

# Equal Access to Marriage:

Ending the segregation of  
same-sex couples and  
transgender people in  
Scotland

The views expressed in this report are that of the authors, Cambium Advocacy, and do not necessarily represent the views of the Commission.

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# Acknowledgments

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# Foreword

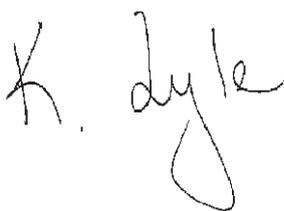
The Equality and Human Rights Commission Scotland has a remit to champion equality and human rights for all, work to eliminate discrimination and reduce inequality. Our daily task is to help Scotland develop in a way that values the ideals that most of us hold dear – respect, freedom, equality, dignity and fairness. These are also the core principles that underpin ‘human rights’ – the basic rights and freedoms that belong to us all. We work with policymakers, stakeholders and the Government to make sure that social policy and the law promote equality.

The Commission’s Scotland Committee support the introduction of Equal Marriage in Scotland and, in partnership with LGBT Youth Scotland and the Equality Network, hosted a symposium which looked at the political, legal, religious and social aspects of equal marriage from a Scottish perspective, examined the perceived barriers to equal marriage and identified possible solutions for legislators.

Scotland currently has a segregated family law system in which marriage is available only to mixed-sex couples, and civil partnership to same-sex couples. In England and Wales, however, the UK Government has announced a public consultation on proposals to hold civil partnerships on religious premises. It has also stated that sometime later it intends to consult on opening up civil marriage to same-sex couples and civil partnership to mixed-sex couples.

Because marriage and civil partnership are devolved issues, these proposals apply to England and Wales only.

We hope that this report will provide a springboard to moving this issue on in Scotland.



**Kaliani Lyle**

Scotland Commissioner, Equality and Human Rights Commission



# Executive Summary

Scotland currently has a segregated system of family law. Same-sex couples do not have the legal right to marry and are restricted to civil partnership. At the same time the law excludes mixed-sex couples from civil partnership.

To fully consider how this segregation could be addressed and equality brought to the institution of marriage, the Equality and Human Rights Commission Scotland, in conjunction with the Equality Network and LGBT Youth Scotland, held an Equal Marriage Symposium.

The report from the Symposium, supported by wider research and interviews with key stakeholders, considered a number of key questions:

- Where is Scotland and the UK in relation to equal access to marriage?
- Why change and why change now?
- What are the options for change?
- How should change happen?
- What is the best way forward?

This report makes a series of recommendations aimed at legislators at Holyrood and Westminster, and for campaigners.

## Where are we now?

Section 1 looks at the changing legal status of same-sex relationships in Scotland, the UK and Europe.

Progress towards equal access to marriage in Scotland and the UK has been steady since 2003. The Civil Partnership Act 2004 allows same-sex couples to have their relationships legally recognised, and for the legal impacts of these relationships to be almost identical to marriage.

However, this has not satisfied demands for equality, and political and public support in Scotland for same-sex marriage continues to grow. Marriage and civil partnership law is devolved, although some consequences of marriage and civil partnership are reserved. The Scottish Government has so far insisted that any further legal change must take place at Westminster.

## Why Change?

### Discrimination and public attitudes

It is argued in Section 2 that current legislation discriminates against same-sex couples and transgender people, and has significant detrimental impacts. Same-sex couples cannot involve their faith in the process for formalising their relationships. Transgender people are required to divorce if they wish to gain full gender recognition, as the law does not allow

same-sex marriage or a mixed-sex civil partnership. In addition there is evidence to suggest that civil partnerships are seen as something less than marriage, with less value and status.

At the same time, public attitudes on same-sex relationships generally and same-sex marriage in particular have become steadily more supportive since the late 1980s. Polls show that in Scotland 53% supported same-sex marriage in 2006, this had grown to 62% in 2009. Support is more marked within younger age groups and therefore likely to continue to grow as they replace older cohorts. Evidence also shows a clear majority of voters across all the main political parties in Scotland support same-sex marriage.

Therefore, while discrimination provides a powerful case for change, growing public support gives a useful context for delivering it.

### Religious Attitudes

Marriage has traditionally contained a religious element which has been central to the institution. As a result religious opinion is often central to the debate surrounding same-sex marriage.

However, evidence from the Scottish Social Attitudes Surveys shows that in all of the major denominations in Scotland there is a clear majority supportive of same-sex relationships and marriage.

Moreover, within and across church bodies, a range of views can be found, from the Religious Society of Friends (Quakers) who formally support same-sex marriage, through the Church of Scotland which has an ongoing debate on its

approach to same-sex relationships in general, to the Catholic Church whose teachings unambiguously view homosexual acts as 'disordered'.

The report therefore concludes that religious communities need to be consulted and their views given weight. However, the evidence shows that views within and across congregations and church bodies are diverse, and no one viewpoint should be taken as 'religious opinion'.

### Religious Freedom

Two aspects of religious freedom are explored. On the one hand there are those who feel celebrants would be unable to act in accordance with their faith if same-sex marriage was made legal. On the other hand there are same-sex couples of faith who are excluded from involving that faith in the formalisation of their union. To address these conflicting aspects a 'conscience clause' is proposed. This could allow church bodies, individual churches, and celebrants the right to refuse to marry same-sex couples. This would enable faith communities to act in accordance with their doctrines, and same-sex couples to involve religion in their marriage.

**Recommendation 1: Current law discriminates against same-sex couples and transgender people with significant detrimental effect. To address this discrimination a change in the law is required.**

**Recommendation 2: The law requires to change in order to increase religious freedoms and allow same-sex couples to commit to their relationships in a religious**

**ceremony. Any change in the law should include a ‘conscience clause’ which gives those churches and celebrants who do not wish to carry out same-sex marriage the ability to opt out.**

### **Options for Change**

There are many examples across the world of different approaches to same-sex relationships. The ‘equivalence approach’ is common, where civil partnerships are open to same-sex couples, and which have various levels of legal consequence making them, more or less, the equivalent of marriage. In many cases, such as in Norway and the Netherlands, this approach has been followed by equal access to marriage as the equivalence approach failed to address wider cultural and religious issues. There is no reason to believe that Scotland or the UK will differ from these international comparators and be satisfied with legal equity in a segregated system – cultural and religious drivers will continue to fuel the demand for change.

There are a range of options for change in Scotland and the UK. The majority of participants at the Symposium, and in a recent survey of LGBT people, favoured marriage being available to same-sex couples and civil partnership being opened up to mixed-sex couples. This appears to be the most rational route to deliver equality.

**Recommendation 3: In Scotland, the continued focus should be on campaigning to have legislation introduced which allows same-sex marriage and includes the ability to**

**carry out civil partnerships on religious premises.**

**Recommendation 4: Legislation should be introduced to allow same-sex couples to marry. Full consideration must be given to what other measures need to be taken to complement this legal change and ensure all aspects of discrimination are addressed.**

**Recommendation 5: To ensure the widest possible choice, civil partnership should be retained alongside equal access to marriage.**

**Recommendation 6: The Westminster government should legislate to open civil partnership to mixed-sex couples.**

### **How Should Change Happen?**

Internationally, equal access to marriage has been achieved in a variety of ways. In some cases this has been through legal challenge, in others it has been as a result of pressure on legislatures.

In the UK, the Equal Love campaign has applied to the European Court of Human Rights on the basis that having a segregated system violates the European Convention on Human Rights. At Westminster, incremental advances are being made and a consultation on allowing civil partnerships to be carried out on religious premises should shortly be underway. However, the litigation approach is not certain to succeed in the near future, while the Westminster proposals will not, as they stand, deliver full equality.

The report therefore recommends that proposals for legislation are brought before the Scottish Parliament.

The Scottish Parliament has the power to legislate for equal access to marriage. However, certain aspects of the legal consequences of marriage are reserved to Westminster such as tax, immigration and pensions which will require some degree of co-operation.

**Recommendation 7: Priority should be given to campaigning for the Scottish and UK Parliaments to change the law to allow same-sex marriage and to allow mixed-sex couples to enter into a civil partnership.**

**Recommendation 8: Following the election in May 2011 an Equal Access to Marriage (Scotland) Bill should be brought before the Scottish Parliament that would allow same-sex marriage in Scotland.**

An Equal Access to Marriage (Scotland) Bill would open up marriage to same-sex couples. However, consideration will need to be given to how the Bill would deal with the issue of transgender people having to divorce to gain full gender recognition. As well as considering how the issue could be dealt with in Scottish legislation the Scottish Government may have to work with Westminster to develop a mechanism to address the issue. In addition, an amendment would need to be made to the Civil Partnership Act 2004 to allow for Scottish same-sex marriages to be treated as civil partnerships in England and Wales and for reserved matters in Scotland.

If the Scottish Government does not bring forward a Bill, consideration should be given to a Committee Bill or a Member's Bill being introduced at Holyrood.

**Recommendation 9: In advance of an Equal Access to Marriage (Scotland) Bill becoming law the Scottish Government should work with the Westminster Government to ensure a mechanism is in place that means a transgender person living in Scotland does not have to divorce, or end their civil partnership, to gain full gender recognition.**

**Recommendation 10: Following the 2011 election, the Scottish Government should bring forward legislation to allow same-sex couples to marry.**

**Recommendation 11: If the Scottish Government fails to introduce legislation to allow same-sex couples to marry, the possibility of (a) a Committee Bill or (b) a Member's Bill should be explored.**

**Recommendation 12: Regardless of the mechanism used to create equal access to marriage, a statutory instrument should be used to amend the Civil Partnership Act 2004. This would allow Scottish same-sex marriages to be recognised as civil partnerships in Scotland for reserved purposes and in England and Wales for all purposes.**

## **A Way Forward**

There is clearly a great deal of momentum in the campaign for equal access to marriage. Consolidating and building political and parliamentary support is essential. This is of particular significance in the pre and immediate post-election period, both to encourage a new Government to come forward with a Bill, and to identify new supporters in Parliament.

There is a real need to keep options for change open and preparations should account for the possibility of a Government Bill, a Committee Bill or a Member's Bill. Moreover, it is important that whatever option is taken it addresses the wider consequences of passing legislation in the Scottish Parliament.

Any Equal Access to Marriage Bill should contain a conscience clause which enshrines in law the rights of those churches and celebrants who do not wish to carry out same-sex marriage, the ability to opt out.

## **Conclusion**

The current system segregates people into separate institutions based on their sexual orientation and is therefore discriminatory. That this discrimination has detrimental impacts is evident. Therefore, for those who want a society where people are not segregated and stigmatised because of their sexual orientation or gender identity, there is a clear need for change.

What is required first and foremost is the political will to change, and the willingness of politicians and political institutions to take on the task of delivering this change. A significant and growing majority of the Scottish public, 62%, support same-sex marriage and this majority is likely to continue to grow over the coming years. Therefore politicians should have nothing to fear from a widespread backlash from voters.

Only change that fully tackles the discrimination against transgender people, which maintains, extends and equalises religious freedoms, and ends the discrimination inherent in the terminology of a segregated system, should be considered.

An Equal Access to Marriage (Scotland) Bill dealing with all of these aspects should be introduced in the Scottish Parliament following the election in May.

# Introduction

“Scotland has in the past shown that we and our government can be a pioneer in equalities legislation and in equalities practice, and I think that encourages us, that is part of the reason we are here today, to make the challenge to our legislators and also to draw on that strength.” (Angela O’Hagan, Symposium Chair)

Scotland currently has a segregated system of family law. Couples of the same sex do not at present have the legal right to marry and are restricted to civil partnership. At the same time the law excludes mixed-sex couples from civil partnership.

The Equal Marriage Symposium, organised by the Equality and Human Rights Commission Scotland in conjunction with the Equality Network and LGBT Youth Scotland, brought together a wide range of experts, opinion formers, representatives and individuals to debate the current situation and examine ways in which a non-segregated system could be devised and implemented, bringing equality to the institution of marriage.

The Symposium included contributions in a main session which looked at:

- Why the Symposium was taking place and consideration of what legislation needs to change
- Equal marriage as a matter of religious equality
- The international perspective
- An overview of the political landscape

Panel question and answer sessions included the consideration of what equal marriage should look like, a contribution from representatives from political parties, and a discussion on the way forward to achieve equal marriage in Scotland.

Participants attended workshops considering:

- Defining the goal
- The legal changes required
- Generating public and political support
- Implications for faith/religion
- Young people’s perspectives

This report draws on and highlights the key themes from the day and is supported by desk-based research and interviews with some key stakeholders. In writing this report it has been the intention of the authors to extract the main themes from the Symposium and clearly set out the arguments for creating equal access to marriage in Scotland.

Building on these themes and arguments, the report contains a series of recommendations. These recommendations are primarily aimed at legislators in the Scottish and UK Parliaments. There are also some recommendations aimed at those campaigning for equal marriage in Scotland. Finally, the report suggests a way ahead aimed at helping achieve gender-neutral marriage in Scotland.



# Section 1: Where Are We Now?

Same-sex couples in Scotland can enter into a civil partnership but cannot get married. Civil partnership has virtually the same legal rights as marriage with some minor differences. The law does not allow a religious element to a civil partnership registration ceremony (although this is about to change in England and Wales where, as a result of an amendment to the Equality Act 2010, civil partnerships will be able to be formalised on religious premises). Married transgender people who wish to have full gender recognition are required to divorce before a full gender recognition certificate can be issued.

It is important to look at the current situation in the context of developments with the European Convention on Human Rights (ECHR) before considering the key developments in Scotland and the UK, the current political context and changing public opinion.

## **ECHR and the European Court Ruling**

In Austria in 2004 two gay men – Schalk and Kopf – applied to the European Court of Human Rights (ECtHR) on the basis that Austria’s failure to legally recognise same-sex marriages constituted a violation of their Human Rights.<sup>1</sup>

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**1** Specifically – Article 12 of the European Convention on Human Rights (ECHR) (men and women of marriageable age have the right to marry and to found a family). They also complained under Article 14, (rights and freedoms set forth in the Convention should be secured without discrimination), taken in conjunction with Article 8 (there should be no interference by a public authority with the exercise of the right to respect for private and family life) see Council of Europe The European Convention on Human Rights (1950)

The basis of their application was that they had been discriminated against on account of their sexual orientation, since they were denied the right to marry. In June 2010 the ECtHR ruled against both applications. The Court did however note that:

**“There is an emerging European consensus towards legal recognition of same-sex couples. Moreover, this tendency has developed rapidly over the past decade. Nevertheless, there is not yet a majority of States providing for legal recognition of same-sex couples.”<sup>2</sup>**

The inference in this element of the judgement is that the ECtHR may be inclined to find in favour of such applications should there be a majority of states which legally recognise same-sex couples. Professor Robert Wintemute of Kings College London, who acted as Counsel for the non-governmental organisations in the case, believes that, overall, the judgement is a positive one:

**“... for the first time same-sex relationships are recognised as family life. Its is a significant step forward that the court found that a cohabiting same-sex couple, living in a stable partnership falls within the notion of family life just as the relationship of a different-sex couple in the same situation would.”<sup>3</sup>**

During his presentation Professor Kenneth Norrie also highlighted other benefits of the judgement:

**“I think the case is hugely positive, and there are a number of positives in the judgement. We got recognition of family life which was hugely important. We also got recognition that in due course, as different countries open up marriage to same-sex couples, the court may require it of all countries. In addition, for those countries which have opened up marriage the court said that for those countries, Article 14, the non-discrimination provision, applies. In other words, if you open marriage to same-sex couples you have to do it in a non-discriminatory fashion.”**

Clearly the situation is not static in Europe. Indeed, with the inference from the ECtHR judgement above, it may be that in time ECHR signatories will be required to introduce legislation that applies equally to people regardless of their sexual orientation.



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**2** European Court of Human Rights: Case of Schalk and Kopf v Austria, Judgement, Strasbourg June 2010

**3** Cambium, interview with Professor Robert Wintemute (January 2011)

In Section 3 (A) we look further at developments abroad and for lessons which may be useful in the Scottish context.

### Scottish and UK Developments

Although marriage law is devolved to Scotland, the legal change, establishing civil partnership, was made at Westminster. Below are the key events that have brought us to the situation we have today.

**In 2003** Patrick Harvie, a Green Party MSP, introduced a Member's Bill proposal in the Scottish Parliament. He proposed that the Civil Registered Partnerships (Scotland) Bill would establish civil partnership registration for same-sex and mixed-sex couples and provide registered partners with legal protection, rights and responsibilities similar to those provided to married couples. The Bill did not progress but helped to put civil partnership on the political agenda.

**In 2004** the Scottish Executive confirmed it would seek the Scottish Parliament's agreement to include Scottish provisions in a UK Civil Partnership Bill<sup>4</sup>. The UK's Civil Partnership Act 2004<sup>5</sup> was passed and became law in 2005.

**In 2005** the Gender Recognition Act 2004 made provision for the legal recognition of

transsexual people's true gender. Following application to the Gender Recognition Panel, and meeting several criteria, a person can legally change their gender. However, if that person is married or in a civil partnership this is not the case. As the UK Government refuses to allow same-sex marriages to be created by gender recognition, the Gender Recognition Panel can only issue them with an **interim** gender recognition certificate. Interim recognition does not change a person's legal gender. The person can only obtain full gender recognition, with legal effect, by ending their marriage.

The same rule applies in a civil partnership. It is necessary to apply to court to dissolve the civil partnership before full gender recognition is granted, otherwise gender recognition would create a mixed-sex civil partnership, which the UK Government also refuses to allow.<sup>6</sup>

**In 2009** two petitions were submitted to the Scottish Parliament's Public Petitions Committee:

Petition 1239 (Nick Henderson on behalf of LGBT Network), calling on the Scottish Parliament to urge the Scottish Government to amend the Marriage (Scotland) Act 1977 to allow two persons of the same sex to register a civil marriage and a religious marriage if the relevant religious body consents.<sup>7</sup>

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<sup>4</sup> Scottish Executive News Release Responses to Civil Partnerships (2004)

<sup>5</sup> The Civil Partnership Act 2004 <http://www.legislation.gov.uk/ukpga/2004/33/contents>

<sup>6</sup> Gender Recognition A Briefing from the Equality Network (2009) <http://www.equality-network.org/Equality/website.nsf/webpages/5EE4DEF17100142280256FE40035CC90> (accessed February 2011)

<sup>7</sup> PE1239 <http://www.scottish.parliament.uk/business/petitions/docs/PE1239.htm> (accessed February 2011)

Petition 1269 (Tom French on behalf of the Equal Marriage Campaign), calling on the Scottish Parliament to urge the Scottish Government to amend legislation to allow same-sex marriage and mixed-sex civil partnership.<sup>8</sup>

The Committee closed the second petition and considered the issues as part of petition 1239. After a range of correspondence between the Committee, stakeholders and the Scottish Government, the Committee closed petition 1239 in January 2011 on the grounds that:

**“The Scottish Government has repeated on six successive occasions that it has no plans to change the law in this area and that it is not a priority. In addition, in response to specific points raised by the Committee, the Scottish Government has responded that it does not consider it necessary to conduct research to ascertain how the constitutional difficulties attached to same sex marriage can be resolved and that it does not consider it helpful to establish an advisory committee at this point in time.”<sup>9</sup>**

**The Equality Act (2010)** includes (in section 202) a provision for civil partnership ceremonies to be held on religious premises. This applies to England

and Wales only. As this report was being written, the UK Government announced that the part of the Act relating to this is to be commenced. The change will be entirely voluntary and will not force any religious group to host civil partnership registrations if they do not wish to do so.<sup>10</sup>

**In June 2010** the Equality Network published the results of a survey on marriage and civil partnership. Of more than 400 LGBT respondents, only 6% were happy with the law as it stands. 8% thought that allowing civil partnerships to be conducted by religious organisations would be the answer. 85% said marriage should be opened to same-sex couples. 54% thought this issue is a high priority, and a further 31% that it's a medium priority<sup>11</sup>.

**In February 2011** the Westminster Government announced it had a desire to move towards equal civil marriage and partnerships, and will be consulting further on how legislation can develop.

### **Political Context**

Legislative developments dealing with discrimination over the past few years are a useful barometer of political opinion in Scotland and the UK. Tim Hopkins of the Equality Network noted that:

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**8** PE1269 <http://www.scottish.parliament.uk/business/petitions/docs/PE1269.htm> (accessed February 2011)

**9** Scottish Parliament Official Report (January 2011) <http://www.scottish.parliament.uk/s3/committees/petitions/or-11/pu11-0202.htm#Col3365> (accessed February 2011)

**10** Government Equalities Office, New push for LGB and T equality will allow civil partnerships in religious buildings Press Release (Feb 2011)

**11** Equality Network Marriage Survey (2009)

**“Recent legislative developments at both a Scottish and UK level have tackled a number of areas of discrimination. Extension of legislation to tackle age and gender [discrimination] at a UK level, the Hate Crimes Bill passed in the Scottish Parliament and the recognition of male rape in the Sexual Offences (Scotland) Act have all been very positive, and leave the fact that same-sex couples cannot marry as the last area of discrimination needing attention.”<sup>12</sup>**

At UK level, equal access to marriage is party policy of the Liberal Democrats, whilst the Conservatives’ 2010 ‘equalities manifesto’ said they would consider the case for allowing civil partnerships to be called, and classified as, marriage. During his leadership campaign the UK Labour leader Ed Milliband said:

**“Separate but equal” is not good enough and PinkNews.co.uk’s own recent poll demonstrated the huge support in the LGBT community for a right to marry. The cruel consequence of the current compromise is trans people forced to divorce their partners before they could be legally recognised in their new gender. I want to see heterosexual and same-sex partnerships put on an equal basis and a Labour Party that I lead**

**will campaign to make gay marriage happen.”<sup>13</sup>**

In Scotland the Green Party joins the Scottish Liberal Democrats in adopting equal access to marriage as party policy whilst Scottish Labour, the Conservatives and the SNP have no official party position on the issue. At the Symposium there was recognition that, whilst there are supporters of equal access to marriage across the political parties, there was still a great deal of work to be done to achieve it. Patrick Harvie commented that:

**“... there’s a role for those of us in every political party who support equal marriage to make sure that we lobby as hard as we can within our political parties and lobby within our constituents, to be proud of the fact that we support equal marriage and try and change opinions which still exist [against equal marriage].”**

Although having no party position on equal marriage, the SNP Government does not favour a change in the law:

**“The approach to the Civil Partnership legislation was that it should offer same sex couples the same rights and responsibilities across the UK and we would not wish to depart from that state, so any change would have to be made across the UK.”<sup>14</sup>**

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**12** Cambium, Interview with Tim Hopkins (December 2010)

**13** Milliband, E. Labour must listen and lead in the fight for LGBT equality (2010). <http://www.pinknews.co.uk/2010/08/25/comment-labour-must-listen-and-lead-in-the-fight-for-equality/> (accessed February 2011)

**14** Scottish Government, Letter to Scottish Parliament Public Petitions Committee (August 2009) <http://www.scottish.parliament.uk/s3/committees/petitions/petitionsubmissions/sub-09/09-PE1239K.pdf> (accessed February 2011)

Nick Henderson of the LGBT Network expressed frustration at this position:

**“The Government’s position for the last two years has been to put their fingers in their ears and their head in the sand, not wanting to engage with the issue, or with same-sex couples, or the LGBT community in general.”** And added **“[we] have to make sure that the next Scottish Government realise that we are not a community that can be ignored, this is an issue we are passionate about and we are not going to sit there and let ourselves be ignored like this government has.”**

Simon Stockwell, Head of the Family and Property Law team in the Scottish Government confirmed there is currently no inclination to legislate on the issue. The preference would be for legislation to be introduced at Westminster which would, he felt, avoid complications regarding reserved and devolved issues. This is explored in detail later in the report. However, it is Simon’s belief that:

**“It is down to political will. If after the elections we discover there is a political will [to legislate on equal access to marriage], the civil servants will go away and do it. Whether we do it at Westminster or the Scottish Parliament will depend on where the political will lies. If you gave me the ideal choice, I would probably want to do it for Westminster, I think we can sort it... if the political will isn’t there at**

**Westminster, that option may not be available to us.”**

It would appear then that while there is some political will to support changes allowing equal access to marriage, at both Scottish and UK levels, it is not yet clear whether we will see government-led legislation to allow equal access to marriage. However, as is the case internationally, this situation is not static and approaches to shaping this political and legislative context are covered in section 4.

### **Public Opinion**

There has been growing public acceptance of same-sex relationships in the last two decades. The Scottish and British Social Attitudes Surveys show a substantial increase in those who feel same-sex relationships are “rarely/never wrong”. The surveys show that in Scotland in 2006, 53% of people agreed that same-sex couples should be allowed to marry while 21% disagreed.<sup>15</sup>

There is therefore a significant and growing majority of people who see nothing wrong with same-sex relations generally, or equal access to marriage in particular. Public attitudes are explored in detail in section 2(B).

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<sup>15</sup> NatCen and ScotCen, British/Scottish Social Attitudes Surveys, and presentation from Prof. Curtice.

## Section 2: Why Change?

There are compelling reasons for addressing the current legal situation as it relates to same-sex marriage. The discrimination experienced by same-sex couples and transgender people provides a strong basis for changing the law, whilst shifting public and religious attitudes provide a supportive context for such change.

### **(A) Discrimination and Detriment**

Participants were clear that, as it stands, the law discriminates against, and is detrimental to, same-sex couples and transsexual people.

Tim Hopkins commented that:

**“[Civil Partnerships] were specifically introduced to deny same-sex couples marriage because there were too many opponents, for example, the Church of England, and the UK government six years ago felt we can’t go as far as same-sex marriage, so we’ll introduce civil partnership. It is an inherently second-class status. Some people feel it’s better, that’s fine, but the segregation is what causes the discrimination.”**

Laura McLachlan of LGBT Youth saw the struggle for same-sex marriage as a fight for equal rights:

**“I agree with fighting for the right to choose either a marriage or civil partnership. I would love to say I’m legally married. I agree we should be able to have the choice and wouldn’t be standing here if I didn’t want to change what is not right. Not only do I agree, but I’m fighting for what others want and ultimately equality is about choice for everyone.”**

It was argued that this discrimination led to various forms of detriment.

### **Religious detriment**

Same-sex couples cannot marry and cannot have their legal relationship solemnised by a religious or humanist celebrant. Civil partnerships can only be performed by a registrar. The ceremony cannot have any religious content and cannot take place on religious premises. An amendment to the Equality Act 2010 will allow civil partnership ceremonies in England and Wales to take place on religious premises, although the section of the Act relating to this provision has not

been commenced. Following a 'listening exercise' the UK Government announced on 17th February 2011 that this part of the Act will be commenced. The Scottish Government has no plans to extend this to Scotland.

For the Rev Sharon Ferguson it is a matter of involving God in committing to her relationship:

**“I believe that God is love and therefore love can only come from God, therefore for me, making a commitment entering into a covenantal relationship with another person should be done in the eyes of God.”**

The exclusion of religion from the process of committing to a relationship is a fundamental issue for those of faith. Therefore, this issue is more fully assessed later in this section in the context of the debate on religious freedom.

### **Detriment to transsexuals**

Under section 9(1) of the Gender Recognition Act 2004, where a full gender recognition certificate is issued to a person, the person's gender becomes for all purposes the acquired gender. This means that a transsexual who has obtained a certificate under the Act will be entitled to marry or enter a civil partnership according to his or her acquired gender.

The key issue, however, is that transgender people must divorce, or end their civil partnership, to gain full gender recognition. This is clearly detrimental and is direct discrimination. During the debate

James Morton of the Scottish Transgender Alliance argued that, not only should there be legislation to introduce equal marriage, but that it will not be truly equal unless the requirement to divorce in the Gender Recognition Act is dealt with:

**“It simply isn't equal marriage unless there is an amendment to the Gender Recognition Act. If the issue of transsexual requirement to divorce is not dealt with, we have not implemented equal marriage.”**

In addition transgender people who are required to divorce and enter a civil partnership may have their pensions adversely affected. This is set out below.

### **Practical and social detriment:**

Discrimination was further evidenced in findings from an Equality Network's survey of 427 LGBT people. When asked whether they were treated equally, with the same respect that married couples were, 58% of respondents in a civil partnership said “no”.<sup>16</sup>

Tim Hopkins expanded on this finding:

**“The kinds of discrimination faced were things like, ‘we're not going to recognise your civil partner as your next of kin in hospital’. Work colleagues bought cards and presents for colleagues who got married and ignored a colleague who got a civil partnership. Expressions of distaste when people said they were in a civil partnership or people saying, ‘it's not a proper marriage.’**

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**16** Equality Network, Marriage Survey, (2009)

**These are the experiences people reported. Real discrimination is going on. If same-sex couples could marry, that is not going to stop discrimination, but it removes an excuse, the excuse that a civil partnership is not really a marriage, so we don't have to treat you equally.”**

In addition there are anomalies in how some in a civil partnership are treated in relation to payments of survivor's benefits and state final salary schemes.<sup>17</sup>

Many occupational pension schemes do not, as yet, recognise same-sex, or civil partners or unmarried couples.

### **Summary and Recommendation 1**

The establishment of civil partnerships has created a segregated system which discriminates against LGBT people. From this flows a clear detriment. Same-sex couples are prevented from acting in accordance with their faith thus limiting their religious freedom.



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**17** There are some differences between how those in civil partnerships and those who are married are treated in relation to pension provision. In terms of those in a civil partnership, state final-salary pension schemes will only pay out survivor's benefits for years of service after 1988, although widow's pensions in most schemes, and widower's pensions in some, are based on years of services starting from earlier dates. In addition if an occupational pension scheme is 'contracted in' to the State Second Pension Scheme, a surviving civil partner must be treated as a surviving spouse, but only in relation to their partner's service after the amended Employment Equality (Sexual Orientation) Regulations came into force – December 2005. There is not the same right as in other schemes to have benefits calculated on service from 1988. Benefits are calculated on service from December 2005, irrespective of the date the member registers a civil partnership.

Moreover, requiring people to divorce from an existing marriage before their gender can be recognised has an obvious detrimental impact, not only on that individual but their husband/wife and wider family members. Being excluded from using the term ‘marriage’ bars couples from the meaning attached to this and their relationships are subsequently viewed, and often treated, as something less. The detriment can also be financial where in some cases civil partners will lose out on pension payments where married couples would not. Such detriment to same-sex couples and transgender people provides a powerful case for change.

**Recommendation 1: Current law discriminates against same-sex couples and transgender people with significant detrimental effect. To address this discrimination a change in the law is required.**

## **(B) Changing Public Attitudes**

**“... we are in a society where we don’t believe there is anything wrong with same-sex relationships, it is a recent climate of opinion, but it is probably one that is going to continue further.” (Prof Curtice)**

This section deals with changing public attitudes towards same-sex relationships and marriage. It is based largely upon Professor Curtice’s presentation to the symposium which is in turn based on analysis of data from the Scottish Centre for Social Research (ScotCen) and the National Centre for Social Research (NatCen) Social Attitudes Surveys. Additional statistics from Gallup, ICM/Observer and Populus/Times polls are also used.<sup>18</sup>

The main findings are:

- There is an increasing acceptance of homosexuality generally and same-sex marriage in particular,
- Opposition to same-sex relationships is concentrated within the older age groups,
- A majority of voters for each of the main political parties support same-sex marriage.

### **Change over time**

Figure 1 shows changing public attitudes towards same-sex relationships in Britain since 1983.

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**18** Gallup, Gay Rights Poll (2004)

<http://www.gallup.com/poll/13561/Gay-Rights-US-More-Conservative-Than-Britain-Canada.aspx>

ICM/Observer, Sex Uncovered Poll (2008)

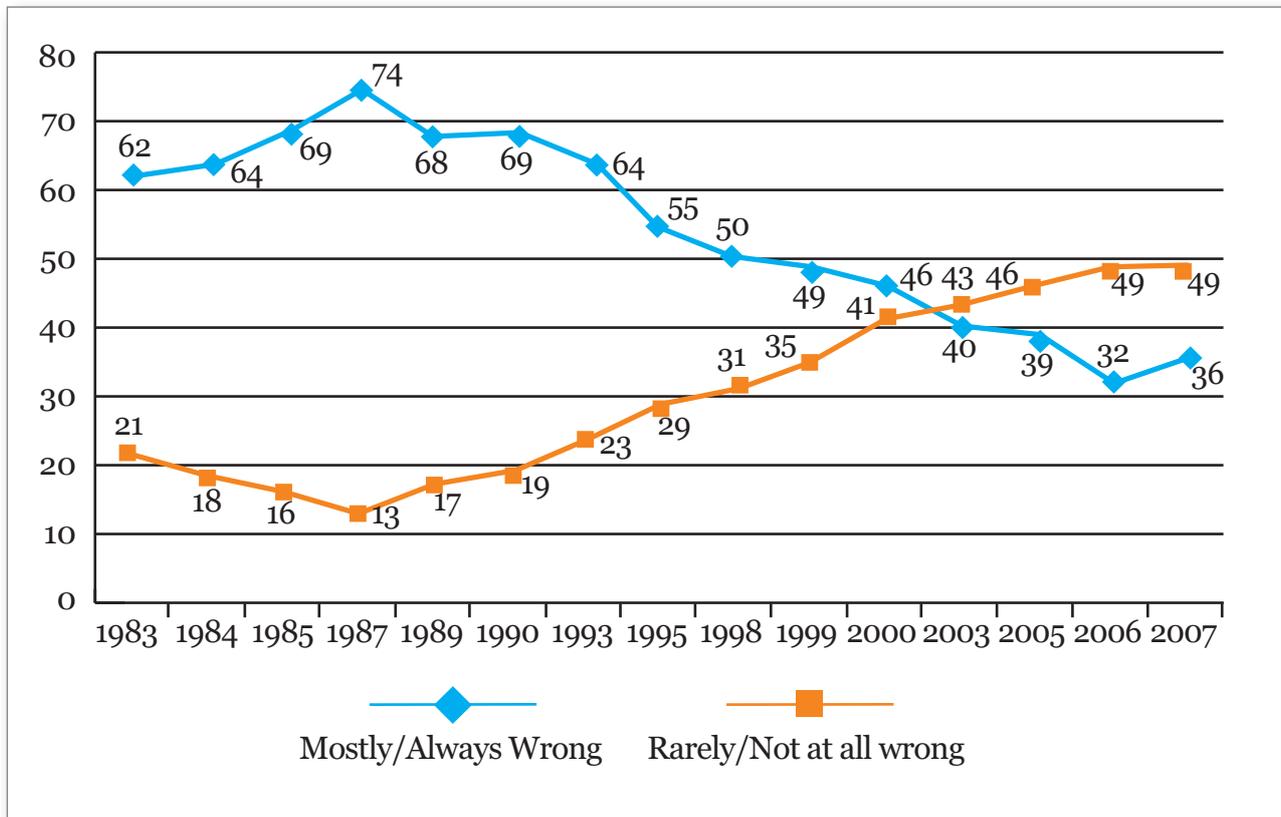
<http://www.guardian.co.uk/lifeandstyle/2008/oct/26/relationships>

Populus/Times, Gay Britain Poll (2006)

<http://www.populuslimited.com/the-times-the-times-gay-britain-poll-100609.html>  
(all accessed Feb. 2011)

Figure 1

Are relationships between adults of the same sex “wrong/mostly wrong” – or “rarely/not at all wrong”? – Britain, 1983-2007 (%)



Source: NatCen,/ScotCen Social Attitudes Surveys reproduced from Prof. Curtice

It can be seen that from 1987 there has been a steady shift in attitudes and, for the first time, from around 2002, there was a majority who felt there was nothing wrong with same-sex relationships.<sup>19</sup>

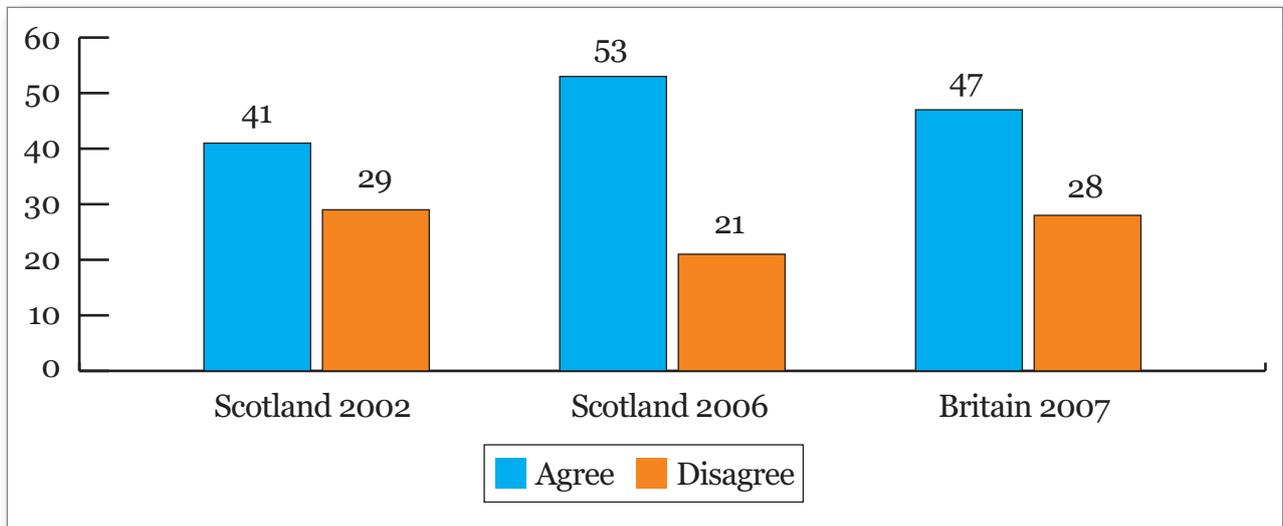
Figure 2 shows that this acceptance of same-sex relationships has been reflected

in growing support for same-sex marriage. Since 2002 more people supported same-sex marriage than opposed it, this support continued to grow to 2006. These findings from NatCen are reflected in data from other polls showing 61% in the UK (62% in Scotland) supported same-sex marriage by 2009 (Figure 3).

<sup>19</sup> NatCen, press release Scotland takes relaxed attitude to sex (Feb 2011) <http://www.natcen.ac.uk/media-centre/press-releases/2011-press-releases/scotland-takes-relaxed-attitude-to-sex>

Figure 2

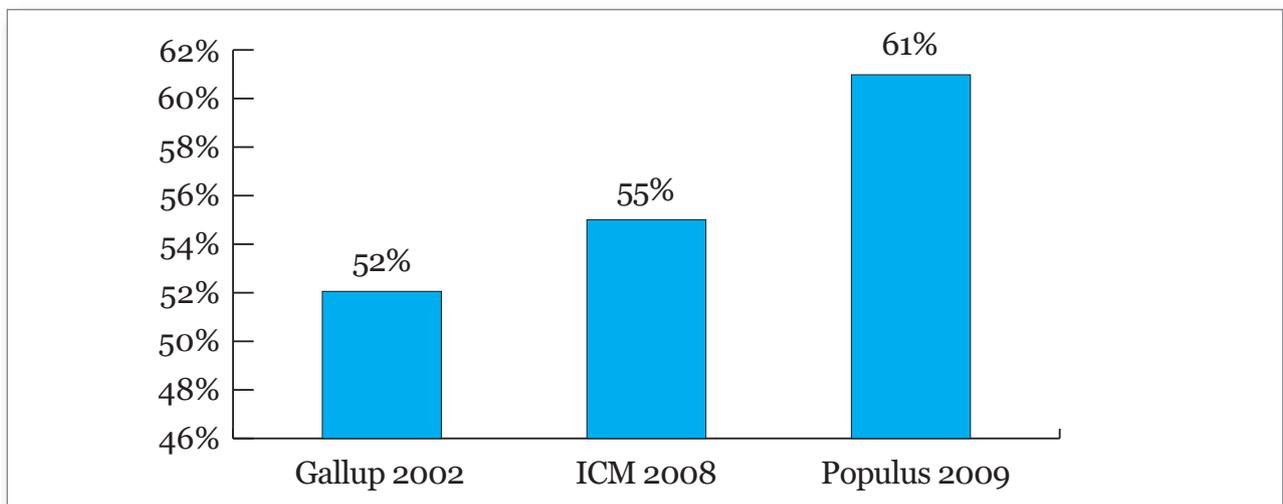
Same-Sex couples should be allowed to marry 2002-2007 (%)



Source: Scotcen/NatCen/Curtice

Figure 3

Support for same-sex marriage – various polls UK, 2002-2009 (%)



Source: see footnote 18

**Age**

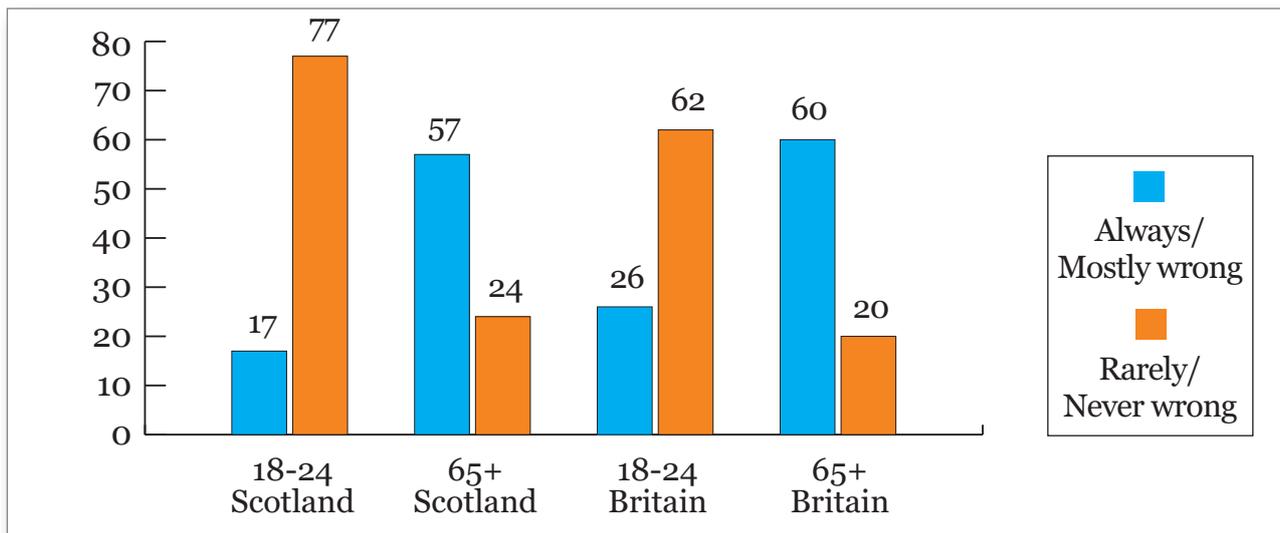
Acceptance of same-sex relationships is more marked within younger age groups. Figure 4 shows 77% of the 18-24 age group felt same-sex relationships are “rarely or not all wrong”, while a Populus poll of 2009 showed the 25-35 age group most supportive slightly ahead of the 18-24 age group.<sup>20</sup>

<sup>20</sup> Populus, *op cit.*

Figure 4

Attitudes towards same-sex relations by age group 2007 (%)

Are relationships between adults of the same sex “wrong/mostly wrong” – or “rarely/not at all wrong”?



Source: NatCen/Scotcen/Curtice

Professor Curtice therefore argued that, while events can change opinion, such as the HIV scare in the early 1980s, it was likely that ‘all things being equal’, we should expect acceptance of same-sex marriage to continue to grow as younger cohorts replace older ones:

**“... there is plenty of reason to believe that attitudes will continue to become less censorious... there is a clear relationship between attitude and age ... [but] it is not the case that people become more censorious of same-sex relationships as a result of getting older.”**

It is also argued that the changing context within which we grow up plays an important part in shaping attitudes. The over 65s grew up in a time where homosexuality was illegal. They are also less likely than younger cohorts to know

someone who is openly gay. It is such factors which shape attitudes throughout our lives. It is therefore unlikely the younger cohorts will become more homophobic as they age, and likely the trend of increased acceptance will continue.

### How does Scotland compare

Figure 5 shows attitudes in Scotland were more supportive of same-sex relationships than in England. It would appear there is very little difference between attitudes in Scotland and the UK generally.

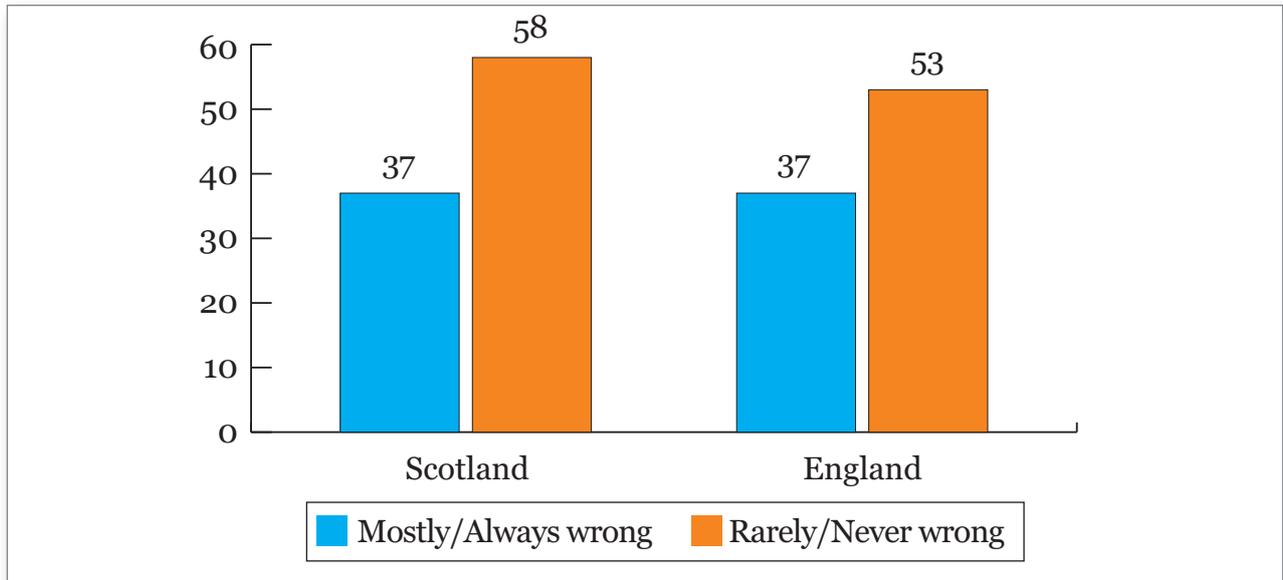
This led Professor Curtice to conclude that:

**“In so far as a politician believes the law should conform to public opinion, there is no reason why the law in Scotland should be different from that of England and Wales...” (Prof Curtice)**

Figure 5

Attitudes towards same-sex relations by country 2010 (%)

Are relationships between adults of the same sex “wrong/mostly wrong” – or “rarely/not at all wrong”?



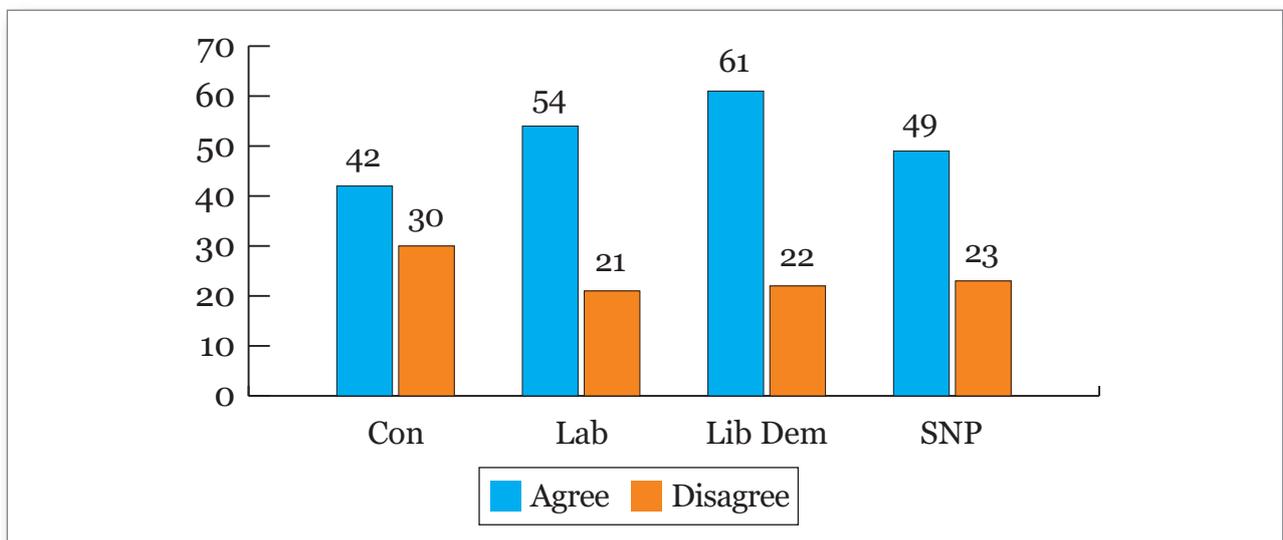
Source: NatCen/ScotCen/Curtice

**Party affiliation**

Figure 6 shows that among party voters there is a clear majority in favour of same-sex marriage in every party.

Figure 6

Same-sex couples should be allowed to marry by party, Scotland 2006 (%)



Source: NatCen/ScotCen/Curtice

In a message to politicians Professor Curtice pointed out:

**“So in truth it’s not clear any party necessarily has much to worry about so far as their own ideological flocks are concerned... Therefore, my conclusion is, and it’s not very often I give politicians quite such stark advice is that, well, there probably isn’t much reason you shouldn’t act already, given the state of public opinion, but in the not too distant future you won’t have an excuse at all.”**

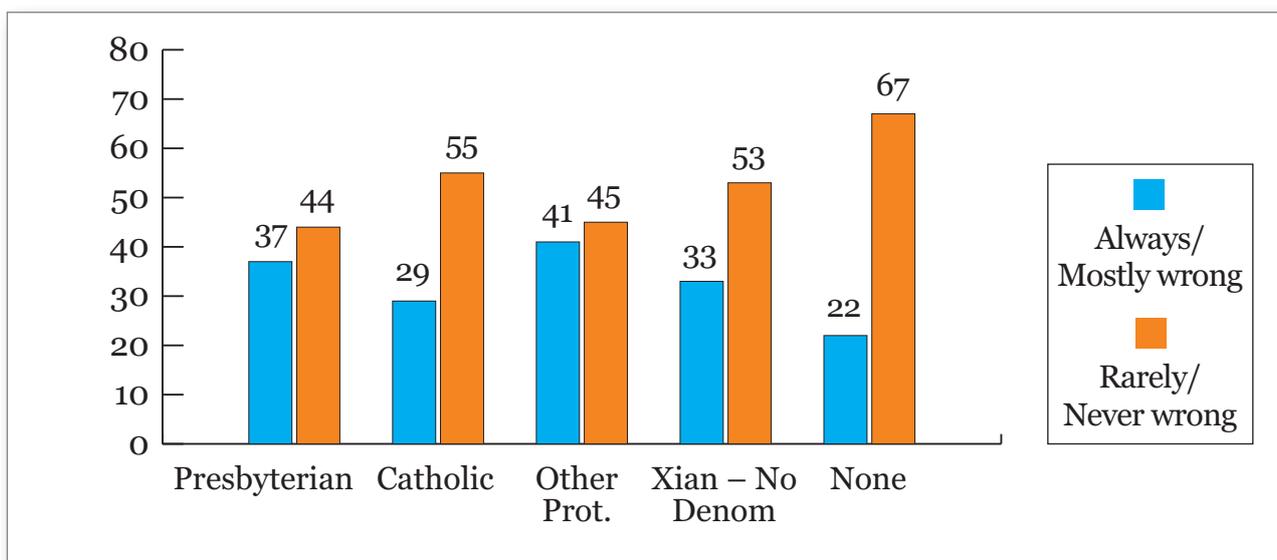
**(C) Religious Attitudes**

**“The church is still the main bastion that is opposed to marriage between people of the same gender.” (Rev Sharon Fergusson)**

Traditionally, marriage in the UK has contained a religious element which has been central to the institution. As a result churches are often central to the debate surrounding same-sex marriage. This section looks in detail at the attitudes of followers of the main faiths and again draws on Professor Curtice’s presentation. Additionally, we look at the varying stances taken on the issue from church bodies.

Figure 7

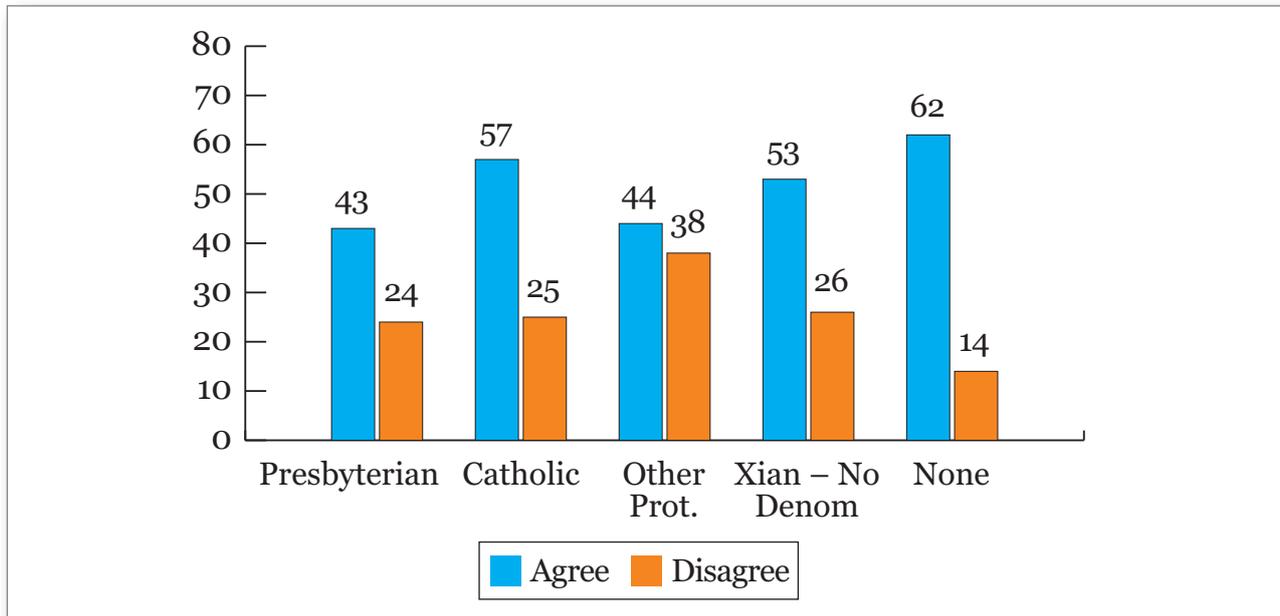
Are relationships between adults of the same sex “wrong/mostly wrong” – or “rarely/not at all wrong”? – faith groups Scotland, 2006 (%)



Source: NatCen/ScotCen/Curtice

Figure 8

Same-Sex couples should be allowed to marry – faith groups, Scotland, 2006 (%)



Source: NatCen/ScotCen/Curtice

### The Congregations

Within some religious teachings, homosexuality is seen as something less than heterosexuality. This is explored below. It could be reasonably expected, then, to find followers of some faiths holding a negative attitude towards same-sex relationships. Indeed Figures 7 and 8 show that acceptance of same-sex relationships generally, and marriage in particular, is highest amongst those professing no faith at 67% and 62% respectively.<sup>21</sup>

However, a somewhat unexpected finding was that a clear majority in each denomination felt there was nothing wrong with same-sex relationships or marriage (Figs. 7 & 8). Catholics were the most accepting of both same-sex relations

and marriage. Professor Curtice and participants in the symposium felt this highlighted the distance between the views of the various church leaderships and their congregations:

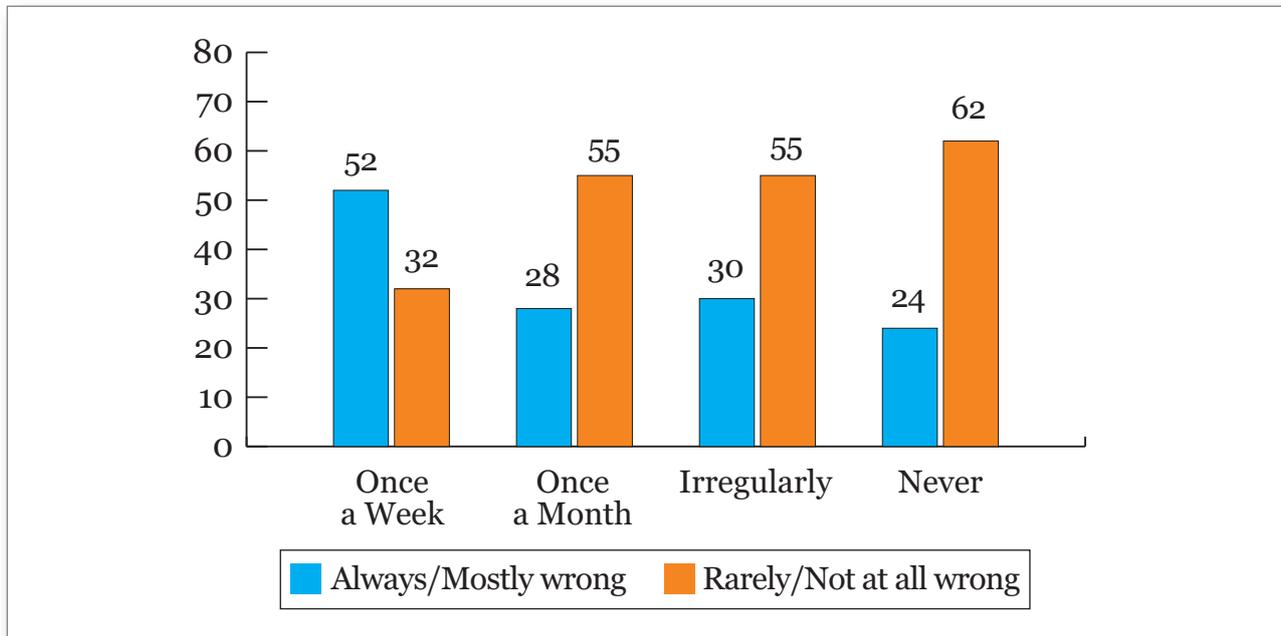
**“... we have to bear in mind in some religious organisations that what leaders may be saying publicly is not necessarily the views of the majority of their followers.” (from the floor)**

Professor Curtice went on to drill deeper into the attitudes of congregations. As many may profess faith but rarely attend a place of worship, he assessed the views of those who might be seen as ‘most devout’, that is those who attend a place of worship at least once each week.

<sup>21</sup> Only data for the main denominations were statistically significant and are covered here.

Figure 9

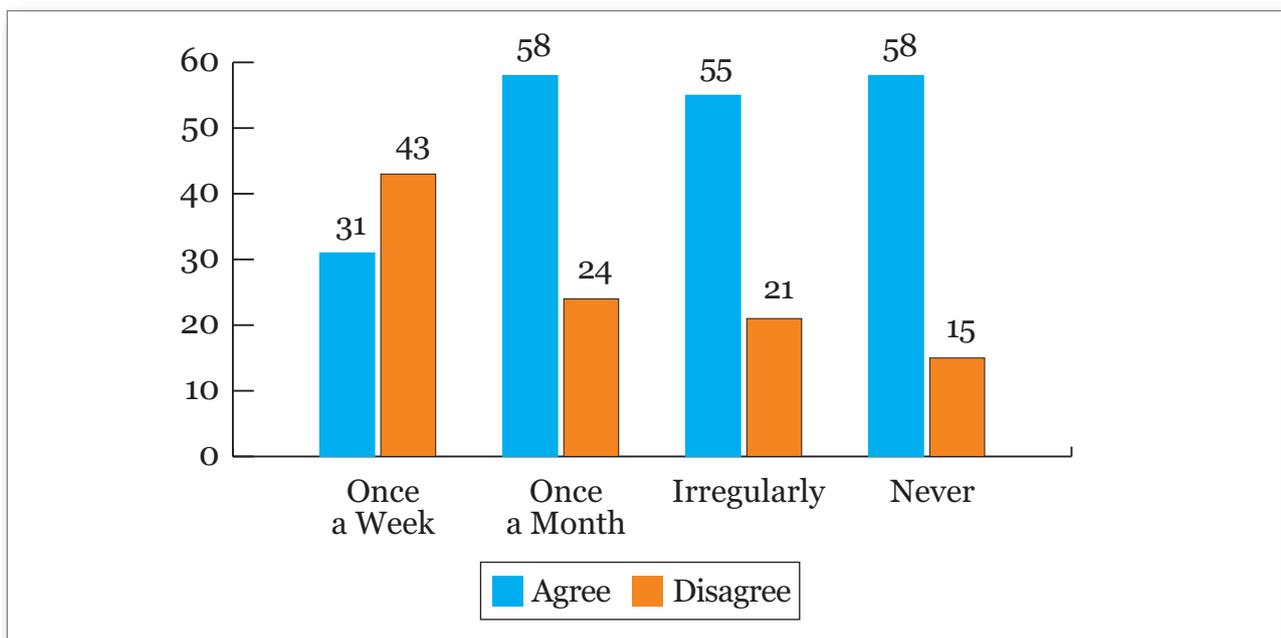
Are relationships between adults of the same sex “wrong/mostly wrong” – or “rarely/not at all wrong”? –regularity of attendance at place of worship Scotland 2006 (%)



Source: NatCen/ScotCen/Curtice

Figure 10

Same-sex couples should be allowed to marry – regularity of attendance at place of worship Scotland 2006 (%)



Source: NatCen/ScotCen/Curtice

Figures 9 and 10 show a majority of those seen as ‘most devout’ do not accept homosexuality and disagree with same-sex marriage. The majority in all other categories, those going once per month or less regularly, are accepting of same-sex relationships and marriage.

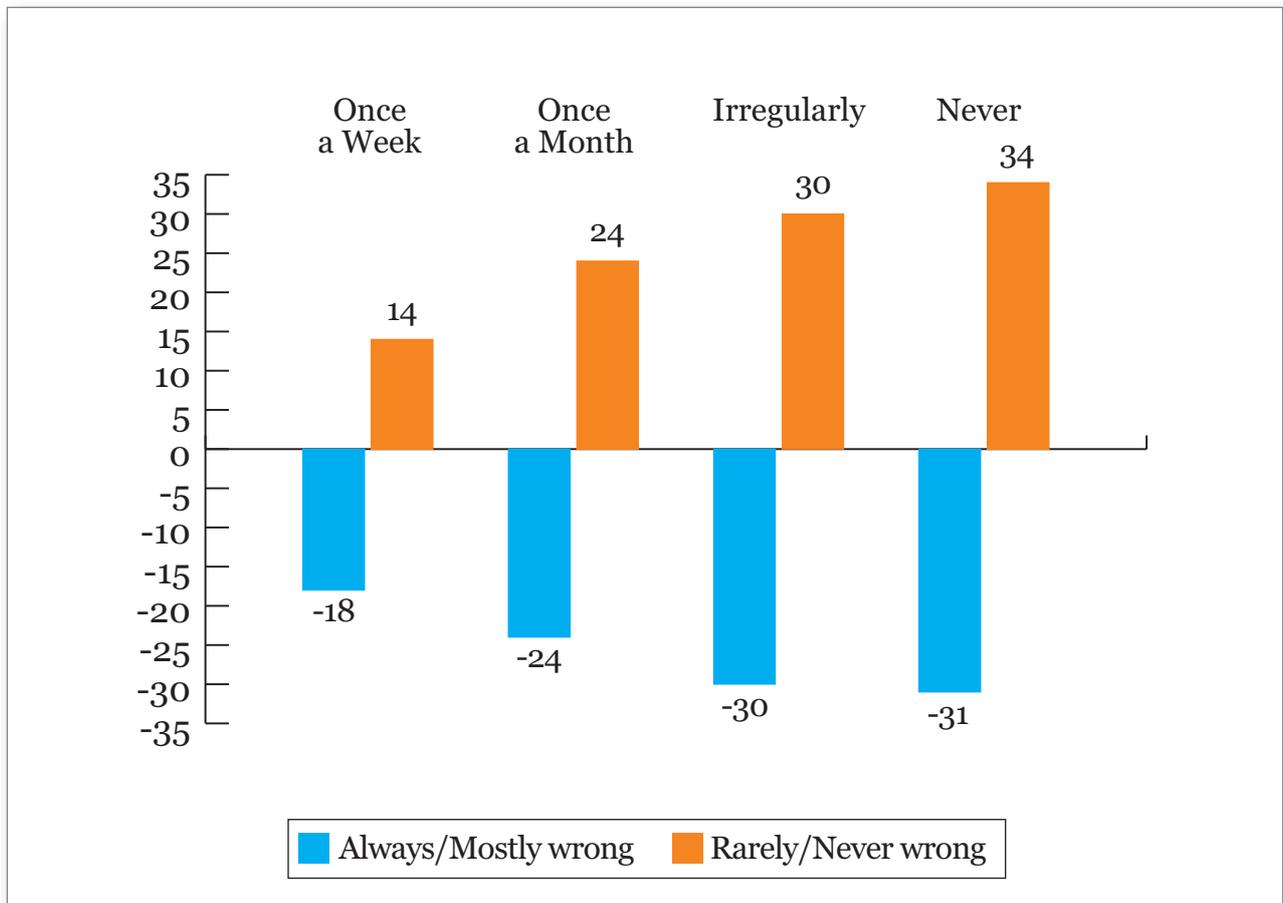
However, on this most devout group (Fig. 11) Professor Curtice noted:

**“... even here public opinion has shifted quite noticeably during the**

**course of 20 years. Therefore, a community that was in truth 20 years ago pretty much united that same sex-relationships were wrong is now a community which is divided. As older Catholics and Anglicans and Protestants are no longer going to church, because they are no longer with us, we may discover that opinion gradually changes.”**

Figure 11

Are relationships between adults of the same sex “wrong/mostly wrong” – or “rarely/not at all wrong”? – Change in attitudes based on regularity of attendance at place of worship Britain 1989 – 2007 (%)



When considering the role public attitudes play in shaping public policy Professor Curtice pointed out that the most devout are a small minority, with only 13% of respondents attending church weekly, and that of those only a small and diminishing majority felt same-sex relationships were wrong:

**“The other thing to bear in mind is this: the vocal are not necessarily the numerous. We are in truth a secular society. 63% of people in Scotland now do not, or hardly ever, attend any kind of religious institution. Those who regularly attend... are one in eight of all Scots. So one question is: what is the point where you say ‘you really are a minority and we do have to consider the majority opinion’?”**

Therefore the message to MSPs and political parties considering changes to legislation was there should be little to fear from a large-scale backlash from voters within the churches.

However, it is not only the views of a religious public which might exert influence but those of the church bodies and leaders themselves. It is to these we now turn.

### **The Church Bodies**

While it may be argued public opinion should to some degree shape public policy, it should be noted this does not necessarily follow for church policy. As Rev Ian Galloway noted:

**“We were looking earlier on at public opinion... Of course, that is**

**important, but public opinion and polity are not the same things. How decisions are made [within the church], and what people think are not the same thing necessarily.”**

Also Peter Kearney, spokesperson for the Catholic Church in Scotland, recently pointed out:

**“Ultimately, the role of the Church is to lead not to follow. Much of what it has to say is counter-cultural and challenging, but this is its strength not a weakness.”<sup>22</sup>**

Here we give a brief overview of the publicly expressed positions of the main church bodies, the Church of Scotland and the Catholic Church. The position of the Religious Society of Friends (Quakers) is also briefly outlined. What is clear is there are a wide variety of views across and within churches.

**“I think ... from outside, faith communities look more homogeneous than they are. ... There are huge differences in the way decisions are made and the kind of decisions that are open to individual practitioners within different faith communities.” (Rev Ian Galloway)**

### **Catholic Church**

In Catholicism marriage has two stated purposes – the good of the couple involved and the procreation and education of children. It is a sacrament, involving the activity of God making sacred the relationship between a man and a woman.

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**22** The Herald, “Scots’ relaxed attitude to sex” (9/02/11)

In addition, Roman Catholic teaching on homosexuality is unambiguous:

**“Basing itself on sacred Scripture, which presents homosexual acts as acts of grave depravity, tradition has always declared that homosexual acts are intrinsically disordered. They are contrary to the natural law. They close the sexual act to the gift of life. They do not proceed from a genuine affective and sexual complementarity. Under no circumstances can they be approved.”**<sup>23</sup>

Therefore, marriage and homosexuality can be seen as incompatible in the eyes of the Catholic Church.

There are, of course, dissenting views, such as those recently expressed in a letter to a German newspaper signed by 140 Catholic theologians from Germany, Switzerland and Austria suggesting, among other things, that the priesthood might be opened up to homosexual people:

**“The high value that the Church places on marriage and a celibate form of life should not be called into question. But this does not demand that we exclude people who live responsibly with love, fidelity and mutual respect in a same-sex partnership...”**<sup>24</sup>

Because of the Catholic Church’s authority structure such views may be regarded as incompatible with the catechism.

However, it is clear that disagreements exist within the Church and there are views at variance with current religious teachings.

Given this, and the fact that of all the major denominations Catholics are the most accepting of same-sex relations and marriage, support from some individual Catholics for same-sex marriage is likely. At the same time considerable opposition from the institution of the Catholic Church is inevitable.

### **Church of Scotland**

The Church of Scotland is divided over the issue of homosexuality. Whilst it has not endorsed homosexuality as a valid way of life, it has resisted attempts to condemn it.

Rev Ian Galloway stated that if there was a change in law allowing for same-sex marriage:

**“I think, in my own denomination, you’d have the same kind of split that there is at the moment, which is probably down the middle, around people who would want to be able to act out of that change in the law and people who would not.”**

Following the Civil Partnership Act 2004 some ministers were being asked for a religious blessing for partnerships. They sought clarification on the church’s position on this pastoral request since there was a fear some would seek to bring disciplinary proceedings against such ministers.

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**23** Catechism of the Catholic Church 2357

**24** The Local, Catholic theologians call for end to celibacy for priests (4/02/11)  
<http://www.thelocal.de/society/20110204-32883.html> (accessed February 2011)

The Legal Questions Committee of the Church stated:

**“The committee... believes that it is important to recognise the existing freedom of pastoral conscience of ministers and others, and to guarantee that they do not face censure in the wake of providing a service in this context.”**

A vote permitting this clarification was narrowly passed but had to be approved by all presbyteries in Scotland, which it was not. The status quo therefore prevails where ministers can respond as they see fit but risk the possibility of disciplinary action.

In 2009, amid conflict, the General Assembly voted narrowly to approve the appointment of an openly gay minister, Scott Rennie, in Aberdeen. A moratorium on similar appointments was then declared until May 2011 when the General Assembly will consider the issue again. There has been an extensive consultation with local congregations and presbyteries, the results of which will not be known until May but will be of considerable significance.

There is therefore ongoing debate within the Church of Scotland and its current position is not, as it were, set in stone.

## **Quakers**

As the Quakers were the first members of ‘Churches Together in Britain and Ireland’ to sanction the official blessing of same-sex relationships, it is worth looking at their policy here. In July 2009 Quakers agreed to carry out same-sex marriages on the same basis as marriages for mixed-sex couples, saying:

“... we are being led to treat same-sex committed relationships in the same way as opposite-sex marriages, reaffirming our central insight that marriage is the Lord’s work and we are but witnesses. The question of legal recognition by the state is secondary.”<sup>26</sup>

## **Secular or religious law?**

Within and across churches there are wide-ranging, shifting and divergent opinions on homosexuality and same-sex marriage. However, whether or not churches can come to an agreed position within their own structures may not be the issue. As Rev Ian Galloway pointed out:

**“... if the law is to change, then the law needs to change for the reasons that the law needs to change. Then faith communities would need on the other side of that to work out what their response is to a change in the law.”**

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**25** See Onekirk, [http://www.onekirk.org/cofs\\_sexuality\\_reports.html](http://www.onekirk.org/cofs_sexuality_reports.html) (accessed February 2011)

**26** Minute 25, Britain Yearly Meeting 31 July 2009  
<http://www.quaker.org.uk/sites/default/files/YM%202009%20Minutes.pdf>  
(accessed February 2011)

His view was that churches would adapt to the legal context within which they exist. However, he did stress that churches have their own cultures and should be given the space and time to adapt to such changing contexts:

**“... if we get to the point where faith communities are excluded because they can’t immediately respond to a change in the law or where there’s compulsion under the law, and for example a catholic priest would be in danger of being prosecuted for refusing to conduct [a marriage], that’s a problem.”**

It is clear however that society is becoming increasingly secular and, even amongst those who hold a religious faith, a growing majority accept same-sex relationships.

It must be asked then:

- Firstly, in an increasingly secular society, should the law surrounding sexual relationships be driven by religious beliefs at all?

and

- Secondly, if religious beliefs are to be taken into account when framing laws, should one view point, from what is clearly no homogenous or static world view, be given prominence over other views?

It is the premise of this report that the law does need to change, and it needs to change for reasons partly secular (i.e. the discrimination faced by transgender

people and the second-class status afforded the term ‘civil partnership’) and partly religious (the desire of those of faith to have the freedom to involve God in their commitments to each other).

Our view is that in considering a change in the law, secular drivers must have prominence but not to the exclusion of other views. Religious communities, as with other communities, need to be consulted and their views given weight. However, the evidence shows that views within and across congregations and church bodies are diverse, and no one viewpoint should be taken as ‘religious opinion’, as Professor Curtice argued **“the vocal are not necessarily the numerous”**.

### **Religious freedom**

Religious freedom means different things to people.

One meaning was expressed recently by the Catholic Archbishop of Glasgow, Mario Conti:

**“It would be unwise of society not to see the possible implications for religious freedom in redefining civil partnerships as marriage or indeed by any other subterfuge undermining the rights of faith communities to act in conformity with their legitimately held doctrines and traditions.”<sup>27</sup>**

Here the status quo maintains religious freedom.

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<sup>27</sup> The Herald, Letters (1/01/11)

An alternative view was given by Rev Sharon Fergusson outlining what she felt was a denial of religious freedom by the status quo:

**“... for me this should be about us all having the same choices to be able to decide for ourselves whether marriage is a religious commitment or not, and to then have the opportunity to celebrate it in that way... the commitment is not only between me and my partner, but also involves God...”**

Additionally, Tim Hopkins asked:

**“Why? Why do people think marriage should be opened up? One reason is freedom of religion. If you’re a Quaker or a Unitarian or liberal Jew all of your religious bodies would like to be able to conduct a same-sex marriage for you and for it to be legally effective.”**

Whose religious freedom is then is more important – those who fear being denied the choice to act in accordance with their faith, or those who are currently excluded from doing so?

### **Conscience Clause**

One very simple option for tackling this apparent dichotomy was put forward, a ‘conscience clause’.

A ‘conscience clause’ could be designed to allow church bodies, individual churches, and celebrants the right to refuse to marry same-sex couples. This clause exists in various formats in legislation in several countries including Canada and Norway. It is possible to require that only celebrants from church bodies who agree can sign up with a registrar to perform such

ceremonies. This would allow faith communities to act in accordance with their doctrine and allow same-sex couples the freedom to involve religion in their wedding.

Two objections were put forward to a conscience clause. Firstly, it was argued that, as individual celebrants already have the right to refuse to perform a marriage if they believe the couple are unsuitable, it is not required. Secondly, it was suggested an opt-out clause was unacceptable as it would not be thought acceptable if celebrants refused mixed-race marriages, so why would it be fine to reject same-sex couples?

The first objection needs to recognise that not only individual ministers can be covered by such a clause, but entire faiths. Therefore if the Catholic Church, for example, chose not to perform same-sex marriages, then individual Catholic priests could not do so. The clause is about allowing church bodies, as well as celebrants, this opt out. While this may be an issue for an individual celebrant who wishes to perform same-sex marriages, it is an issue that needs to be resolved between that individual celebrant and their church body.

The second objection is more problematic. This is about maintaining in law a level of discrimination against homosexual people. However, attempting to force celebrants to act against their faith is neither desirable, if one believes in protecting religious freedom, nor achievable, in any practical sense. Therefore, while both civil and religious marriage can be opened up for all, church bodies and individual celebrants should be left to deal with their own internal conflicts and respond as they see fit.

## Summary and Recommendation 2

It is not only those who have a faith who wish to marry. The term ‘marriage’ is itself of wider cultural significance and denying people access to it is to deny them this meaning. Alongside this there is the issue of discrimination against transgender people. For non-religious same-sex couples to face continued discrimination due to the views of some elements of some faith communities seems unjustifiable.

Moreover, there are churches, individual celebrants of various faiths, and individuals of faith who wish to use religious ceremony to formalise same-sex marriage but who are not free to do so.

Equal access to marriage would allow celebrants and same-sex couples to use the same terminology and follow the same ceremonies as mixed-sex couples while a conscience clause, allowing individual ministers and church bodies to opt out,

would allow all people to act according to their own doctrines.

In an increasingly secular society, and a society where a growing majority, within both religious and secular communities, see nothing wrong with homosexuality, it must be considered whether the views of a minority should be allowed to restrict the freedom of others, both the faithful and secular, to act according to their own world views.

**Recommendation 2: The law requires to change in order to increase religious freedoms and allow same-sex couples to commit to their relationships in religious ceremony. Any change in the law should include a ‘conscience clause’ which gives those religious bodies and celebrants who do not wish to carry out same-sex marriage the ability to opt out.**

# Section 3: Options for Change?

## (A) International Comparators

Globally there are examples of almost every possible approach to same-sex relationships, ranging from equal access to marriage, to the criminalisation of homosexuality. Here we give a very brief overview and seek to highlight the main lessons for Scotland.

Ten countries have equal access to marriage, seven of which are in Europe,<sup>28</sup> whilst a number of sub-national jurisdictions have equal access including several US states and Mexico City.<sup>29</sup> Additionally, there are over 20 jurisdictions where some form of civil partnership exists.<sup>30</sup>

Professor Norrie noted three approaches around the world to increasing equalities for same-sex relationships.

1. **The formalisation of cohabitation.** The legal rights in cohabitation can be extensive, as in Victoria, Australia. However, it is neither legally binding nor exclusive. One can ultimately walk away.

2. **The equivalence approach.** This is civil partnership open to same-sex couples bearing some level of legal consequences. These are legally exclusive relationships and require to be ended through legal processes.
3. **The marriage approach.** This is where marriage has been made gender neutral and where almost all legal consequences for same and mixed-sex couples are the same.

Professor Norrie noted several paths were followed to deliver the equal marriage approach. In Portugal, Argentina, parts of Spain and Canada, and three US states they developed same-sex marriage without any prior creation of civil partnerships. Same-sex marriage followed civil partnerships, which continued to co-exist, in the Netherlands, South Africa and Belgium. In Iceland, Sweden and Norway same-sex marriage followed and replaced civil partnerships.

Clearly the UK currently fits into the equivalence approach.

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**28** Holland 2001, Belgium 2003, Spain 2005, Norway 2008, Sweden 2009, Portugal 2010 and Iceland 2010, with the other 3 being Canada 2005, South Africa 2006 and Argentina 2010.

**29** Including Washington DC, Iowa, Connecticut, Massachusetts, New Hampshire and Vermont.

**30** For a full list see [http://en.wikipedia.org/wiki/Civil\\_union](http://en.wikipedia.org/wiki/Civil_union) (accessed February 2011)

In terms of the way ahead, if it were to legislate for equal access to marriage, it would be similar to those countries such as Norway and the Netherlands, which developed civil partnerships first and then moved to equal marriage.

### Legal consequences and religion

A 2004 study of nine European countries found that the legal consequences of same-sex civil partnerships were broadly similar to those of the separate institutions of mixed-sex marriage in Norway, Sweden, Iceland, and Denmark<sup>31</sup>. However, in these countries only marriage (mixed-sex) could be formalised by a religious practitioner in a church. Civil partnerships could only be performed in a civil ceremony. Therefore, despite the extensive legal rights afforded civil partners in these countries, the campaigns for equal access to marriage continued and were ultimately successful in all except Denmark where the campaign continues.

Similarly, as Professor Norrie demonstrated, there are very few legal differences between civil partnerships and marriage in the UK. He argued therefore that, from an atheistic and legally pragmatic point of view, civil partnerships as they currently stand are adequate.

However, there are clearly other drivers of change such as the desire to involve religion in the ceremonies formalising a union, as was seen in the Nordic countries above. Therefore there is little reason to believe legal edifices alone will satisfy the demand for equality in the UK.

In all of the countries that moved to equal marriage, conflict with various churches occurred. Several countries responded with a variety of ‘conscience clauses’ where churches and/or individual ministers could opt out, including Canada, Sweden and Norway.

### The meaning of ‘marriage’

In another study, based on the Dutch experience of civil partnerships, the term ‘marriage’ itself was what was seen as important, as having cultural meaning beyond ‘partnership’.

**“Only ‘marriage’ has the social understanding to back up the legal status, and the social meaning is as important as the legal rights. Civil unions just don’t have that social meaning. One woman I interviewed put it this way: ‘Two-year-olds understand marriage. It’s a context, and everyone knows what it means.’”<sup>32</sup>**

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**31** Waaldijk, K. More or less together: Levels of legal consequences of marriage, cohabitation and registered partnership for different-sex and same-sex partners. A comparative study of nine European countries. (INED 2005). The country where the legal impacts were most similar was the Netherlands. However by this time same-sex marriage existed in the Netherlands. Also, as marriage is only a civil institution in the Netherlands it is disregarded for this comparison.

**32** New York Times, Dutch Views on Same-Sex Marriage (09/11/09) based on interview with M. V. Lee Badgett, author of *When Gay People Get Married: What Happens When Societies Legalize Same-Sex Marriage*, (accessed 25/01/11)

It is noteworthy that this study was based in the Netherlands where, with Belgium, Germany and France, marriage starts as a civil union by a public authority rather than religious celebrant. It is not therefore the religious element of the process of getting married which drives this demand for change, but the desire for the ability to use the term itself due to the cultural value attached to it:

**“... the word “marriage” matters. The Dutch same-sex couples I interviewed saw their civil union-like status as “a bit of nothing,” as one person called it, or as a political compromise that an accountant might invent...”**

So the drive for equality goes beyond legal consequences and into religion, and beyond religion into wider cultural values. As the Equality Network in Scotland points out, a variety of court rulings in the USA and Canada found that a segregated system for marriage and civil partnership based on sexual orientation is discriminatory. The Equality Network goes on to argue that this

**“... reflects the practical fact that civil partners do not always get treated with the same respect for their relationship as married couples do, and in part it reflects the fact that a segregated system, by its very nature, stigmatises people and reinforces a second class status.”<sup>33</sup>**

## Summary

In the countries where equal access to marriage exists, this was driven by the demand for equality across all aspects of marriage. Legal equity alone has not proved adequate in the countries which first adopted an equivalence approach. This approach has been followed by equal access to marriage in countries such as Norway, Iceland and Sweden where civil partners were initially denied access to religious ceremony to formalise their union. In the Netherlands, marriage is civil, but even here civil partnerships were seen as inadequate partly because of the cultural significance of the term ‘marriage’. Similarly, in court rulings in the USA and Canada it was this cultural meaning of the term which was seen as central and a segregated system as discriminatory.

It is clear that in the UK the almost identical legal consequences in civil partnership and marriage have not been enough to quell demand for equal marriage. The evidence from abroad suggests that all aspects of marriage – legal consequences, religious ceremony, and cultural status – drive the demand for equality. There is no reason to believe that an advance in any one of these on its own will be viewed as anything but partial equality.

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**33** Equality Network, <http://www.equality-network.org/marriage> (accessed January 2011)

## **(B) Scotland and the UK**

During the Symposium participants were presented with five options regarding civil partnerships and marriage and asked to vote on which one they favoured. The options were:

- The current system is fine
- The current system would be fine if a civil partnership could be registered in a ceremony carried out by a religious or humanist leader
- Marriage should be available to all couples (same sex and mixed sex), and civil partnerships will not then be needed at all

- Marriage should be available to all couples and civil partnerships should be kept for same-sex couples only
- Marriage and civil partnerships should both be available for all couples (same sex and mixed sex) to choose between

Put to a vote almost 70% (37 of 53) of participants favoured the option of marriage and civil partnerships being available for all. As can be seen in Table 1, the support for this option was even more pronounced than in the 2009 Marriage Survey carried out by the Equality Network.

Table 1

<b>Statement</b>	<b>Agree</b>
The current system is fine	<b>6%</b>
The current system would be fine if a civil partnership could be registered in a ceremony done by a religious or humanist leader	<b>8%</b>
Marriage should be available to all couples (same sex and mixed sex), and civil partnerships will not then be needed at all.	<b>31%</b>
Marriage and civil partnerships should both be available for all couples (same sex and mixed sex) to choose between	<b>54%</b>

Debate at the Symposium focused on allowing civil partnerships to take place on religious premises; allowing same-sex couples to marry; keeping or abolishing civil partnership when equal access to marriage is achieved; and the implications of opening civil partnership to mixed-sex couples. Each of these areas is examined below.

### **Civil Partnership on religious premises**

The optimistic view of the amendment to the Equality Act 2010 (section 202), making provision for civil partnerships to be carried out on religious premises, would be that it was a step closer to equal marriage.

However, it should be judged on

- a) whether it is what people want, and
- b) whether it addresses the discrimination highlighted in section 2 above.

In terms of the desirability of this option, it is clear that it would not address the wishes of the majority of the LGBT communities polled by the Equality Network nor during the vote at the symposium.

**“In terms of the solutions looked at in England, to open up civil partnership so it can be done on religious premises, but still keeping it as civil partnership, only eight per cent thought that was a good long-term solution. In other words, most people didn’t think it was equality, although it might be a step forward.”**  
**(Tim Hopkins)**

However, Rev Sharon Ferguson pointed out that civil partnership carried out on religious premises may be desirable as it avoids some of the ‘baggage’ carried by the institution of marriage:

**“For some people it’s about having a religious element to the civil partnership... What they want is to have God in that relationship and recognised in their commitment, but without that baggage [of marriage]. Also, without feeling they’re just emulating a straight relationship. They’re recognising their relationship is different in some ways because it’s based on equality of their gender as well as in other areas.”**

Therefore there would appear to be a role for civil partnerships to be carried out on religious premises allowing people of faith to have God involved in their commitment while avoiding the term ‘marriage’.

However, unless the law barring celebrants from carrying out same-sex unions is changed, it must be assumed that a registrar will be required. Perhaps, having a celebrant carry out a ceremony with a civil registrar in attendance to make it legal, would make it feel more like a ‘marriage’. However, it is not clear that all people would be satisfied with a ceremony which in reality remains different, but which has been made to look more like marriage. It seems a convoluted route which does not deliver equal religious freedoms for those of faith.

Moreover, it does not address the other elements of discrimination – namely the exclusion from the cultural meaning of term ‘marriage’, and the detriment

suffered by transgender people forced to divorce.

At this time the Scottish Government has no plans to allow civil partnerships to take place on religious premises in Scotland.

### Summary and Recommendation 3

Allowing the formalisation of civil partnerships on religious premises is at best a partial solution to part of the problem. It seems a convoluted way of creating the illusion of marriage for same-sex couples while denying its reality.

Moreover, it will not address the broader aspects of discrimination mentioned above. On its own it would seem to the current authors to be a distraction from the desired end and may prove counter-productive by allowing for illusion of equality. However, as part of broader legislation on gender-neutral marriage, it may prove useful for those of faith who do not wish to carry the baggage of ‘marriage’.

**Recommendation 3: In Scotland, the continued focus should be on campaigning to have legislation introduced which allows same-sex marriage and includes the ability to carry out civil partnerships on religious premises.**

#### Equal access to marriage: marriage for same-sex couples

The key concern of participants at the symposium and those responding to the marriage survey was that same-sex couples should be given the right to marry. Tim Hopkins gave three main reasons why equal access to marriage was wanted and needed:

- Freedom of religion
- Transsexual people being forced to divorce before they can get gender recognition
- The importance of status and symbolism and the effect of these on the prevalence of discrimination

These are discussed in detail elsewhere in this report.

Equal access to marriage must, like the provision to hold civil partnership on religious premises, be judged on whether it is what people want, and whether it addresses the range of discrimination set out in section 2. On the first point, there appears to be no ambiguity among those in the LGBT community that equal access to marriage is what they want. On the second point, making marriage gender neutral would go some way to addressing the different aspects of discrimination and detriment experienced by same-sex couples.

Beyond religious objections, and more general discriminatory attitudes, discussion focussed on **how** change should be delivered and **who** should deliver it. Simon Stockwell argued that process was important:

**“To instigate change it is important to think about what process we need to ensure that the change, which there’s a political will for, would come about, and how best to reach a view what that change should be, and that all the implications are considered, and that we make sure we bring Westminster with us.”**

Whilst process is important, particularly as full consideration needs to be given to the impact of legislating, the primary focus for campaigners should be to use the favourable changes in public, political and religious opinion to establish the political will for change amongst key decision makers. Suggestions for the most effective processes to achieve the desired change are detailed below.

### Summary and Recommendation 4

There is a clear appetite among LGBT communities for legislation which creates equal access to marriage. Allowing same-sex couples to marry would address many of the issues of discrimination and detriment experienced by same-sex couples and transgender people. Nevertheless this will depend on what other measures are taken. Legislating for same-sex marriage will also require legislation in other areas and may well require action at both the Scottish and UK levels. To ensure that all aspects of discrimination are addressed, this is not an option that can be carried out in isolation.

**Recommendation 4: Legislation should be introduced to allow same-sex couples to marry. Full consideration must be given to what other measures need to be taken to complement this legal change and ensure all aspects of discrimination are addressed.**

### Civil Partnership: What happens next?

It was highlighted in section 3 (A) that in countries with equal access to marriage, different approaches were taken to civil

partnerships. Four main options exist: end civil partnerships and allow partners to convert to marriage; close them to new entrants but allow existing ones to carry on; retain them for same-sex couples only; retain them and allow access for all.

One argument against the retention of civil partnership is that, if marriage is open to all, there is little point in having two institutions with the same function.

**“Why have two institutions to achieve the same effect. People’s answer is ‘choice’. ... But why don’t we have choice between marriage, civil partnership and ‘tiddly plonk’? “That is exactly the same as civil partnership. I want that. People say it’s the same”. You call it you what want to call it. It doesn’t matter. Legally, if the consequences are the same for the two institutions, it’s unnecessarily complicated in law to have [those] two institutions. That is my view.” (Prof Norrie)**

So, if we have marriage as it stands, open to all, or develop a new form of civil marriage, as was suggested by Professor Norrie, there may indeed be no need for anything else if all the legal consequences are the same.

Another argument was made that civil partnership should be abolished on the basis it has less cultural meaning than marriage. Tim Fell, representing the Conservative Party group LGBTory argued:

**“Civil partnership feels too much like a contractual agreement. I think a marriage is an agreement based on love and commitment and long-term**

**monogamy. I think a marriage is an incredibly powerful act. I would like to get rid of civil partnerships, have marriage for everyone, equality for all and I don't think there is a need for civil partnership."**

In terms of overcoming the discrimination and detriment outlined in Section 2 these are attractive arguments. If one institution was open to all, regardless of sexuality or gender, the issue of transgender people having to divorce would be dealt with. The religious discrimination against same-sex couples would also be dealt with. Applied across the UK it could simplify the legal situation. Finally, it would overcome issues arising from differing status given to the two institutions.

However, this approach is also problematic in two interconnected respects. Firstly, the view that a formalised union is only a legal relationship ignores the wider cultural meanings of such a union. Secondly, the view that this cultural meaning of 'marriage' is attractive to all is a mistaken one. For many couples civil partnership is preferable to marriage. This was reflected in the survey carried out by the Equality Network:

**"We also said to people if we introduced same-sex marriage and you're already in a civil partnership and you can convert your civil partnership to a marriage by some simple process would you want to do that? 58 % said 'yes' but 42% said 'no we'd rather stick with the civil partnership'. So you can see if we abolish civil partnership, we'd be taking something away from people who want to keep it. What we should**

**do, therefore, in the Equality Network's view, is have both available to everybody." (Tim Hopkins)**

Rev Ferguson explained some objections to marriage:

**"I also understand the objections to marriage, it is very much based in patriarchy..."** She continued, **"I understand for a lot of gay people and lesbians that marriage has the heteronormativity aspect to it as well. They feel they are mimicking straight relationships and they want something different."**

So, while the establishment of equal marriage accompanied by the abolition of civil partnership may achieve an end to discrimination, marriage is not the preferred option for all.

Patrick Harvie, MSP went on to argue that, rather than narrowing the choices available to people, the state's role was to be as flexible as possible:

**"I think we need to be clear about what is the state's business here. The state's business I think is to offer support on the basis of family law to people on their own terms, in a range of different ways, because people are different."**

James Morton agreed that the rights of transgender people would be best served by having a range of choices:

**"Civil partnerships need to be retained. [There are] issues around having to divorce or dissolve a civil partnership to get [gender] recognition."**

**People are clear they want civil partnership and marriage open to all couples, regardless of gender, by having the options remaining, so people have the choice and the least interference in their existing relationships. If they have made a civil partnership, they shouldn't be forced to change the nature of their relationship and the legal situation they're in."**

### **Summary and Recommendation 5**

It is clear therefore that the legal consequences can be almost identical between marriage and civil partnerships and there is little legal reason to maintain both institutions. However, it is also clear that 'marriage' has a wider cultural meaning beyond the law which many couples desire. It is also clear that many other people do not want to use the term or be associated with its wider meanings. For them civil partnerships are clearly more desirable. We therefore recommend expanding upon people's choice here and maintaining civil partnerships in the context of equal marriage.

**Recommendation 5: To ensure the widest possible choice civil partnership should be retained alongside equal access to marriage.**

### **Civil Partnership and mixed-sex couples**

**"I thought if we were creating a new institution it was bizarre to create one that had inbuilt prejudice from day one." (Patrick Harvie MSP)**

A key argument for opening civil partnership to mixed-sex couples is that it is in line with an approach of 'equality for all'. Patrick Harvie noted his Member's Bill proposal in 2003 would have opened up civil partnership to mixed-sex couples on the basis that legislation aimed at eliminating inequality in one way should not create it in another.

He also felt equal access to marriage was tied up with allowing mixed-sex couples to enter into a civil partnership:

**"I think it is clear, if we do win the argument on opening up marriage to same-sex couples... it is likely that civil partnership will be opened up."**

A majority of the politicians attending supported civil partnership being open to all. Shirley-Anne Somerville, MSP argued that denying mixed-sex couples access to civil partnership was equivalent to denying same-sex couples access to marriage:

**"People should have the right to choose between either. If straight couples want to enter into a partnership as a different way of marking love and respect for each other, that is fine. I wouldn't tell them that they can't do that anymore than we should be telling same-sex couples they can't get married."**

Margaret Smith, MSP outlined the Liberal Democrat position:

**“Our position is that... we would have equal marriage open to same-sex couples and civil partnerships opened to straight couples.”**

While there are technical issues about opening up civil partnership to mixed-sex couples in Scotland within the context of devolution, explored later in the report, there was little disagreement that this was desirable.

## **Summary and Recommendation 6**

Opening civil partnership to mixed-sex couples ensures a truly equal approach. In addition it would mean that transsexual people in a civil partnership would not have to dissolve the partnership to gain gender recognition.

The diversity of human relationships, and the various meanings attached to these, mean the law should include a range of options allowing people to access institutions which best match their circumstances, needs and beliefs. Equal access to marriage and civil partnership for both mixed and same-sex couples would seem the most rational way to deliver this.

**Recommendation 6: The Westminster government should legislate to open civil partnership to mixed-sex couples.**

# Section 4: How Should Change Happen?

## Legal challenge

In a number of countries equal marriage has been delivered through legal challenges. However, in Europe the introduction of equal marriage has been achieved solely by pressure brought to bear on legislatures who have responded with legislation.

On 2nd February 2011 the 'Equal Love' campaign in England made an application to the European Court of Human Rights on the basis that banning same-sex marriage and mixed-sex civil partnerships violates Articles 8, 12 and 14 of the European Convention on Human Rights.

The campaign is described as **“the legal bid to overturn the twin bans on same-sex civil marriages and opposite-sex civil partnerships in the United Kingdom.”**<sup>34</sup>

Peter Tatchell, a key member of the campaign, describes the law which stops same-sex civil marriages and mixed-sex civil partnerships as a form of 'sexual apartheid', arguing that gay and heterosexual couples should be equal before the law.<sup>35</sup>

It is believed that the legal challenge has the potential to force a change in legislation at a UK level, as Professor Robert Wintemute said:

**“I am confident that we have a good chance of persuading the European Court of Human Rights that the UK’s system of segregating couples into two ‘separate but equal’ legal institutions violates the European Convention. I predict that same-sex couples will be granted access to marriage in the UK and that this will be because the UK Government will eventually accept that it cannot defend the current discriminatory system.”**<sup>36</sup>

Tim Hopkins believes that in light of the decision in relation to Schalk and Kopf v Austria the litigation approach is making progress, albeit slowly:

**“The point is the European Convention is a living instrument. The way the court interprets it depends on the social situation across the whole of Europe. What the court effectively said was, in the**

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**34** Equal Love Campaign Website, <http://equallove.org.uk/> (accessed Feb. 2011)

**35** Equal Love Campaign Press Release (2011) Legal bid for gay marriages and heterosexual civil partnerships see <http://equallove.org.uk/2011/02/equal-love-case-filed-to-european-court/#more-276> (accessed February 2011)

**36** Cambium interview

**future when a significant majority of European countries allow same-sex marriage, the court may say ‘now all of you have to do it’, but we could be waiting up to 30 years before a significant majority of European countries do allow same-sex marriage.”**

Professor Wintemute, when interviewed, welcomed any legislative pressure from Scotland and believes it can only add to the growing movement for equal access to marriage. As legal advisor to the ‘Equal Love’ campaign he believes the UK Government will, when asked to respond by the ECtHR, legislate to make equal access to marriage a reality. He believes the direction of travel makes change inevitable:

**“Although Schalk and Kopf was lost it does represent another step in the evolution of the legal status of same-sex couples in Europe, from criminals risking death or imprisonment for their private same-sex sexual activity, to fully equal citizens entitled to marry.”**

Tim Hopkins believes that campaigning to get the Scottish Parliament to legislate is the best option here:

**“Because of the situation at the moment, we think the way forward in Scotland is to try and change the law through the Scottish Parliament. We think it will take less time to do that than it would take to take the cases to the European Court of Human Rights and wait for them.”**

## **Summary and Recommendation 7**

Legal challenges to laws discriminating against same-sex couples have been successful in other countries. However, as yet, there have been no successful legal challenges in Europe. All same-sex marriage in Europe has been delivered through governments and parliaments acting to change the law. Nevertheless the ruling on Schalk and Kopf gives some hope that in the future the ECtHR may require signatories to the Convention to allow same-sex couples to marry. The challenge to the UK from the Equal Love campaign may well add momentum to this process.

It is clear, however, that this may take considerable time and the opportunities afforded by growing political and public support should be grasped.

The ongoing legal challenges are therefore useful but they should not detract from attempts to influence the UK and Scottish Parliaments.

**Recommendation 7: Priority should be given to campaigning for the Scottish and UK Parliaments to change the law to allow same-sex marriage and to allow mixed-sex couples to enter into a civil partnership.**

### **Holyrood, Westminster or both?**

The Scottish Parliament has the power to legislate to introduce equal access to marriage. However, although marriage is a devolved issue, certain aspects of its legal consequences are reserved to Westminster such as tax, immigration and pensions and would therefore require some level of co-operation between the Parliaments.

The opening of civil partnership to mixed-sex couples would also require amendments to legislation at Westminster.

The Equality Network has suggested three possible ways forward:

- **Co-ordinated legislation at Holyrood and Westminster** where both parliaments introduce legislation to establish equal access to marriage and civil partnerships. This would deal with issues around tax, pensions and immigration. This type of legislative approach has not been done before.
- **Legislation at Westminster that covers Scotland, England and Wales.** This would require the political will at Westminster to legislate for equal access to marriage and civil partnerships, and for the Scottish Parliament to pass a Legislative Consent Motion (LCM) to allow Westminster to legislate on devolved matters.
- **Introducing an Equal Access to Marriage (Scotland) Bill at Holyrood.** This could provide for equal access to marriage for same-sex couples and be effective for all devolved purposes. A statutory instrument would be required at Westminster to amend the Civil Partnership Act 2004 to treat Scottish same-sex marriages as civil partnerships in Scotland for reserved purposes and in England and Wales for all purposes.

Options one and two would require the co-operation of the UK Government to bring

forward or amend legislation. The Liberal Democrats have adopted equal access to marriage as party policy. Additionally, as this report was being prepared, the UK Government announced that, **Ministers have also identified a desire to move towards equal civil marriage and partnerships, and will be consulting further how legislation can develop.**<sup>37</sup> Marriage is, however, devolved to the Scottish Parliament. The move by the UK Government will add weight to arguments that a new Scottish Government should take option three above and move to create equal marriage.

Politicians attending the symposium held slightly different views on the way forward. Lesley Hinds, Prospective Parliamentary Candidate for the Scottish Labour Party, felt that achieving equal access to marriage required Westminster and Holyrood to work together:

**“We want to make sure if we’re going to bring it through the Scottish Parliament it’s done in partnership with Westminster. With Ed Milliband making a commitment I think we could work within all the political parties hopefully within Westminster. But the first step is to get people interested in all political parties, and within the Scottish Parliament soon after May, and decide a timetable and how we’ll do this and actually make sure it gets through the Scottish Parliament, and also work with Westminster.”**

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**37** Government Equalities Office News release 17/02/11  
<http://nds.coi.gov.uk/content/detail.aspx?NewsAreaId=2&ReleaseID=418069&SubjectId=2>

Patrick Harvie felt that if the Scottish Parliament seized the initiative it would pressure the UK government into acting:

**“I’d be delighted if the UK government was to move on this and also surprised if it did in the near future, but one opportunity that devolution gives us is the opportunity to crack on here and start drafting legislation and making it clear to the UK government they have to face that situation.**

**I think if we cracked on and said, “You’re going to have to respond to this one way or the other”, I think then they would move because they already have to recognise relationships registered in jurisdictions where same-sex marriage elsewhere in Europe is allowable and they already have to respond to that.”**

Margaret Smith for the Scottish Liberal Democrats argued that Westminster was the first port of call, however she also noted that:

**“I think Patrick is right. I think if the UK government don’t address this, then I think the option is there that the Scottish Parliament can and should.”**

She felt strongly that it should be done in partnership to avoid any harmful anomalies arising:

**“Whichever option we take, there has to be a lot of discussion about how we make sure that we don’t get into the situation that we’ve got at the moment in terms of the**

**transgender community, where there are anomalies after the civil partnership legislation.”**

Legislating at the Scottish Parliament does appear to leave open some anomalies.

Tim Hopkins believes many of these can be dealt with without primary legislation at Westminster:

**“An Equal Marriage (Scotland) Bill would open up marriage to same-sex couples and would be effective for all devolved purposes, whilst Scottish same-sex marriages would be recognised in other countries with equal access to marriage. A statutory instrument at Westminster could give a Scottish same-sex marriage the same status as a civil partnership for reserved purposes in Scotland and for all purposes in England and Wales.”**

It is also important to deal with the issue of transgender people having to divorce to obtain gender recognition. In relation to the Gender Recognition Act, James Morton proposed solutions which could address this issue either at Westminster, or in a Holyrood bill:

**“The way we could change the Gender Recognition Act depends on whether the legislation is done at a Scottish Parliament level or UK level. The ideal solution would be to remove the requirement to divorce from the [Gender Recognition] Act, so that anybody who can show they have been living in the new gender role for over two years is eligible for legal recognition, regardless of their marriage circumstances. If we were**

**doing [same-sex marriage] through the Scottish Parliament, and it was only changing what would be the case of people in Scotland and not for England and Wales, then you could make it a simpler process by still having the interim certificate but saying in Scotland perhaps that if somebody came with their interim gender recognition certificate to the Sheriff Court in Scotland they could have a declaration from both parties and instead of them going through a divorce, the sheriff would say, “right, I grant you the full gender recognition certificate and I’m not requiring you to do the divorce first”.**

**So there are solutions to enable it to work in Scotland, even if not implemented across the whole of the UK.”**

### **Summary and Recommendations 8 & 9**

There is clearly some political support for creating equal access to marriage for same-sex couples in Scotland and the UK. In Scotland, pursuing legislation through the Scottish Parliament is a legitimate route in itself and can deliver much of what is required to end discrimination in relation to religious equality and the use of the term ‘marriage’.

The most effective approach would be if legislation was introduced at Westminster that also applied to Scotland through a Legislative Consent Motion. This could then deal with all of the devolved and reserved issues around civil partnership. The solution to transgender people having to divorce should be achieved by the

Scottish and Westminster Governments working together to find a mechanism that ends this clearly harmful situation.

At Westminster the Liberal Democrats and the leader of the Labour Party have voiced support for equal access to marriage and the Government will be consulting on how to create equality for civil marriage and partnership. These are welcome developments but will only apply in England and Wales. In addition it might be argued that although welcome, taken together, both developments fall short of true equality simply because they maintain a segregated system of family law.

As such it is important that an Equal Access to Marriage (Scotland) Bill is brought before the Scottish Parliament following the election in May. It will however be necessary for the Scottish Government to work closely with Westminster as this legislation progresses. In particular, the issues surrounding transgender people need to be addressed.

**Recommendation 8: Following the election in May 2011 an Equal Access to Marriage (Scotland) Bill should be brought before the Scottish Parliament that would allow same-sex marriage in Scotland.**

**Recommendation 9: In advance of an Equal Access to Marriage (Scotland) Bill becoming law, the Scottish Government should work with the Westminster Government to ensure a mechanism is in place that means a transgender person living in Scotland does not have to divorce, or end their civil partnership, to gain full gender recognition.**

### What legislative instrument?

As both the Scottish and UK Governments are currently opposed to introducing legislation, consideration needs to be given to how an Equal Access to Marriage (Scotland) Bill could be taken forward.

#### ■ A Committee Bill

Shirley-Anne Somerville believes this could start after the election in May and could take the form of a Committee Bill:

**“I’d like to think [a change in the law could happen] within the next session of the Scottish Parliament. A Committee Bill, although not often used, could be used for this. The point was made that this has to be a cross-party issue and I think it is. There are those of us in all parties that want to see this happen and see it happen now, rather than later.”**

There have only been three Committee Bills since the Scottish Parliament was formed and all have been enacted. A Bill of this nature will need cross-party support and if this can be achieved there is a strong chance that the Bill will be passed. A Committee Bill would also have the resources of the sponsoring Committee at its disposal for consultation and drafting.

#### ■ A Member’s Bill

A Member’s Bill (MB) could be brought forward by a supportive MSP. Following consultation the MSP can bring forward an MB as long as it is supported by at least 18 other MSPs, representing at least half of the political groups on the Parliamentary Bureau. Therefore the Bill would not need complete cross-party support at an early stage. It is also an attractive option following the precedent set by the introduction of legislation on

hate crime. The Scottish Government worked with Patrick Harvie after he introduced an MB in 2008, and this resulted in the passing of the Offences (Aggravation by Prejudice) (Scotland) Act 2009 which extended hate crimes to cover disabled people as well as those in LGBT communities.

### Summary and Recommendations 10, 11 & 12

There is growing support in Scotland and the UK for legislation on equal access to marriage and civil partnership. Change is most likely to be achieved as a result of a range of activities, such as legal challenges currently underway, and more general parliamentary activity at both Westminster and Holyrood.

The main challenge then in Scotland is to find a way to bring proposals for legislation before the Scottish Parliament. It remains to be seen whether a new Scottish Government will make legislation in this area a priority. In the absence of a Government Bill, an Equal Access to Marriage (Scotland) Bill will have to be introduced as a Committee Bill or a Member’s Bill. A Committee Bill is an attractive option which, outside of a Government sponsored Bill, would give the best chance of success. It may however take longer to introduce as cross-party support is sought, the relevant Committee identified, and a space is found in the Committee work programme.

A Member’s Bill could be introduced relatively quickly, although there is no guarantee that cross-party support can be achieved and this could not rely upon committee resources. It is also more open to being blocked by the Government.

Both of these options should be considered. The recommendations below reflect this and contain options for both a Committee Bill and a Member's Bill.

**Recommendation 10: Following the 2011 election the Scottish Government should bring forward legislation to allow same-sex couples to marry.**

**Recommendation 11: If the Scottish Government fails to introduce legislation to allow same-sex couples to marry the possibility of (a) a Committee Bill or (b) a Member's Bill should be explored.**

**Recommendation 12: Regardless of the mechanism used to create equal access to marriage, a statutory instrument should be used to amend the Civil Partnership Act 2004. This would allow Scottish same-sex marriages to be recognised as civil partnerships in Scotland for reserved purposes and in England and Wales for all purposes.**

### **Legislation and religion**

If a Scottish Equal Access to Marriage Bill was introduced it would have to deal with the issue of churches and individual ministers who did not want to carry out a same-sex marriage. Tim Hopkins believes this can be done by allowing churches to opt out:

**“A celebrant would have to apply to the Registrar General to carry out same-sex marriages but can only do so with the support of their religious body. This allows churches to opt out. As it involves the Registrar General it can be set out in legislation.”**

Such systems operate successfully elsewhere, for example in Norway and Canada, where churches and celebrants can opt out, and the development and inclusion of a 'conscience clause' in legislation, as highlighted in Recommendation 2, is vital.



# Section 5: A Way Forward

**Change** is the underpinning theme of this report. A change in the law to allow same-sex couples to marry and to open up civil partnership to mixed-sex couples is the predominant view of the LGBT community in Scotland. It was also the overwhelming view of those attending the Symposium. Growing support for this change means the momentum is with campaigners and a number of opportunities will be available in the coming months and years. This section considers what action needs to be taken to make change a reality.

It has not been the intention here to set out a definitive list of campaign methods and objectives, but rather to identify a broad campaign approach that can contribute to current and future campaigning work.

What follows is a breakdown of the changes required to ensure all aspects of the current inequalities are dealt with and an overview of the broad approaches that could be taken.

## **An Equal Access to Marriage (Scotland) Bill: opening up marriage to same-sex couples**

A Bill could be brought before Parliament either as a Scottish Government Bill, Committee Bill or Member's Bill. Regardless of how the legislation is laid

there is a need to address some of the consequential issues that arise as a result of the Scottish Parliament legislating on the issue. In addition, the Bill will need to contain an important provision to protect religious freedoms.

## **Consolidating and building political and parliamentary support**

It was mentioned earlier in this report that, whilst there were supporters of equal access to marriage in all parties, there is also recognition that there is work required to build on that support. The pre-election period offers the opportunity to influence those parties who do not have a position on equal access to marriage and consolidate the support of those parties who are in favour. Working with current 'champions' of the issue there should be opportunities to identify how parties can

be influenced throughout the election campaign. One participant at the Symposium put forward an idea:

**“What would be useful is for there to be some kind of cross-party public event to promote the issue before we get to the elections. The statistics we have been given are very, very clear about where things lie in terms of public opinion. So I don’t think that the politicians need to have any fear about speaking out on this issue.”**

This could take the form of a one-off event, or a series of ‘hustings’ type events.

Building a solid base of support in the pre-election period will:

- Help to identify additional ‘champions’ and supporters in the Parliament and possibly Government
- Identify MSPs who would be willing to pursue a Committee Bill
- Identify MSPs who would be willing to propose a Member’s Bill and MSPs who would support it

### Keeping options open

The recommendations in section 4 set out three options for bringing legislation before the Scottish Parliament:

- **The Scottish Government should bring forward legislation:** It will be important to engage with Ministers at the earliest opportunity after the election. Existing good relationships with officials will help this process. It would seem Scottish Ministers will need to give more priority to the issue of equal marriage given the recent developments in England and Wales on civil partnership and civil marriage.

- **A Committee Bill:** Instigating a Bill of this nature will require that significant representations are made to members of the Equal Opportunities Committee. An initial step could be to seek a Committee inquiry, as soon as possible following the election, on the basis that developments in England and Wales will leave same-sex couples in Scotland increasingly disadvantaged and marginalised.

- **A Member’s Bill:** There may be some advantage in identifying a member of the governing party to take a Bill of this nature forward, although membership of the government party is not necessary. In addition, identifying key people for a steering group to support work on the Bill is important, as well as getting cross-party support. If interest in a Committee Bill was to develop as work was being carried out by an individual MSP, it may be possible to pass on the work carried out to the Committee to take it forward.

Whichever route is taken it is important that preparatory work goes into allowing for all three options to happen.

### Addressing the consequential

There are two main consequential changes which would be required as a result of an Equal Access to Marriage (Scotland) Bill being passed in the Scottish Parliament:

- A ‘section 104 order’ will be required to amend the Civil Partnership Act 2004 to allow Scottish same-sex marriages to be recognised as civil partnerships in Scotland for reserved purposes, and in England and Wales for all purposes. This order allows for consequential modifications to be made to reserved

law in consequence of legislation passed by the Scottish Parliament<sup>38</sup>. This is a relatively straightforward change that will require support from Scottish Government officials regardless of the legislative mechanism used for an Equal Access to Marriage (Scotland) Bill.

- A mechanism will be required to ensure that a transgender person living in Scotland does not have to divorce or end their civil partnership to gain full gender recognition. This was an issue that current Scottish Ministers were sympathetic to as representations to them were made by the Public Petitions Committee. In the context of any proposed Scottish legislation it is essential there is early engagement with Scottish Ministers and officials. Moreover, it would be useful to make representations to Scottish MPs and the Scottish Affairs Committee to ensure legislators at Westminster are fully aware of the Scottish situation.

### **Recognising and respecting beliefs**

An Equal Access to Marriage (Scotland) Bill should contain a conscience clause which gives those churches and celebrants who do not wish to carry out same-sex marriage the ability to opt out. It is likely that opposition to the Bill will be centred on faith issues. This clause would require those celebrants who do wish to carry out same-sex marriage to register, with the support of their church body, with the General Register Office. It will be useful to highlight positive international experience in relation to this issue.

### **Legislation to open civil partnership to mixed-sex couples**

This would require primary legislation at Westminster. Whilst the Scottish Parliament could legislate for mixed-sex civil partnership, it would only be effective for devolved purposes. There should be opportunities to work with the Equal Love campaign who will be pressing this issue with the Westminster Government in advance of any action by the European Court of Human Rights.

### **Summary**

It is likely that some form of legislation aimed at creating equal access to marriage will be introduced in the next Scottish Parliament. There needs to be a continued drive to build political support for the campaign, ensure that all MSPs are fully informed of the arguments for a legal change and that any concerns they have on behalf of their constituents are addressed. Such concerns are likely to be informed by those churches who do not wish to be involved in same-sex marriage. In this event it is important that legislators are fully aware of the two aspects of religious freedom discussed in depth at the Symposium and examined in detail in this report. Although this report recommends legislation be introduced in Scotland, it is clear that in order to deal with all aspects of discrimination, work with the Westminster Government is crucial. This should be central to any specific Scottish approach.

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**38** Scotland Office: <http://www.scotlandoffice.gov.uk/scotlandoffice/37.html> (accessed February 2011)

**39** Cambium Advocacy: Interview with Simon Stockwell, December 2010

# Conclusion

The current system of civil partnerships for same-sex couples, and marriage for mixed-sex couples, segregates people into separate institutions based on their sexual orientation and is therefore discriminatory. That this discrimination causes detriment is clear. Transgender people are forced to divorce, or end their civil partnership, to gain full gender recognition. Same-sex couples who hold a religious belief are barred from celebrating their faith during their union and therefore restricted in their religious freedom. The term ‘marriage’ carries with it wider cultural significance than ‘civil partnership’. The status of ‘partnership’ is therefore often seen as ‘second class’ and people are viewed, and often treated, differently because of this segregation.

These are statements of fact which beg the question ‘what do we do about it’?

Some sections of society may view this discriminatory and segregated system as acceptable, even desirable, and their answer will be to maintain the status quo. However, for those who want a society where people are not segregated and stigmatised because of their sexual orientation or gender identity, the only answer can be change. Before we get into the detail of what should change and how, we stress that change is, for those who believe in equality, desirable, and the technical details of delivery should not detract from the overall argument.

However, looking around the world, non-gender-specific marriage law is clearly achievable and not overly complex. What is required first and foremost is the political will to change, and the willingness of politicians and political institutions to take on the task of delivering this change.

Professor Curtice pointed out that a majority of voters for each political party, along with a majority of those of faith in each main religion, agree same-sex marriage should be allowed. A significant and growing majority of the Scottish public – 62% – support same-sex marriage and this majority is likely to continue to grow over the coming years. Therefore politicians should have nothing to fear from a wide-spread backlash from voters. In fact it may be argued they are obliged to respond to changing attitudes and ensure people are governed with legislation which more closely reflects their moral views.

Resistance from some sections of faith communities is inevitable. However, by developing a ‘conscience clause’ which would allow church bodies, individual churches and celebrants to opt out, it is hoped that this respect for religious freedom can be reciprocated and same-sex couples supported in their efforts to commit to each other within the context of their faith. Otherwise, the doctrines of some serve to limit the religious freedoms of others.

Beyond this, it is also clear that society is increasingly secular, and it must be asked whether the world views of some sections of some faith communities should be allowed to impinge upon peoples' civil liberties and continue to exclude them from the right to marry.

What change is required? Only change that fully tackles the discrimination against transgender people, which maintains, extends and equalises religious freedoms, and which ends the discrimination inherent in the terminology of a segregated system, should be considered. Partial solutions, such as allowing civil partnerships to be carried out on religious premises, are at best a step in the right direction, at worst, counter-productive. We conclude that nothing short of equal access to marriage should be accepted and the aim of any campaign on this issue should be full equality. Anything else would be a waste of resources and allow the appearance of equality to mask the reality of continued discrimination.

How should this change be delivered? In the context of a Scottish audience the answer must be the Scottish Parliament. While work carries on through litigation in Europe, and consultations on civil marriage are launched through Westminster, efforts here should focus on delivering equal access to marriage through the Scottish Parliament.

It would give the greatest potential for overcoming discrimination more quickly than litigation, and more fully than what may flow from the consultation on civil marriage. It may be argued that it was for issues such as this that the Scottish Parliament was created, and the very point of having devolved powers is to bring forward legislation in tune with the views of the people of Scotland.

An Equal Access to Marriage (Scotland) Bill would be something around which all campaigning groups and individuals could rally and which the Scottish Parliament could deliver.

The Symposium demonstrated there were many informed, committed and experienced campaigners working on this and we therefore see no reason why the campaign should not focus on delivering equal marriage legislation within the next term of the Scottish Parliament.

# Appendix 1

## **The Speakers and Panellists – Biographies**

### **Angela O’Hagan, Equality and Human Rights Commission**

Angela O’Hagan chaired the event. She is a member of the Scotland Committee of the Equality and Human Rights Commission.

### **Tim Hopkins, Director, The Equality Network**

Tim Hopkins is the director of the Equality Network, a national organisation in Scotland working for lesbian, gay, bisexual and transgender (LGBT) equality.

### **Laura McLachlan from LGBT Youth Council**

Laura McLachlan is part of the Rainbow Sisters, Standout and creative writing groups based in Glasgow. She is the representative for the LGBT National Youth Council (NYC) representing the Rainbow Sisters Glasgow group.

### **Reverend Sharon Ferguson, Lesbian and Gay Christian Movement**

Rev Sharon Ferguson is the Chief Executive of the Lesbian and Gay Christian Movement. Sharon is an ordained minister with the Metropolitan Community Church and is currently the Senior Pastor for MCC North London.

### **James Morton, Scottish Transgender Alliance**

James Morton is the Scottish Transgender Alliance Co-ordinator, the only transgender-specific equality and rights post in Scotland.

### **Carl Watt, Director, Stonewall Scotland**

Carl Watt is the Director of Stonewall Scotland, a charity that works to achieve equality and justice for lesbian, gay, bisexual and transgender people in Scotland. Stonewall has developed leading campaigns and programmes to target workplace discrimination, homophobic bullying in schools and hate crime in our communities.

### **Professor Kenneth Norrie, Professor of Law, Strathclyde University**

Kenneth Norrie has been Professor of Law at the University of Strathclyde since 1990, having previously been at the Universities of Aberdeen and Dundee. Author of 10 books and innumerable articles on Scottish family law, with particular interests in same-sex families, and child protection.

**John Curtice – Deputy-Director of CREST, Professor of Politics University of Strathclyde**

John Curtice is Professor of Politics at Strathclyde University and Research Consultant to the Scottish Centre for Social Research (ScotCen). He has been co-editor of the annual British Social Attitudes reports since 1994, and a co-director of the Scottish Social Attitudes survey since its establishment in 1999.

**Shirley-Anne Somerville – MSP, Lothians (SNP)**

After gaining a postgraduate diploma in Housing Studies from the University of Stirling, Shirley-Anne worked as a researcher for Duncan Hamilton MSP before joining the Chartered Institute of Housing as a Policy and Public Affairs Officer. She was Media and Campaigns Officer for the Royal College of Nursing until she entered the Scottish Parliament as an MSP for the Lothians region in 2007.

**Patrick Harvie – MSP, Glasgow (Scottish Green Party)**

Patrick was elected as a regional MSP for Glasgow in May 2003. He has previously been a member of the Communities Committee, which dealt with housing, planning, charity law, and social issues, but is currently Convenor of Parliament's Transport, Infrastructure and Climate Change Committee. Patrick is the joint Convenor of the Scottish Green Party, who have a gender balanced leadership arrangement.

**Tim Fell, Scottish Officer, LGBTory**

In 1999 Tim Fell was elected to his Student's Union Executive Committee as Gay Rights Officer. In 2005 he set up and ran the first Conservative Future branch covering the city of Edinburgh. In 2007, Tim was involved in setting up the gay Conservative group, LGBTory, and has co-ordinated its Scottish operations since then.

**Margaret Smith – MSP, Edinburgh West (Scottish Lib Dems)**

**Current Political: MSP for Edinburgh West, 1999 – present**

Scottish Lib Dem Education and Young People Spokesperson, Member of the Scottish Parliament's Education, Lifelong Learning and Culture Committee, Substitute Member of the Equal Opportunities Committee. Previous : Scottish Liberal Democrats' Justice Spokesperson, Member of the Scottish Parliament's Justice Committee, Chief Whip for the Scottish Liberal Democrats, Vice-Convenor, Equal Opportunities Committee, Parliamentary Spokesperson on Justice.

**Lesley Hinds, Labour candidate for the Scottish Parliament for Edinburgh Western**

Lesley was a Councillor in Edinburgh for nearly 26 years and is currently Councillor for the Inverleith ward on the City of Edinburgh Council. Previous posts in Edinburgh Council include Lord Provost and Leader of the Council. She was Convenor of Lothian and Borders Police Board for four years and is a past Chair of NHS Health Scotland, a member of Unite, CND, CO-OP Party and Scotmid.

**Mhairi Logan, LGBT Youth Scotland**

Mhairi Logan is the Head of Policy and Mainstreaming for LGBT Youth Scotland. Mhairi heads up a team which undertakes research, training and influencing policy. The current key policy priorities for both LGBT Youth Scotland and the LGBT National Youth Council are Challenging Homophobic Bullying, raising awareness of Hate Crime and Equal Marriage.

**Nick Henderson, Director, LGBT Network**

Nick Henderson has been the director of the LGBT Network since it was formed in 2008, and has helped lead its work on LGBT asylum, the blood ban and marriage equality. Prior to that, he was LGBT spokesperson and policy coordinator for the Scottish Socialist Party.

**Rev Ian Galloway, Convenor, Church & Society Council**

Convenor of the Church of Scotland's Church and Society Council, Ian Galloway is parish minister of Gorbals. He is Chair of the Board of Bridging the Gap, which is engaged in youth work and integration work on the South side of Glasgow, and a Director of Faith in Community Scotland.

**Simon Stockwell, Scottish Government**

Simon Stockwell joined the then Scottish Office in 1985. He has had a variety of posts relating to matters such as teachers' salaries, building regulations and local government and has also worked for the Secretary of State for Scotland, on social policy, and had a brief secondment to the European Commission. For the past 18 months, he has been head of the Scottish Government team in Justice with responsibility for family and property law.

# Contacts

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