but have opposing views on same sex marriage. It will result in disputes over whether or not one religious organisation has the right to veto the use of shared religious buildings, and it will hinder inter-faith relations by engendering a reluctance to share buildings and resources in the future.

(f) Recourse to the ECHR renders the 'safeguards' questionable in any event:

Parliament may seek to provide protections for religious individuals or religious organisations under domestic law but it cannot ensure that these protections themselves will withstand complaints against them to the European Court of Human Rights (ECtHR).

There is a risk that the ECtHR will find that the protections provided by the Bill are incompatible with the Convention under Article 8[9] alone, or Articles 8 and 12[10], read with Article 14,[11] on the ground that the Bill adopts a discriminatory regime by enabling some religious organisations to refuse to perform same sex marriage ceremonies.

A key reason for this increased risk is that Britain, by changing the law on 'marriage' as such would open up the prospect that a discrimination claim could succeed because the claimed discrimination would then come '*within the ambit*' of Article 12. It is clear that a challenge directly under Article 12 would be unlikely to succeed (because the ECtHR has held there is no right to same sex marriage under Article 12) but a claim under Article 14 read with Article 12 is a different matter.

The Government has argued that the chance of a successful challenge to the protections in the ECtHR is low on the basis that Article 9 (protecting freedom of religion) would protect the safeguards. But the recent judgment by a Chamber of the ECtHR in the case of *Eweida and Others v The United Kingdom* [2013] (*Application nos. 48420/10, 59842/10, 51671/10 and 36516/10*)[12] illustrates that the right to freedom of thought, conscience and religion (Article 9) does not provide adequate protection when there is a clash between it and other competing rights and interests. The Government cannot therefore guarantee that the ECtHR would accept the safeguards put in place to protect the position of individuals and organisations that have a conscientious objection to same sex marriage, should a challenge be brought.

There is no precedent from the ECtHR on the acceptability under the Convention of balancing religious protections with sexual orientation in the context of a same sex marriage law that has been introduced by a Member State.[13] Previous case law has involved the question *whether* Member States should introduce same sex marriage, not on *how* it legislates for same sex marriage. What we know from case law, however, is that the Court often accords Article 9 rights relatively little weight, and accords a Member State a considerable margin of appreciation in deciding how to protect that right. Much greater weight is given to equality on the basis of sexual orientation, meaning the margin of appreciation is correspondingly reduced. Differences in treatment based on sexual orientation can be justified only with very considerable difficulty, as indicated by the case law of the ECtHR.[14]

It is also likely that challenges will be made under the Human Rights Act in domestic courts, where, of course, the margin of appreciation does not apply. The proposed 'safeguards' may turn out not to be safeguards at all.

6. THE WIDER CONSEQUENCES OF THE BILL HAVE NOT BEEN ADEQUATELY ADDRESSED

The consequences of the Bill will be wide-ranging. The Government has not identified all these consequences and they certainly have not all been addressed. Three of the wider potential repercussions are explored below, but there are and will be many others.

(a) Unknown Implications For Public And Private Law:

Clause 11(1) is extremely broad and its implications cannot possibly be known in advance. It states: *'In the law of England and Wales, marriage has the same effect in relation to same sex couples as it has in relation to opposite sex couples.'* The intention is to ensure, as the default position, that same sex marriage is for all legal effects the same as opposite sex marriage. To incorporate such a broad provision is a dangerous substitute for the detailed (and extensive) inquiry that is necessary. Inadequate thought has been given to the repercussions of such a significant change, no doubt because of the rushed way in which the legislation was prepared. This provision is likely to lead to costly litigation, the need for continuing *ad hoc* parliamentary engagement, or both.

Given the constitutional importance of this proposed change of law, such a clause (with extensive and unknown consequences that may detrimentally affect a number of people and institutions) is unacceptable.

(b) Education – Freedom of Expression and Freedom of Religion:

A change in the definition of marriage will have an adverse impact on schools because the Secretary of State is under a statutory duty to issue guidance on *'the nature of marriage and its importance for family life and the bringing up of children'* under s.403 of the Education Act 1996. A statutory change may therefore result in religious schools being compelled to teach a definition of marriage contrary to their own understanding and thus impact on previously accepted and protected religious freedoms.

There is also a danger that teachers will be limited in their freedom of expression both inside and outside school as far as same sex marriage is concerned.[15]

It is imperative that freedom of expression and the freedom of thought, conscience and religion,[16] are protected in the school curriculum, when individuals are teaching, or where teachers publicly express dissenting views in other contexts. The Bill fails to do this.

(c) An emerging gulf between religious and secular conceptions of marriage:

In marriage, legal and religious institutions are thoroughly intertwined.[17] It is one of the central examples in Britain where there is, at present, no clear separation of church and state. This is true not just with regard to the special role of the Church of England, but more generally. Britain, unlike most continental European countries, provides that 'religious' marriages are also valid 'civil' marriages.

The effect of the Bill, if it is passed, will be to make a more complete separation of church and state in the area of marriage almost inevitable. 'Civil' marriages will be performed by state officials only and the state will determine the legal benefits, rights and duties that accompany marriage, but these will not be regarded as marriages in the eyes of many Churches. 'Religious marriages' will be performed by religious institutions according to their own doctrine and rites, and will have no effect on legal relations. Over time, civil and religious marriages will become fundamentally distinct institutions.

Some will welcome that development; some will not. But either way it is important that Members of Parliament are fully aware of the longer-term effects of the Bill in this respect. The choices that Parliament is being called to make will have profound implications for the future architecture of relations between church and state in Britain.

Notes

[1] For a discussion of different arguments against same sex marriage, see David Cole, The Same Sex Future, *New York Review of Books*, July 2, 2009, 12-16.

[2] See the useful discussion regarding current debates on same sex marriage in the United States at: <http://www.scotusblog.com/2012/11/same sex-marriage-iii-the-arguments-against/>, from which several of the points made in this section are drawn.

[3] See, for example, Robin West, *Marriage, Sexuality, and Gender* (Paradigm).

[4] Although if one party is not willing to have children and conceals this from the other party to the marriage then the marriage is voidable.

[5] 61% of those questioned though that civil partnerships should be open to heterosexual couples and only 24% thought that they should not be.

[6] *Wilkinson v Kitzinger [2006]* EWHC 2022 (Fam) per Sir Mark Potter.

[7] Article 9 of the ECHR (which protects freedom of religion, conscience, and belief).

[8] See several recent cases including *Ladele v United Kingdom,* and *McFarlane v United Kingdom* [both ECtHR, 2013] and *Smith v Tafford Housing Trust* [2012] EWHC 3221.

[9] Article 8 protects private and family life.

[10] Article 12 Protects the right to marry.

[11] Article 14 prohibits discrimination.

[12] In the cases *Eweida and Others v The United Kingdom [2013]* a registrar (Ms. Ladele) was disciplined after she refused to carry out civil partnership ceremonies but she failed in her application to the ECtHR under Article 14 taken in conjunction with Article 9. Mr. McFarlane (a counsellor) was dismissed after colleagues became concerned that he would not provide sexual therapy to same sex couples given his religious beliefs. Mr. McFarlane failed in his application both under Article 9 and Article 14 in conjunction with Article 9. These cases show that the Government cannot guarantee that religious individuals will be protected by either Articles 9 or 14.

[13] In *Schalk and Kopf v Austria (Application no. 30141/04)* the applicants alleged that they were discriminated against because they were denied, as same sex couple, the option of marrying or having their relationship otherwise recognised by the law. Thus far no applicant has applied to the ECtHR from a country in which the law has already changed to allow same sex marriage. It is therefore difficult to predict how a change to the definition of marriage will affect the balancing and application of the Convention rights and obligations.

[14] *Eweida and Others v The United Kingdom* [2013] (*Application nos. 48420/10, 59842/10, 51671/10 and 36516/10),* para. 105

[15] In the case of *Smith v Tafford Housing Trust* [2012] EWHC 3221 Mr. Smith was suspended from work and then demoted after he made a comment about same sex marriage on his personal Facebook page.

[16] Articles 9 and 10 of the ECHR. Article 10 protects freedom of expression.

[17] See the discussion by Douglas Laycock, in Douglas Laycock, Anthony R Picarello Jr., and Robin Fretwell Wilson, *Same Sex Marriage and Religious Liberty: Emerging Conflicts* (Beckett Fund/Rowman and Littlefield), and discussed by Cole, above.