Marriage (Same Sex Couples) Bill 2012-13

Submission to the House of Commons
Public Bill Committee

February 2013

About the Equal Rights Trust

The Equal Rights Trust (ERT) is an independent international human rights organisation whose purpose is to combat discrimination and promote equality as a fundamental human right and a basic principle of social justice. ERT focuses on the complex relationship between different types of discrimination, developing strategies for translating the principles of equality into practice.

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1. Introduction

1. The Equal Rights Trust (ERT) is an independent international organisation whose purpose is to combat discrimination and promote equality as a fundamental human right and a basic principle of social justice. ERT is the only international human rights organisation which focuses exclusively on the rights to equality and non-discrimination as such. Established as an advocacy organisation, resource centre, and think tank, ERT focuses on the complex relationship between different types of discrimination, developing strategies for translating the principles of equality into practice. In working to accomplish this mission, from time to time we submit legal opinions to governments and parliaments concerning the implementation and enforcement of equality rights.

2. ERT welcomes the Marriage (Same Sex Couples) 2012-13 (the Bill), which opens up the institution of marriage to couples of the same sex and thereby removes the current discrimination against persons on grounds of their sexual orientation with regard to the ability to marry the person they love. Subject to the comments and recommendations set out below, we believe that the adoption of this Bill would address one of the few remaining areas of legal inequality on grounds of sexual orientation in the United Kingdom. Therefore, as a result of this Bill's adoption, the United Kingdom would have some of the strongest and most progressive legislation protecting the rights of lesbian, gay and bisexual people.

3. Notwithstanding ERT's overall support for the Bill, however, we believe that there remain a number of provisions within the Bill which do not fully comply with the rights to equality and non-discrimination as set out in international human rights law, and which render the Bill unnecessarily weaker as a result. In our view, by adopting the recommendations set out in this submission, the Committee would significantly strengthen the Bill and ensure that it is fully compliant with the rights to equality and non-discrimination as protected by international human rights law.

4. In analysing the Draft Bill, ERT has applied the standards contained in the Declaration of Principles on Equality.[1] The Declaration of Principles on Equality was drafted and signed by 128 human rights and equality experts from over 40 different nations. It reflects a moral and professional consensus on the right to equality. The 27 principles of the Declaration take their starting point from the United Nations Declaration on Human Rights providing that "all human beings are born free and equal in dignity and rights".[2] The principles are based on concepts and jurisprudence developed in international, regional and national contexts and are intended to assist the efforts of legislators, the judiciary, civil society organisations and anyone else involved in combating discrimination and promoting equality. The Declaration has been described as "the current international understanding of principles on equality"[3] and has been fully endorsed by the Parliamentary Assembly of the Council of Europe, which has

[1] *Declaration of Principles on Equality*, The Equal Rights Trust, London, 2008.

[2] Article 1 of the Universal Declaration of Human Rights, G.A. Res. 217A (III), U.N. Doc A/810 at 71 (1948).

[3] *Naz Foundation v. Government of NCT of Delhi and Others* 160 Delhi Law Times 277 (2009), Para 93.

recommended to member states to take it into account when developing their national legislation and policies.[4]

5. In addition to the Declaration of Principles on Equality, ERT has also referred, where relevant, to international human rights law, and in particular to the European Convention on Human Rights and the jurisprudence of the European Court of Human Rights. The evolution in the Court's jurisprudence in relation to same sex couples, culminating in *Schalk and Kopf v Austria*[5] makes clear that the relationship between same sex couples is protected by the "right to respect for family life" in Article 8. Further, although the Court also stated that the recognition of same sex marriages falls within the margin of appreciation of states, this will, of course, be subject to developments within the member states of Council of Europe. As a greater number of member states provide for the recognition of same sex marriages, this margin of appreciation will decrease in scope. As the margin of appreciation decreases, the Court's Article 14 jurisprudence on discrimination is likely to apply to English law in this area.

2. Differences between Civil Marriages and Religious Marriages / Marriages Solemnised by Religious Organisations: Clauses 1 to 8 and Schedule 1

6. Clauses 1 to 8 of, and Schedule 1 to, the Bill open up the institution of marriage to persons of the same sex and make amendments to a number of pieces of legislation, primarily the Marriage Act 1949, with the effect of permitting civil same sex marriages in register premises, approved premises, and for persons who are housebound or detained; and religious same sex marriages where the religious organisation "opts in" to conducting such marriages.

7. The piecemeal development of marriage law in England and Wales has resulted in a number of different ways by which a marriage may be conducted. These were set out in the consultation document produced by the Government Equalities Office, as follows:

   (a) Marriages according to the rites of the Church of England or Church in Wales;
   (b) Marriages according to the rites of the Society of Friends (the Quakers);
   (c) Marriages according to the Jewish religion;
   (d) Other religious marriages in a registered building and in the presence of an authorised person;
   (e) Marriages in a register office conducted by a superintendent registrar and registered by a registrar;
   (f) Marriages on approved premises conducted by a superintendent registrar and registered by a registrar; and
   (g) Marriages for the housebound or detained, as well as "death bed" marriages.[6]

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[4] Parliamentary Assembly of the Council of Europe, Recommendation: The Declaration of Principles on Equality and activities of the Council of Europe, REC 1986 (2011), 25 November 2011.

[5] Application No 30141/04, 24 June 2010.

[6] Government Equalities Office, *Equal Civil Marriage: A Consultation*, March 2012, Para 2.4.

8. These various methods of conducting marriages may be broadly divided into three categories:

(i) Marriages which are entirely "religious" in their nature. This category would include (a), (b) and (c) in that the marriage is conducted by a religious celebrant and the involvement of the state is limited solely to recognition of the marriage thus conducted;

(ii) Marriages which are partly "religious" and partly "civil" in their nature. This category would include (d) in that the marriage is conducted in a religious building by a religious celebrant, but the presence of a person authorised by the Registrar General is required; and

(iii) Marriages which are entirely "civil" in their nature. This category would include (f), (g) and (h) in that there is no religious element involved and the marriage is conducted in the presence a public servant (i.e. a superintendent registrar).

9. ERT proposes to address each of these three categories separately, as each raises different issues in relation to the rights to equality and non-discrimination, though some general principles can be said to apply to marriage generally and therefore to all three categories.

2.1. The Regulation of Marriage is a Public Function

10. In the view of ERT, international and regional human rights law (including the European Convention on Human Rights and the jurisprudence of the European Court of Human Rights) and English law clearly recognise that the regulation of marriage is a public function.

11. Marriage between two persons has long been recognised under English law. Until the Marriage Act 1753, the state had no involvement in the conduct of marriage save that it recognised marriages conducted in accordance with the Canons of the Church of England. Since then, the state's involvement in marriage has changed dramatically. The Marriage Act 1753 set down legal requirements for a marriage to be valid. Such requirements included that the marriage should take place in a church or chapel and be conduced by a minister, and that a formal marriage announcement (banns) or licence should be obtained prior to the marriage taking place. Under the Marriage Act 1836, the state has conducted civil marriages itself. Today, the law on marriage is entirely set down in statute and dozens of separate pieces of legislation, in areas as diverse as wills and the administration of estates, inheritance, housing and tenancies, criminal justice, immigration and social security, refer to marriage and to persons who are married.

12. The state therefore has an indispensable role in relation to marriage in that it (a) recognises marriages conducted by certain religious organisations, (b) conducts marriages, and (c) regulates the position of married persons through legislation in areas such as those listed above. The effect is that the *conduct*, *recognition* and *regulation* of

marriages are roles of the state. The exception to this is that, through various provisions of the Marriage Act 1949, the capacity to *conduct* marriages can be delegated to religious organisations either entirely (in the case of the Church of England, the Church in Wales, the Society of Friends (the Quakers) and the Jewish religion) or partially (all other religions).

13. Principle 8 of the Declaration of Principles on Equality defines the scope of the rights to equality and non-discrimination as "all areas of activity regulated by law". As the law regulates the conduct of marriages, the rights to equality and non-discrimination apply in this field. Principle 8 of the Declaration reflects the scope of Article 26 of the International Covenant on Civil and Political Rights (ICCPR) which states that:

> *All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination*...[7]

14. The United Nations Human Rights Committee has interpreted Article 26 as "prohibit[ing] discrimination in law or in fact in any field regulated and protected by public authorities".[8]

15. English law itself also recognises that international and domestic human rights law, and in particular the European Convention of Human Rights, applies to the conduct of marriages as a function of the state (or public function). For example, upon the introduction of the Human Rights Act 1998 – which incorporated the European Convention on Human Rights into national law – the then Home Secretary, Jack Straw, during the Committee debate of the Bill in the House of Commons stated that:

> *Much of what the Churches do is, in the legal context and in the context of the European Convention on Human Rights, essentially private in nature, and would not be affected by the Bill even as originally drafted. For example, the regulation of divine worship, the administration of the sacrament, admission to Church membership or to the priesthood and decisions of parochial church councils about the running of the parish church are, in our judgment, all private matters.*
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> *In such matters, Churches will not be public authorities; the requirement to comply with convention rights will not bite on them. We do not believe that, for example, the Church of England, the Church of Scotland or the Roman Catholic Church, as bodies, would be public authorities under the Bill. I was asked to clarify that by many people, not least the Cardinal Archbishop.*
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> ***On the occasions when Churches stand in place of the state, convention rights are relevant to what they do.*** *The two most obvious examples relate to*

[7] G.A. Res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966).

[8] Human Rights Committee, *General Comment No. 18: Non-discrimination*, U.N. Doc. HRI/GEN/1/Rev.1 at 26, 1994, Para 12.

> ***marriages*** *and to the provision of education in Church schools. In both areas,* ***the Churches are engaged, through the actions of the minister or of the governing body of a school, in an activity which is also carried out by the state, and which, if the Churches were not engaged in it, would be carried out directly by the state.***[9] (Emphasis added.)

16. In the same debate, the Home Secretary stated:

> *There was a time when one could get married only in church but, these days, marriage is a matter of civil law – it is the exercise of a public right. The Churches are standing in the stead of the state in arranging the ceremony of marriage, which is recognised not only in canon law, but in civil law.* ***In that instance, the Church is performing a function not only for itself, but for civil society****.*[10] (Emphasis added.)

17. The conduct of marriages is also recognised as a public function by the Equality Act 2010. Section 29 of the Act prohibits discrimination in the provision of services. Section 31(1) of the Equality Act defines "provision of a service" as including the "the provision of a service in the exercise of a public function" and section 31(4) defines "public function" as "a function that is a function of a public nature for the purposes of the Human Rights Act 1998". That the conduct of marriages is regarded as a provision of a service is explicitly, though indirectly, recognised through Part 6 of Schedule 3 to the Act which provides an exception to section 29 in that refusal of religious organisations to solemnise a marriage on grounds of the gender reassignment of one or both of the participants will not constitute unlawful discrimination.

18. The Marriage (Same Sex Couples) Bill itself recognises that the conduct of marriages is the provision of a service through subclause 2(5) which inserts a new Part 6A into Schedule 3 to the Equality Act 2010 which will extend the exception to section 29 in that refusal of a person to (a) conduct a relevant marriage, (b) be present at, carry out, or otherwise participate in, a relevant marriage, or (c) consent to a relevant marriage being conducted on grounds that marriage is between two persons of the same sex will not constitute discrimination. "Relevant marriage" is defined in subclause 1(4) as any religious marriage and so the exception will not apply to civil marriages.

19. It is clear, therefore, that the conduct of a marriage, wherever it takes place, and whoever is conducting the marriage, is the provision of a service and, indeed, a public function, and is therefore within the scope of international human rights law.

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[9] Hansard HC Deb, 20 May 1998, vol 312, col 1017.

[10] Ibid., col 1017 to 1018.

2.2. Marriages which are Entirely Religious in Nature

20. Marriages which are entirely religious in nature are those which are conducted by the Church of England, the Church in Wales, the Society of Friends (the Quakers) and the Jewish religion. They are entirely religious in nature in that the marriage is conducted in a religious building by a religious celebrant with no state involvement, save that the state recognises the marriage that has been thus conducted. Thus, while these marriages are entirely religious, as the paragraphs above make clear, these institutions are undertaking a public function on behalf of the state, by virtue of the state recognition of the marriages which they conduct.

21. In the view of ERT, by permitting these religious organisations to refuse to conduct same sex marriages, the Bill allows these institutions to directly discriminate on the basis of sexual orientation. The Bill expressly permits the different and unfavourable treatment of lesbian, gay and bisexual people in the exercise of marriage by these institutions. While ERT accepts that these institutions should be free to determine the doctrines applicable to marriage in accordance with the tenets of their religion, such religious freedom does not extend to acts which constitute public functions. To the extent that these institutions are undertaking a public function, they are bound by obligations under international and domestic human rights law not to discriminate on grounds of sexual orientation.

22. Principle 5 of the Declaration of Principles on Equality provides a definition of direct discrimination:

> *Direct discrimination occurs when for a reason related to one or more prohibited grounds a person or group of persons is treated less favourably than another person or another group of persons is, has been, or would be treated in a comparable situation; or when for a reason related to one or more prohibited grounds a person or group of persons is subjected to a detriment. Direct discrimination may be permitted only very exceptionally, when it can be justified against strictly defined criteria.*[11]

23. This definition reflects the current understanding of direct discrimination in international law. For example, the United Nations Committee on Economic, Social and Cultural Rights, in interpreting the prohibition against discrimination in Article 2(2) of the International Covenant on Economic, Social and Cultural Rights, has provided the following definition:

> *Direct discrimination occurs when an individual is treated less favourably than another person in a similar situation for a reason related to a prohibited ground; e.g. where employment in educational or cultural institutions or membership of a trade union is based on the political opinions of applicants or employees. Direct discrimination also includes detrimental acts or omissions on the basis of*

[11] See above, note 1, Principle 5.

prohibited grounds where there is no comparable similar situation (e.g. the case of a woman who is pregnant).[12]

24. Similarly, European Union law defines discrimination as: "where one person is treated less favourably than another is, has been or would be treated in a comparable situation [on a prohibited ground].[13]

25. The European Court of Human Rights has used the following formulation: "differences in treatment based on an identifiable characteristic, or "status" ... of persons in analogous, or relevantly similar, situations." [14]

26. These definitions are reflected in English law via section 13 of the Equality Act 2010 which provides:

> ***13 Direct Discrimination***
>
> (1) *A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.*

27. The Bill, by permitting religious institutions to "opt out" of the provision of same sex marriages, allows these institutions to treat lesbian, gay and bisexual people less favourably on the basis of their sexual orientation in respect of marriage. By allowing the specified institutions to refuse to provide same sex marriages, the Bill has the effect of denying lesbian, gay and bisexual persons the ability to express their emotional, affectional and sexual attraction to a person of the same sex through marriage in one of these institutions, in a way which is not denied to heterosexual people.

28. Principle 5 of the Declaration of Principles on Equality provides that direct discrimination "may be permitted only very exceptionally, when it can be justified against strictly defined criteria".

29. The sole justification which has been put forward for the differential treatment between opposite sex marriages and same sex marriages is the protection of religious freedom. ERT accepts that the protection of religious freedom is a legitimate aim in international

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[12] Committee on Economic, Social and Cultural Rights, *General Comment 20: Non-discrimination in economic, social and cultural rights*, UN Doc. E/C.12/GC/20, 2009, Para 10.

[13] Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, Article 2(2)(a); Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, Article 2(2)(a); Council Directive 2004/113/EC of 13 December 2004 implementing the principle of equal treatment between men and women in the access to and supply of goods and services, Article 2(a); and Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast), Article 2(1)(a).

[14] See, for example, *Carson and Others v United Kingdom* (Application No. 42184/05), 16 March 2010, Para 61. See also *D.H. and Others v the Czech Republic* (Application No. 57325/00), 13 November 2007, Para 175; and *Burden v United Kingdom* (Application No. 13378/05), 29 April 2008, Para 60.

human rights law and, in fact, is explicitly recognised under, for example, Article 18 of the International Covenant on Civil and Political Rights and Article 9 of the European Convention on Human Rights.

30. ERT believes, however, that the debate about the need for religious organisations to "opt out" of the requirement to conduct same sex marriages has placed insufficient emphasis upon the public function that the religious organisation is carrying out. The evolution of English marriage law is such that the religious ceremony and the public function of conducting a marriage are fused together. This conflation of these two actions has resulted in a failure properly to appreciate the clear distinction between the private, religious act and the public function which a religious institution is carrying out when performing a marriage recognised by the state. While the individual religious organisation is entirely free to determine its doctrines – including the necessary criteria for persons wishing to marry under its doctrines – when acting as a private institution, the public function of conducting a marriage recognised by law must be conducted without discrimination.

Recommendation 1: The Bill and any other relevant legislation should be amended so as to provide that the Church of England, the Church in Wales, the Society of Friends (the Quakers) and the Jewish religion must not discriminate against same sex couples when carrying out their public function of conducting marriages on behalf of and in the stead of the state. These religious organisations should, however, be free to conduct religious marriages which are *not* automatically recognised by the state (and therefore not public functions) according to their own doctrines.

2.3. Marriages which are Partly Religious in Nature and Partly Civil in Nature

31. Marriages which are partly religious in nature and partly civil in nature are those conducted by all other religions under section 44 of the Marriage Act 1949. Whilst the ceremonies are religious and conducted by a religious celebrant, the marriage must be conducted in the presence of either (a) a registrar of the registration district in which the registered building is situated, or (b) an authorised person whose name and address have been certified (...) by the trustees or governing body of that registered building or of some other registered building in the same registration district.[15]

32. For the same reasoning set out in section 2.2 of the submission above, ERT believes that, to the extent that they take advantage of the privilege to conduct marriages on behalf of the state, rather than conducting marriages which are purely religious, religious organisations are fulfilling a public function. As such, they assume the responsibilities that lie with carrying out public functions, including the obligation to respect and protect the rights to equality and non-discrimination.

[15] Section 44(2) of the Marriage Act 1949.

Recommendation 2: The Bill should be amended so as to provide that all other religious organisations must not discriminate against same sex persons when carrying out the public function of conducting marriages on behalf of and in the stead of the state. These religious organisations should, however, be free to conduct religious marriages which are *not* automatically recognised by the state (and therefore not public functions) according to their own doctrines.

2.4. Marriages which are Entirely Civil in Nature

33. ERT notes that the Bill will treat same sex marriages and opposite marriages conducted in civil ceremonies as equivalent for all purposes and that there is no exception to the Equality Act 2010 for civil marriages.

34. ERT welcomes the provisions in Part 1 of Schedule 7 to the Bill which will provide that all premises currently approved to conduct opposite sex marriages under section 26(1)(bb) of the Marriage Act 1949, as amended by section 3 of the Bill, will automatically be approved to conduct same sex marriages, and that in future, any applications for approval will be for both opposite sex and same sex marriages. Proprietors or trustees of approved premises – whether already approved or approved in the future – will not, therefore, be able to refuse to permit same sex marriages to take place on those premises.

3. Jurisdictions Recognising Same Sex Marriages (Clause 10 and Schedule 2)

35. Section 10(3) and Schedule 2 to the Bill contain provisions on how same sex marriages conducted in England and Wales are to be recognised in Scotland and Northern Ireland.

36. Paragraph 1(1) of Schedule 2 provides that the Secretary of State may pass an order providing that the law of Scotland will recognise such a marriage as a civil partnership in Scotland. Such an order may only be made if same sex marriage is not lawful in Scotland (paragraph 1(3)). The Scottish Government announced in July 2012 that it would introduce legislation to allow same sex marriage in Scotland and in December 2012 published the Draft Marriage and Civil Partnership (Scotland) Bill for consultation with a view to introducing a Bill in the Scottish Parliament during this legislative session. It is therefore unlikely that the order-making power provided in paragraph 1(1) will need to be used.

37. Paragraph 2(1) of Schedule 2 provides that under the law of Northern Ireland, a same sex marriage is to be treated as a civil partnership. In October 2012, the Northern Ireland Assembly voted by 50 to 45 against a motion calling for the introduction of same sex marriages. It therefore appears likely that Northern Ireland will be the only constituent country in the United Kingdom which will not conduct or recognise same sex marriages and will instead treat such marriages entered into in the rest of the United Kingdom as civil partnerships.

38. ERT notes the government's explanation in the consultation and the consultation response that marriage is a devolved matter in respect of Northern Ireland.[16] However, ERT would remind the Committee that responsibility for the implementation of international human rights law ultimately lies with the United Kingdom government, and it is therefore for the United Kingdom government to ensure that the rights to equality and non-discrimination are protected across the full jurisdiction, including Northern Ireland, regardless of any legislation concerning devolution.

39. ERT believes that there is a significant risk that the Bill as currently drafted creates a discriminatory anomaly in that marriages between opposite sex couples will be treated as marriages in Northern Ireland while marriages between same sex couples will be treated as civil partnerships.

40. ERT would remind the Committee that although Article 12 of the European Convention on Human Rights does not compel states to introduce same sex marriage, the European Court of Human Rights stated in *Schalk and Kopf v Austria* (2010)[17] that:

> *[T]he Court would no longer consider that the right to marry enshrined in Article 12 must in all circumstances be limited to marriage between two persons of the opposite sex. However, as matters stand, the question whether or not to allow same-sex marriage is left to regulation by the national law of the Contracting State.*[18]

41. Therefore, in the view of ERT, while a state is free to regulate same sex marriage in *allowing* it or not, where a state has decided to provide for same sex marriage, these marriages fall within the ambit of Article 12. Thus, the positive decision by a state to permit same sex marriages extends the right to marry under Article 12 to include same sex couples. Moreover, the European Court of Human Rights, again in *Schalk and Kopf v Austria*, recognised that same sex couples have a right to family life under Article 8 of the European Convention on Human Rights. As the regulation of marriage is clearly connected to an important aspect of family life, these marriages also fall within the ambit of Article 8.

42. As the regulation of same sex marriages falls within the ambit of Articles 8 and 12, the non-discrimination provisions of Article 14 must apply. As a consequence, a state is not permitted to regulate same sex marriages in a discriminatory manner any more than it is permitted to regulate opposite sex marriages in a discriminatory manner.

43. Under Article 1 of the European Convention of Human Rights, the United Kingdom has undertaken to "secure to everyone within [its] jurisdiction the rights and freedoms

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[16] Government Equalities Office, *Equal Civil Marriage: A Consultation*, March 2012, Para 2.37; HM Government, *Equal Marriage: The Government's Response*, December 2012 Para 9.4.

[17] See above, note 5.

[18] Ibid., Para 61.

defined in Section I of this Convention". Therefore, while we note the government's position that the regulation of marriage is a devolved matter, we urge the Committee to consider this contention in light of the primary obligation of the state to protect the human rights of all persons within its jurisdiction. ERT therefore calls on the Committee to consider whether the devolution of the regulation of marriage is compatible with the obligations of the state to protect the rights arising under Article 14 in conjunction with Articles 8 and 12 of the European Convention.

Recommendation 3: The Committee should consider the extent to which the state should be permitted to devolve the regulation of marriage, where such devolution may result in differential and discriminatory treatment of some persons within its jurisdiction, on the basis of their sexual orientation and/or place of residence.

4. Differences between Opposite Sex Marriages and Same Sex Marriages (Clause 11 and Schedules 3 and 4)

4.1. Presumption on Birth of Child to Married Woman (Schedule 4, Part 2)

44. The presumption of legitimacy is a longstanding rule of English common law, concisely stated by the Lord Chief Justice of the Court of Common Pleas when delivering the unanimous opinion of the judges in the *Banbury Peerages Case*:

> *[T]he birth of a child from a woman united to a man by lawful wedlock is, generally, by the law of England, prima facie evidence that such a child is legitimate.*[19]

45. The presumption is a rebuttable one, the burden being on the party who submits evidence that the child is *not* that of the husband to prove, on the balance of probabilities, that the child *is not* that of the husband.[20]

46. Part 2 of Schedule 4 to the Bill provides that the common law presumption of legitimacy (the presumption that a child born to a woman who is married is the child of her husband) will not apply to marriages between two women. The effect is that where, in a marriage between two women, one of the women gives birth, there will be no common law presumption that her wife is a parent of the child. The Bill seeks to partially remedy this differential treatment through an amendment to section 42 of the Human Fertilisation and Embryology Act 2008 (HFEA 2008) as follows:[21]

[19] (1811) 1 Sim. & St. 153, per Sir James Mansfield CJ.

[20] Section 26 of the Family Law Reform Act 1969.

[21] The amendment is made by paragraph 36 of Schedule 7 to the Bill.

Section 42 of HFEA 2008 (current)	**Section 42 of HFEA 2008 (*as amended*)**
Woman in civil partnership at time of treatment	Woman in civil partnership at time of treatment *or marriage to a woman*
(1) If at the time of the placing in her of the embryo or the sperm and eggs or of her artificial insemination, W was a party to a civil partnership, then subject to section 45(2) to (4), the other party to the civil partnership is to be treated as a parent of the child unless it is shown that she did not consent to the placing in W of the embryo or the sperm and eggs or to her artificial insemination (as the case may be).	(1) If at the time of the placing in her of the embryo or the sperm and eggs or of her artificial insemination, W was a party to a civil partnership *or a marriage with another woman*, then subject to section 45(2) to (4), the other party to the civil partnership *or marriage* is to be treated as a parent of the child unless it is shown that she did not consent to the placing in W of the embryo or the sperm and eggs or to her artificial insemination (as the case may be).
(2) This section applies whether W was in the United Kingdom or elsewhere at the time mentioned in subsection (1).	(2) This section applies whether W was in the United Kingdom or elsewhere at the time mentioned in subsection (1).

47. Thus, while the amendment to section 42 of the HFEA 2008 will ensure that the wife of a woman who gives birth will be in an equivalent position to a husband of a woman in an opposite sex relationship who gives birth where the child was conceived through assisted reproduction under the HFEA 2008, it will not provide such equivalence where the child was not conceived through assisted reproduction under the HFEA 2008. The wife of a woman who chooses to conceive in other ways – for example through an informal agreement with a sperm donor – would not enjoy the presumption of parentage.

48. Moreover, ERT notes that the presumption of parentage as currently defined (and as left unchanged by the Bill in its current form) presents a number of other problems of discrimination in the context of the wide range of familial relationships which exist today. At present for example, the law creates a clear distinction on the basis of marital status between the fathers of children born in a marriage and fathers who are not married to the mother of their child. In addition, irrespective of the amendment to the HFEA noted above, the Bill is silent on the question of the presumed parentage of men in same sex relationships. Yet ERT notes that, for reasons connected with the nature of childbirth itself, it is not possible to conceive of how the presumption of legitimacy could be expanded to include male parents in same sex relationships without creating other inconsistencies in the law.

49. ERT believes that the presumption of legitimacy is an anachronism, out of place in a modern system of family law. It predates both the scientific techniques which allow parentage to be established without doubt and the social advances which recognise as normal a far wider range of family relationships than solely those consisting of a married relationship between men and women. In addition, as exemplified above, the presumption discriminates both on grounds of marital status and sexual orientation. We note that, while some of the discriminatory impacts of the presumption can be addressed through amendment to the law, it is not possible to conceive of how the

presumption could be amended to ensure its full consistency with the right to non-discrimination, without nullifying the presumption's essential nature and purpose

50. We are therefore of the view that the consideration of this Bill presents an opportunity to consider removing the presumption from English law. We note however that the presumption cannot be viewed in isolation, as it is intimately bound up with the law more generally on parentage and affiliation, legitimacy and legitimation. ERT therefore believes that, prior to the deletion of the presumption, a comprehensive review of the law on parentage and affiliation, legitimacy and legitimation should be undertaken with a view to identifying a suitable replacement for the presumption which is consistent with the rights to equality and non-discrimination.

Recommendation 4: The presumption of legitimacy should be removed from English law. Prior to any Act removing the presumption, there should be a comprehensive review of the law on parentage and affiliation, legitimacy and legitimation in order to identify a suitable replacement which is compatible with the rights to equality and non-discrimination.

4.2. Divorce and Annulment of Marriage (Schedule 4, Part 3)

51. The effect of Part 3 of Schedule 4 to the Bill is two-fold: first, adultery will be defined in statute as only comprising sexual activity between two persons of the opposite sex; second, non-consummation of a marriage, whether through incapacity or wilful refusal, will result in the marriage being voidable only if it is an opposite sex marriage and not a same sex marriage.

4.2.1. Adultery

52. Paragraph 3 of Schedule 4 will insert new subsection (6) into section 1 of the Matrimonial Causes Act 1973. This subsection will define adultery as sexual activity between two persons of the opposite sex, giving statutory footing to the current definition in the common law.[22] This amendment to the Matrimonial Causes Act 1973 represents a departure from the original consultation which indicated that case law would be allowed to develop to provide a definition of what constitutes adultery in the context of a same sex marriage.[23]

53. In the view of ERT, the distinction which this provision creates – between sexual acts outside of marriage between persons of opposite and same sex – is, essentially, an irrelevant one when considering the nature and effect of adultery as commonly understood. Moreover, while we note that there will be occasions where persons in opposite sex marriages wish to claim adultery where their husband or wife has had sexual relations with a person of the same sex, this distinction treats less favourably

[22] *Dennis v Dennis* [1955] 2 All ER 51.

[23] See above, note 6, Para 2.16.

homosexuals seeking divorce on the basis of their spouse alleged adultery, as the homosexual spouse would ordinarily have engaged in extramarital sex with a same sex partner. The effect of the amendment is to create a definition of adultery which will leave many persons in a same sex marriage unable to rely upon section 1(2)(a) of the Matrimonial Causes Act 1973 where their husband or wife has committed "adultery" with someone of the same sex. Therefore, it is our view that this distinction directly discriminates on grounds of sexual orientation. (It should however be noted that the opposite is true in respect of those who are accused of adultery: the amendment would directly discriminate against heterosexuals who are themselves accused of adultery as compared to homosexuals accused of adultery.)

54. Principle 8 of the Declaration of Principles on Equality provides that the rights to equality and non-discrimination apply "in all areas of activity regulated by law" which undoubtedly includes the regulation of family law, including divorce law and the grounds upon which divorce may be granted.

55. ERT sees no justification for this differential treatment. Persons in same sex marriages will be disadvantaged in that, in a large proportion of cases where their husband or wife has sexual relations outside of marriage, they will be unable to rely on this fact within section 1(2)(a) of the Matrimonial Causes Act 1973. In 2011, this section was relied upon in 15% of all divorces in England and Wales, a total of 17,302 divorces.[24] It is therefore reasonable to predict that there are likely to be many persons in same sex marriages in the future who wish to divorce on grounds of "adultery" but will be unable to do so due to the restrictive definition in the Bill.

56. ERT notes that the alternative ground of "unreasonable behaviour" provided in section 1(2)(a) of the Matrimonial Causes Act 1973 will be available to a person in a same sex marriage who wishes to divorce their partner if they have had sexual relations outside the marriage. However, the fact remains that in many cases where a person has sexual relations outside of a same sex marriage, the other person in that marriage will be unable to rely on the ground of adultery, while relatively few people in opposite sex marriage will find themselves so restricted.

57. Moreover, ERT reminds the committee that one of the key principles behind the introduction of this Bill was to remove the segregation of opposite sex and same sex couples and to allow *all* couples to enter into a single non-segregated institution. The symbolism behind the distinction created by this amendment – that adultery is something that only heterosexuals can do, and, implicitly, that adultery by a heterosexual is more serious than adultery by a gay man or lesbian – seriously undermines this principle. It indicates that sexual infidelity is less of a concern for same sex marriages than opposite sex marriages, and is likely to contribute to the perpetuation of the stereotype of promiscuity amongst LGB people.

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[24] Office for National Statistics, *Divorces in England and Wales – 2011*, 2012, available at: http://www.ons.gov.uk/ons/rel/vsob1/divorces-in-england-and-wales/2011/stb-divorces-2011.html.

58. ERT therefore urges the Committee to amend this provision of the Bill to ensure that adultery is defined as including sexual activity outside of marriage with a person of the opposite sex or the same sex.

Recommendation 5: The Bill should be amended so as to provide that adultery includes sexual activity with a person of the opposite or the same sex.

4.2.2. Consummation

59. Paragraph 4 of Schedule 4 will amend section 12 of the Matrimonial Causes Act 1973 to provide that non-consummation will only render voidable an opposite sex marriage and not a same sex marriage. As with the provisions relating to adultery, this represents a departure from the original consultation which indicated that case law would be allowed to develop to provide a definition of what constitutes consummation between two men or two women.[25]

60. The current standard definition of what will constitute consummation is sexual intercourse through penile penetration of the vagina which is "ordinary and complete" and not "partial and imperfect".[26] A marriage is voidable regardless of whether the non-consummation is due to incapacity of either party[27] or the wilful refusal of the respondent in nullity proceedings.[28]

61. ERT believes that the amendment to the law relating to consummation of marriages made by the Bill constitutes direct discrimination on grounds of sexual orientation. (We also note that the law on consummation as it stands at present constitutes discrimination on grounds of disability, where such disability means that the person is incapable of sexual intercourse which satisfies the definition of consummation.)

62. As noted above, Principle 8 of the Declaration of Principles on Equality provides that the rights to equality and non-discrimination apply "in all areas of activity regulated by law". This undoubtedly includes the regulation of family law, including the grounds upon which a marriage is voidable.

4.2.2.1. Sexual Orientation

63. Direct discrimination is defined in Principle 5 of the Declaration of Principles on Equality as follows:

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[25] See above, note 23.

[26] *DE v Attorney General* (1845) 163 ER 1039.

[27] Section 12(1)(a) of the Matrimonial Causes Act 1973.

[28] Section 12(1)(b) of the Matrimonial Causes Act 1973.

> *Direct discrimination occurs when for a reason related to one or more prohibited grounds a person or group of persons is treated less favourably than another person or another group of persons is, has been, or would be treated in a comparable situation; or when for a reason related to one or more prohibited grounds a person or group of persons is subjected to a detriment.*[29]

64. Under the Bill, a person in a same sex marriage will be explicitly disbarred from citing non-consummation of the marriage, whether through incapacity or wilful refusal, as ground for annulling the marriage, whereas a person in an opposite sex marriage will be able to do so.

65. Decrees of nullity have a number of important effects in law, including permitting the courts to make financial provision orders (section 23 of the Matrimonial Causes Act 1973), property adjustment orders (section 24 of the Act), pension sharing orders (section 25 of the Act), and orders with respect to children under the Children Act 1989.

66. Thus, the inability of a person in a same sex marriage to annul that marriage where it would be voidable if it were an opposite sex marriage is undoubtedly "less favourable treatment" or a "detriment" in that it deprives them of an important legal remedy with potentially significant consequences.

67. This "less favourable treatment" or "detriment" is inextricably linked to the sexual orientation of the person as it is only persons in same sex marriages – where the parties will inevitably be homosexual (or bisexual) who will be unable to take advantage of the remedy.

68. The government has not put forward any justification for this differential treatment, save that they were dissuaded from their original proposals not to change the law and to let case law develop naturally by consultation responses from the Catholic Bishops' Conference of England and Wales and the Family Law Bar Association, amongst others, that "it would not be acceptable to leave such uncertainty in the law".[30]

69. Principle 5 of the Declaration of Principles on Equality provides that "direct discrimination may be permitted only very exceptionally, when it can be justified against strictly defined criteria".

70. The government has not sought to justify this differential treatment between same sex marriages and opposite sex marriages; nor can any reasonable justification be put forward. While ERT believes that the state is entitled to regulate family law, and to set down (or not set down, as the case may be) particular grounds which render a marriage voidable and subject to annulment, it is not entitled to do so in a way which directly

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[29] See above, note 1, Principle 5.

[30] HM Government, *Equal Marriage: The Government's Response*, December 2012, Para 9.9.

discriminates on grounds of sexual orientation without providing a justification against strictly defined criteria.

71. ERT again reminds the committee that one of the key principles behind the introduction of this Bill was to remove the segregation of opposite sex and same sex couples and to allow *all* couples to enter into a single non-segregated institution. The symbolism that consummation is something that is only relevant to opposite sex marriages, and, thus, that the sexual aspect within a marriage is more important to heterosexual people than LGB people denies the sexuality of LGB people. Indeed, the combined effect of the segregation between opposite sex marriages and same sex marriages in respect of the law on adultery and consummation enforces the legal notion that only sexual activity between two persons of the opposite sex is valid and that a different sexual culture exists within the LGB community that does not exist amongst heterosexuals.

72. ERT therefore concludes that, if marriage law is to continue to include provisions on consummation, they should be non-discriminatory in their application and therefore apply both to opposite sex and same sex marriages. This can be done in a number of ways such as:

(a) Not including any provisions on consummation and, instead, leaving the definition of consummation to the judiciary;

(b) Replacing paragraph 4 of Part 3 of Schedule 4 to the Bill with a simple paragraph which provides that, for the purposes of consummation, sexual intercourse may be between two persons of the same sex as well as two persons of the opposite sex; or

(c) Replacing paragraph 4 of Part 3 of Schedule 4 to the Bill with a statutory definition of consummation inclusive of a number of sexual practices.

Recommendation 6: The concept of consummation should apply both to same sex marriages and to opposite sex marriage.

4.2.2.2. Disability

73. Notwithstanding the implementation of Recommendation 6, ERT believes that the law on consummation will continue to discriminate, as it does already, against persons with a disability, where that disability means that they are incapable of sexual intercourse which satisfies the definition of consummation (hereafter 'the disability').

74. "Disability" is defined in section 6(1) of the Equality Act 2010 as any "physical or mental impairment" which has "a substantial and long-term adverse effect on [the person's ability to carry out normal day-to-day activities". This definition would include persons who were physically unable to engage in sexual intercourse, as well as persons with

psychological or emotional disorders which prevented them from engaging in sexual intercourse, such as genophobia.

75. The definition of consummation in the present law treats less favourably persons with certain types of disability and thus persons with a protected characteristic, by reason of that characteristic (disability). The category of disabled persons treated less favourably is those with a disability which prevents them from completing an act qualifying as consummation. As defined presently, a person in a marriage with certain types of disability will never be able to consummate the marriage, thereby rendering the marriage voidable for its entirety, and the person would thus be in a position where the other party to the marriage could seek to annul the marriage at any time. The inability of a person with this kind of disability to consummate a marriage undoubtedly is the reason for their less favourable treatment compared to a person without that disability, in that it leaves them in a significantly weaker position before the law. Not only will the marriage be voidable for its entirety as opposed to valid under the law – an important symbolic difference – but that person is thereby left vulnerable to nullity proceedings being brought against them at any point during the marriage with the range of potentially significant consequences listed above.

76. The government has not sought to justify this differential treatment between persons with this type of disability and persons without disability, nor can any reasonable justification be put forward. ERT believes that the state is entitled to regulate family law, and to set down (or not set down, as the case may be) particular grounds which render a marriage voidable and subject to annulment. However, it is not entitled to do so in a way which puts a certain protected group at a disadvantage, unless the creation of this disadvantage can be objectively justified by a legitimate aim, and the means of achieving that aim are appropriate and necessary.

77. ERT therefore concludes that the Committee should take this opportunity to revisit the law on consummation and to use the Bill to amend the law so as to ensure that it does not discriminate against persons with particular disabilities.

Recommendation 7: The law on consummation should be amended so as to ensure that it does not discriminate against persons with particular disabilities which prevent them for "consummating" a marriage.

4.2.2.3. Consummation generally

78. As a result of the government's express statement in its response to the consultation that "there is no intention to remove references to non-consummation from legislation",[31] ERT has not sought to argue that the concept of consummation should be removed from English law, but merely that if it is to remain, it should be non-discriminatory in its application.

[31] See above, note 30.

79. The Committee may, however, wish to address the law on consummation more generally as part of its consideration of the Bill, and to consider the advantages and disadvantages of retaining non-consummation of a marriage as grounds for its annulment, particularly given the difficulty of formulating the law such that it applies in a non-discriminatory manner.

5. Differences between Opposite Sex Couples and Same Sex Couples in Access to Civil Partnerships

80. Civil partnerships were established by the Civil Partnership Act 2004 and are limited to couples of the same sex.

81. In its consultation, the government stated that they did not intend to open up access to civil partnerships to opposite sex couples.[32] In response to the question of whether access to civil partnerships *should* be opened up to opposite sex couples, 61% of respondents answering that question stated that they should be, and only 24% stated that they should not be.[33] Despite the vast majority of respondents supporting the opening up of access to civil partnerships to opposite sex couples, the government's response was that their position had not changed and the Bill does not provide access to civil partnerships to opposite sex couples.

82. ERT strongly believes that the prohibition of opposite sex couples from entering into a civil partnership constitutes direct discrimination against heterosexual persons on grounds of sexual orientation. Principle 5 of the Declaration of Principles on Equality provides the following definition of direct discrimination:

> *Direct discrimination occurs when for a reason related to one or more prohibited grounds a person or group of persons is treated less favourably than another person or another group of persons is, has been, or would be treated in a comparable situation; or when for a reason related to one or more prohibited grounds a person or group of persons is subjected to a detriment. Direct discrimination may be permitted only very exceptionally, when it can be justified against strictly defined criteria.*[34]

83. This definition reflects definitions found in international human rights law and which are summarised in paragraphs 22 to 25.

84. ERT believes that the case law of the European Court of Human Rights strongly suggests that this direct discrimination would be found to constitute a violation of Article 8 of the Convention, when taken in combination with Article 14.

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[32] See above, note 6, Para 2.20.

[33] See above, note 30, p. 42.

[34] See above, note 1, Principle 5.

85. Article 8 provides that "[e]veryone has the right to respect for his private and family life" and the Court has recently stated in *Schalk and Kopf v Austria*[35] that "family life" includes cohabiting opposite sex couples and same sex couples living in stable *de facto* partnerships.[36] The legal recognition and regulation of opposite sex couples and same sex couples therefore falls within the ambit of Article 8.

86. The Court has stated that "in order for an issue to arise under Article 14 there must be a difference in treatment of persons in relevantly similar situations"[37] and the court has held that same sex couples "are in a relevantly similar situation to a different-sex couple as regards their need for legal recognition and protection of their relationship".[38] Conversely, opposite sex couples must be held to be in a "relevantly similar situation" to same sex couples as regards their need for legal recognition and protection of their relationship.

87. A difference of treatment between same sex and opposite sex couples will constitute a violation of Articles 8 and 14 if:

> *[I]t has no objective and reasonable justification; in other words, if it does not pursue a legitimate aim or if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be realised.*[39]

88. The European Court of Human Rights has held that "differences based on sexual orientation require particularly serious reasons by way of justification".[40]

89. The explanation in the government's consultation response as to why the prohibition on access to civil partnerships for opposite sex couples is necessary is that civil partnerships were not intended or designed to be an alternative to marriage and that they should not be seen as an alternative to marriage for opposite sex couples.[41] Furthermore, the government stated that "it has not been made clear what detriment opposite sex couples suffer by not having access to civil partnerships."[42]

90. These justifications have been elaborated upon in two recent comments on the Bill. The first, provided by the Secretary of State for Culture, Media and Sport, during Second

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[35] See above, note 5.

[36] See above, note 5, Para 94.

[37] See above, note 5, Para 96.

[38] See above, note 5, Para 99.

[39] See above, note 5, Para 96.

[40] See above, note 5, Para 97.

[41] See above, note 5, Para 7.8.

[42] See above, note 5, Para 7.9.

Reading of the Bill, when specifically asked why opposite sex couples would not be permitted to enter into civil partnerships, was that "we do not feel that there is significant demand for the extension of civil partnerships in the way [the questioner] describes".[43] This justification can be described as the "*insignificant demand*" justification.

91. The second was provided by the Prime Minister during Prime Minister's Questions on 6 February 2013 when he stated that:

> *I am a marriage man. I am a great supporter of marriage. I want to promote marriage, defend marriage, encourage marriage, and the great thing about last night's vote is that two gay people who love each other will now be able to get married. That is an important advance. We should be promoting marriage, rather than looking at any other way of weakening it.*[44]

92. ERT understands this to mean a concern that there would either be a reduction in the number of marriages, or a reduction in the social value of the institution of marriage. This justification can be described as the "*promoting marriage*" justification.

93. The case law of the European Convention of Human Rights is clear that it is not sufficient merely that *a* justification be put forward, but that the differential treatment must "pursue a legitimate aim [and] ... there [must be] a reasonable relationship of proportionality between the means employed and the aim sought to be realised."

94. In respect of the first justification – the "insignificant demand" justification, no purported legitimate aim has been put forward or even suggested by the government. Indeed, ERT is unaware of any justification of "insignificant demand" having been put forward, let alone accepted, in the case law of the European Court of Human Rights as a legitimate justification.

95. ERT accepts that the second justification put forward, "protecting and promoting marriage" as understood in paragraph 45 may be considered a legitimate aim. However, we do not believe that there is a "reasonable relationship of proportionality between the means employed and the aim sought to be realised"[45] for two reasons:

    (i) Same sex couples will continue to have access to civil partnerships after the Marriage (Same Sex Couples) Bill comes into force. The government specifically rejected the option it had of removing the civil partnership regime, either by permitting existing civil partnerships to continue but to prohibit any further ones from taking place, or by converting all existing civil partnerships into marriage. ERT believes that it is inconsistent to say both that permitting opposite sex couples from entering civil partnerships would weaken marriage

[43] Hansard HC Deb, 11 December 2012, col 160.

[44] Hansard HC Deb, 6 February 2013, vol 558, col 269.

[45] See above, note 5, Para 96.

and that permitting same sex couples to enter either civil partnerships or marriage would not weaken marriage. To put it another way, if the ability of same sex couples to have the option of either marriage or civil partnership does not weaken marriage, then the same must be true of opposite sex couples. As a result of this inconsistency, there can be no "reasonable relationship of proportionality";

(ii) The government has produced no evidence to suggest that opening access to civil partnerships would weaken marriage. If the government's belief is that there is no "significant demand" for civil partnerships for opposite sex couples, then this would be evidence that the extension would not, in fact, weaken marriage or impact upon the number of opposite sex marriages that took place.

96. ERT is therefore of the view that the continued prohibition on opposite sex couples being able to enter into civil partnerships constitutes differential treatment on grounds of sexual orientation where there is no "reasonable relationship of proportionality between the means employed and the aim sought to be realised" and therefore would potentially constitute a violation of Articles 8 when taken in combination with Article 14 of the Convention.

97. ERT is aware that amendments to the Bill have been tabled by Rob Wilson, Julian Huppert, and Greg Mulholland (New Clauses 1 and 2) which would have the effect of opening civil partnerships to opposite sex couples. ERT therefore recommends that the Committee agree to these amendments and ensure full equality for all couples in access to civil partnerships.

Recommendation 10: The Bill should be amended as per New Clauses 1 and 2 tabled by Rob Wilson, Julian Huppert, and Greg Mulholland, i.e. the following new clauses should be inserted into the Bill:

New Clause 1
'(1) Part 1 of the Civil Partnership Act 2004 is amended as follows.
(2) In section 1, subsection (1), leave out "of the same sex".'.

New Clause 2
'(1) Part 2 of the Civil Partnership Act 2004 is amended as follows.
(2) In section 3, subsection (1), after "if—", leave out—
"(a) they are not of the same sex".'.