Submission to the UK Government Equalities Office Consultation 'Equal Civil Marriage' in Response to the Submission by the Church of England

The Church of England has submitted a response to the government's consultation, in which the church portrays marriage as a monolithic, uniform fortress, historically consistent across time: a bulwark with defences arrayed, protecting society from a single enemy—same-sex couples. Some of the arguments put forth in the church's submission are historically inaccurate; others are logically incoherent; a few are outright silly.

The undersigned respectfully submit the following, which is a response to the consultation document published by the UK Government Equalities Office and a response to the submission by the Church of England. Answers to the consultation questions are contained in the Appendix to this submission.[1]

Marriage Is Not Intrinsically Between a Man and a Woman.

Complementarity Is Not A Justification for Prohibiting Same-Sex Marriage.

A central argument advanced by the church is that gender complementarity requires that marriage not be available to same-sex couples:

> [T]he uniqueness of marriage – and a further aspect of its virtuous nature – is that it embodies the underlying, objective, distinctiveness of men and women. This distinctiveness and complementarity are seen most explicitly in the biological union of man and woman which potentially brings to the relationship the fruitfulness of procreation. And, even where, for reasons of age, biology or simply choice, a marriage does not have issue, the distinctiveness of male and female is part of what gives marriage its unique social meaning. (¶ 10)

The notion of complementarity apparently originates with Hildegard of Bingen's (1098–1179) *Scivias*, and is currently used by Roman Catholic theologians to defend a male priesthood.[2] It has become popular as a way of arguing for the difference of men and women while not necessarily subordinating women.

In fact, however, this doctrine, like the outdated doctrine in the United States that legalized 'separate but equal' facilities for the blacks and whites, leads to differential and unfair treatment of women. It follows quite naturally, if the sexes are complementary, that they may have

---

[1] Thanks are due to Samuel Weinberg, St Anne's College, Oxford, who offered helpful comments on a previous draft.

[2] Plato, or perhaps Aristophanes, had a different view: 'For each of us is a mere tally of a person, one of two sides of a filleted fish, one half of an original whole. We are all continually searching for our other half. Those men who are sliced from originals which comprised both sexes (formerly called androgynous) are lovers of women, and most adulterers originate from this sex, as do adulteresses and all women who are lovers of men. Women who are sliced from the wholly female sex are not at all interested in men but are attracted towards other women, and female homosexuals come from this original sex. Men who are sliced from the wholly male original sex seek out males, and being slices of the male, while they are still boys they feel affection for men and take pleasure in lying beside or entwined with them. In youth and young manhood this sort of male is best because he is by nature the most manly.' (*Symposium*, 191d–192a, M.C. Howatson, trans. (Cambridge, 2008). Opening of Aristophanes' speech)

different functions in society: say, raising children, as opposed to working. Women and men are, in fact different, but in modern society those differences must have functional relevance before they can be recognized by the state, just as other differences must (for example, in skills, talents or education). To say that the criterion of gender, in and of itself, is relevant to what women and men ought to be allowed to do, in the absence of any other criterion, is sexist. In this sense, in the absence of a functionally discernible difference, modern liberal society does in fact 'assert that men and women are simply interchangeable individuals' (¶ 12).

The paragraph quoted above is only one instance where the church attempts to rely upon, but then retreat from, the 'fruitfulness' argument that marriages are for procreation. Clearly, the ability to procreate is no longer a prerequisite to marriage, if it ever was. Indeed, it would be objectionable in the extreme if the state limited marriage to those who could procreate. Moreover, it is now possible, and acceptable, for unmarried people to have and to rear children. Once this part of the argument has collapsed, the church is reduced to the following *petitio principii*: Marriage must be between a man and a woman, because the different sexes exhibit the characteristic of complementarity. Even if they cannot have issue, the 'distinctiveness of male and female is part of what gives marriage its unique social meaning'. Marriage must be between a man and a woman because it must be between a man and a woman.

The English Law of Marriage Has Changed Over Time And Is Not Defined By The Book of Common Prayer.

The church's submission argues that the institution of marriage involved a man and a woman 'before the advent of either church or state' (¶ 6): 'Throughout history, in the laws of the land and in the Church of England's Book of Common Prayer on which the laws concerning marriage are grounded, marriage has been understood to be, always and exclusively, between a man and a woman.' At one and the same time, the church argues that this essential character of marriage has remained the same during history, apparently based upon natural law, and that the dispositive legal criteria are one with the dispositive religious ones. Marriage is far from the immutable, religious institution it is here made out to be.

In 1753 the British legislature passed Lord Hardwicke's Act, which was a last attempt both to insulate the British classes from intermarriage and to define a relative monopoly on marriage for the Church of England. Although it exempted 'that Part of *Great Britain* called *Scotland*' as well as 'Marriages amongst the People called *Quakers*, or amongst People professing the *Jewish* religion', it imposed formal requirements on marriages, including that they be performed in parish churches by Church of England clergy. Roman Catholic and other religious denominations were not allowed, by the state, to do so. This restrictive regime was loosened, but not eliminated, by the Marriage Act, 1836, which permitted civil marriage and non-Church of England weddings, so long as a civil registrar was present for the ceremony (based upon the perceived lack of education and reliability of 'nonconformist' clergy). No similar requirement was imposed upon Church of England clergy.

Any coherence between the theology of marriage and the laws of the land is based upon the privileged constitutional status of the Church of England. However, that status is legal, not religious. No one would claim anymore that the Church of England holds a monopoly on religious truth, any more than anyone would claim that Roman Catholics, Methodists, Congregationalists, Muslims or Hindus were either heretics or heathens. Instead, the Church of

England's legal monopoly, and its privileged status thereafter, depends upon the church's legal status as an arm of government. The Church depends upon the state, not the other way around.

Viewed in this light, arguments about the interconnectedness of the Book of Common Prayer and statute law confuse causes with consequences. Should the definition of marriage be broadened to include same-sex marriage, that would have no implications for the Church of England or its members unless Parliament decided otherwise. Parliament has regularly modified the requirements for marriage, including by giving special privileges to the Church of England. It can do so again, and any argument that it cannot do so begs the question in a nearly identical way to the complementarity argument: Marriage has never been between two persons of the same sex; ergo, it cannot be between persons of the same sex. The conclusion does not follow.

UK Law Recognizes That Marriage Varies Between Cultures And That Not Everyone Is A Christian.

The United Kingdom is a multi-cultural, multi-ethnic nation, which includes people of many faiths and of none. It has been remarkably advanced in its acceptance of alternative visions of marriage. The church's submission refers to the case of *Hyde v Hyde and Woodmansee* (¶ 16, n. 6), a nineteenth-century case, which refused to grant a divorce to an English man who had been married in a legal jurisdiction that permitted polygyny (the then-United States Territory of Utah). However, that decision was legislatively overruled by the Matrimonial Causes Act 1973, and at present plural marriages are afforded many of the same protections as monogamous ones, so long as they have occurred between non-UK domiciliaries in a jurisdiction where they are legal. The UK has been able, under certain conditions, to adapt to plural marriage, not only in its society but in its courts.

The church argues, 'The only kind of marriage which English law recognises is one which is essentially the voluntary union *for life* of one man with one woman to the exclusion of all others.' (¶ 16; emphasis added) The statement is limited to English law, the only nation in the UK where the Church of England is the established church, but even so it is inaccurate. Divorce has been legally available in England since the Matrimonial Causes Act 1857, and even the church has had to engage in an elaborate fudge, recognizing that 'there are exceptional circumstances in which a divorced person may be married in church during the lifetime of a former spouse' and leaving it to the conscience of clergy whether they remarry divorced persons.

The Christian theologian C.S. Lewis wrote about civil divorce at the middle of the last century:

> I should like to distinguish two things which are very often confused. The Christian conception of marriage is one: the other is the quite different question—how far Christians, if they are voters or Members of Parliament, ought to try to force their views of marriage on the rest of the community ... My own view is that the Churches should frankly recognise that the majority of the British people are not Christians and, therefore, cannot be expected to live Christian lives. There ought to be two distinct kinds of marriage: one governed by the State with the rules enforced on all citizens, the other governed by the Church with rules enforced by her on her own members.

Both the law relating to polygamy and the law of divorce are instances where British law has recognized, as C.S. Lewis did, that the majority of British people are not Christians in some strict

sense. As Lewis also recognized, the church should not impose its view of marriage through the law. Offering civil marriage to same-sex couples is perfectly consistent with this view of the law and with this theology of marriage. Legal marriage is not, as the church claims, the union for life of one man with one woman to the exclusion of all others.

Procreation Is Not Essential to Marriage; Mutuality and Faithfulness Are Enough.

The church allows for three social benefits of marriage. The church concedes, 'Same-sex relationships often embody mutuality and fidelity, two of the virtues which the Book of Common Prayer uses to commend marriage.' (¶ 9) The 'virtue', which is missing, it continues, is the distinctiveness of male and female. (¶ 11) Attempting to skirt around the question of procreation, the church is left with its criterion of complementarity, which has been shown to be circular.

Procreation has never been a precondition for marriage in the Book of Common Prayer. Since the time of the Tudors, the Book of Common Prayer has omitted the prayer for the 'procreacion of children' when the woman is 'past childe byrth'.[3] Even Roman Catholic canon law, more stringent on points like these than the Church of England's doctrine, provides 'Sterility neither prohibits nor nullifies marriage' unless one party deceives the other in the matter. (Code of Canon Law, Canon 1083, section 3) At the same time, modern families frequently include children that are related to only one of two parents by blood, because of a previous divorce, artificial insemination, in vitro fertilization or some other form of assisted reproductive technology. And other families include adopted children, who are related to neither parent by blood. Same-sex marriage increases the security of the children of such parents by providing them with two parents. But whether or not a couple can procreate is irrelevant to the modern question of whether they should be able to marry.

Legal Marriage Consists in a Ceremony (and Nothing Else)

The Legal Requirements for Capacity and Impediments Do Not Define Marriage

The Church of England attempts to claim that since the essence of civil and religious marriage is the same, a change in civil marriage will affect religious marriage; the ceremony, although entirely different in the two cases, does not define the marriage. This argument raises the continuing question, what *does* define marriage? Surely the answer must be, the law does. The only evidence of this identity between civil and religious marriage that the church offers is the law concerning capacity to marry and impediments to marriage (Marriage Act 1949, sections 1, 2) and the grounds rendering a marriage void or voidable (Matrimonial Causes Act 1973, sections 11, 12).

However, the first group of restrictions on marriage are parallel to those in the Civil Partnership Act 2004, which prohibits civil partnerships between parties within certain degrees of affinity or under a specified age (Civil Partnership Act 2004, section 3). Provisions for finding civil partnerships void or voidable are also included (Civil Partnership Act 2004, section 37 and following). If the provisions concerning civil marriage, which are common to religious marriage,

[3] Church of England Book of Common Prayer, 1549, 'The Forme of Solemnizacion of Matrimonie', http://justus.anglican.org/resources/bcp/1549/Marriage_1549.htm (last visited 18 June 2012).

define marriage as a social institution, the legislature can unilaterally modify that definition, to make the capacity to marry civilly and the impediments to civil marriage, as well as the grounds rendering civil marriage void or voidable, identical to the current regulations for civil partnership. This change would probably be necessary and desirable anyway. Irrespective of which criteria apply, however, marriage and civil partnership are already identical in imposing criteria for capacity and for dissolution on the parties.

More important than this purely formal point is the wide difference that has been maintained, largely at the instance of the Church of England, *distinguishing* civil and religious marriage ceremonies. The Marriage Act 1949 (section 45(2)) provides, 'No religious service shall be at any marriage solemnized in the office of a superintendent registrar.' The current Oxfordshire County Council page on civil weddings actually links to the civil partnership page on readings and poems, which states, 'You are welcome to include any reading of your choice but they must be [non] religious and must be checked with the registrar beforehand.'[4] The prohibition on religious elements in civil weddings and civil partnerships are sufficiently identical that this council is able to re-use its web pages for both.

The reason for this strict rule against religious elements in a civil wedding (or civil partnership) is the strong effort by the Church of England, and others, to *differentiate* religious weddings from the government weddings that the church now claims are *intrinsically the same*. In 2005, in response to a government consultation concerning using music and readings in civil marriages, the Church of England expressed its willingness to expand what had been an overly strict regime but qualified its response:

> There is scope for a somewhat more generous approach, provided it does not start to blur the fundamental distinction between a civil ceremony and a religious event. We believe that maintaining such a distinction is as much in the interest of the State as of the churches and other faiths.

The church expressed its position that the following should be prohibited: 'readings from religious texts, which are foundational to the Church, a denomination or faith community and such as would form part of its religious services … hymns, worship songs and chants of a kind which would form part of a its religious services'.

The ceremony involved in a civil marriage is a non-religious ceremony, which cannot include prayers or religious music. It is limited to recognizing the public commitment of the parties and the recognition of that commitment by the state and by the witnesses and persons present. The commitment is the marriage, and it becomes legal with a purely civil ceremony, which is different in all relevant respects from a religious marriage.

Marriage, Under English Law, Is a Contract

In 1765 William Blackstone wrote in his *Commentaries on the Laws of England*,

> Our law considers marriage in no other light than as a civil contract. The holiness of the matrimonial state is left entirely to the ecclesiastical law: the temporal courts not having jurisdiction to consider unlawful marriages as a sin, but merely as a civil inconvenience. … [T]aking it in this civil light, the law treats it as it does all other contracts; allowing it to be good and valid in all cases, where the parties at the time of making it were, in the

[4] http://www.oxfordshire.gov.uk/cms/content/readings-and-poems (last visited 13 June 2012).

> first place, willing to contract; secondly, able to contract; and, lastly, actually did contract, in the proper forms and solemnities required by law. (Book I, ch. 15)

He continues, 'It is held to be also essential to a marriage, that it be performed by a person in orders; though the intervention of a priest to solemnize this contract is merely *iuris positivi*, and not *juris naturalis aut divini*.'

Marriage in England, as in the rest of the United Kingdom, is a civil, contractual relationship, governed by civil law. Its religious element, including its celebration by a priest in a church, is a function of positive, not natural or divine, law. Parliament can differentiate legally between civil marriage, which is contractual, and religious marriage. It can modify one without affecting the other. Parliament regulates the form of ceremony, the degrees of affinity, and the age of consent. Nothing can prevent it from dictating that both of the parties can be of the same gender, and religious arguments to the contrary offered by the Church of England are not binding on the UK legislature. The second earl of Pembroke famously said that parliament could do anything but make a man a woman and a woman a man. The current debate over same-sex marriage may come close to this line, but it does not cross it.

Churches and Religious Organizations Will Not Be Required to Perform Same-Sex Marriages

The Church of England relies upon a single case, *Schalk v. Austria* (App. No. 30141/04), in its effort to show that the European Court of Human Rights may require churches to offer religious marriages to same-sex couples if civil marriages become available. The case does not support this claim; the church is adequately protected under existing law; and the threat is chimerical. Indeed, the actual holding in *Schalk* offers the church exactly the protection it seeks.

European law has a number of provisions relevant to this debate. First, the Charter of Fundamental Rights of the European Union (CFR) provides, 'The right to marry and the right to found a family shall be guaranteed in accordance with the national laws governing the exercise of these rights.' (Article 9) That provision does not restrict marriage to men and women. Second, Article 12 of the European Convention on Human Rights and Fundamental Freedoms (ECHR) provides, 'Men and women of marriageable age have the right to marry and to found a family, according to the national laws governing the exercise of this right.' This provision does mention that individuals have gender, although even it does not explicitly require that men and women marry the opposite sex. Third, the ECHR provides as follows:

> Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance. (Article 9)

Fourth, and finally, the ECHR also prohibits discriminatory treatment:

> The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status. (Article 14)

The right to marry is subject, in both cases, to 'national law'. Religious freedom, under ECHR Article 9, is subject to constraints based upon 'the interests of public safety, for the protection of public order, health or morals, or the protection of the rights and freedoms of others'. The non-discrimination provision in Article 14 is not subject to any limitations.

In the church's view, it is conceivable that once the government offers same-sex civil marriage, churches that fail to offer it will be discriminating based upon gender. Thus, the unrestricted requirements of Article 14 ECHR will apply, and people will have a right under Article 9 CFR and/or Article 12 ECHR to marry people of the same sex in church, irrespective of the protections of Article 9 ECHR. However, a close examination of *Schalk* shows that this fear is unfounded.

Schalk involved a same-sex Austrian couple, who applied to be married in a civil wedding. The European Court of Human Rights held that they ***could not***. This holding—the actual ***decision*** by the ECtHR, which is not even mentioned in the church's submission[5]—should have been adequate to show that neither the ECHR nor the CFR might require religious organizations to offer same-sex marriage once civil same-sex marriage became available, particularly as religious organizations are protected by Article 9 of the ECHR. Indeed, the legal part of the church's submission is highly qualified: 'It is not possible to predict with certainty the outcome of proceedings that sought to challenge such a provision – either in our domestic courts or in Strasbourg.' (¶ 38)

The reasoning behind the case makes the situation clear. The ECtHR found substantial differences even between civil marriage and the registered partnership available to same-sex couples in Austria, including the fact that they were registered by different government departments, that the names of the parties were treated differently and that the parties to the partnership could not jointly adopt children. Nevertheless, these differences were not adequate to require Austria to offer same-sex *civil* marriage to the parties to the case. Thus, the applicants' case there was stronger than it would be in the UK, if some hypothetical UK applicants were attempting to force the UK to offer *civil* marriage, which is identical in all relevant respects with civil partnership. Nevertheless, the application in *Schalk* failed. *See also Gas v. France* (App. No. 25951/07, 2012).

The ECtHR refused to reject the case at the admissibility stage, because it was sufficiently complex that it required consideration by the court, even though it was pursued by two men: this is seemingly the basis for the church's alarm. In its decision on the merits, however, the court found, first, that the right to marry was subject to 'national law'. (¶ 61) Second, having regard to the margin of appreciation afforded to national authorities, 'who are best placed to assess and respond to the needs of society', and given 'that marriage has deep-rooted social and cultural connotations which may differ largely from one society to another', the court parties could not force Austria to provide them with a same-sex *civil* marriage. (¶ 62) *Religious* marriage would be even more strongly protected by Article 9 ECHR.

To claim, as the church does, that the ECtHR presents any appreciable legal threat that religious organisations might be required to offer same-sex marriage is a profound misinterpretation of both the ECtHR's holding and its reasoning in *Schalk*. No such threat exists based upon the only case they rely on; nor does it exist based upon the explicit language of the applicable law.

[5] The submission incorrectly calls the court's determination that marriage would no longer be limited to members of the opposite sex a holding (¶29); that statement was an *obiter dictum*.

Separate Is Not Equal

The church claims, 'Civil partnerships have … already provided a framework within which same sex couples can exhibit the social virtues of fidelity and mutuality.' (¶ 14) It is not clear, according to the church, what additional rights might be desirable besides those provided through civil partnerships aside from meeting 'emotional needs' of lesbian, gay and bisexual citizens. The submission continues,

> Without wishing to diminish the importance of emotional needs, legislating to change the definition of a fundamental and historic social institution for everybody in order to meet the emotional need of some members of one part of the community, where no substantive inequality of rights will be rectified, seems a doubtful use of the law. (¶ 16)

A number of points need to be unpacked here analytically. First, although the church's submission claims that the Civil Partnership Act 2004 'was supported by a majority of [the church's] bishops who voted on the legislation' (¶ 15), the statement is misleading; second, substantive rights are affected by the distinction between civil partnership and marriage; third, even if civil partnership were separate but equal, it would still be inadequate.

The Church of England's bishops have not supported civil partnership.

Richard Chapman, Church of England Secretary for Parliamentary Affairs, has helpfully supplied a chronology of the votes and interventions by the Bishops in the House of Lords on civil partnership bills since the first was introduced in 2002.[6] This document confirms what had earlier been pointed out by Lord Harries of Pentregarth and by Iain McLean:[7] viz., that in the main Lords debate on what is now the Civil Partnership Act 2004 "*Six bishops voted in favour of (and one against) what was widely considered to be a 'wrecking amendment' to the Bill at Report stage*"; indeed, the then bishop of Winchester co-sponsored this wrecking amendment.

The Commons rejected the amendment in the names of Lady O'Cathain and the Bishop of Winchester. When the Lords briefly considered the Commons amendments, Lady O'Cathain offered a similar amendment again. On this occasion, "*eight bishops voted in support of the decision taken by the Commons (two voted against).*" When the Church of England response to the Government consultation claims at paragraph 15 that "the introduction of civil partnerships ... was supported by the majority of our bishops who voted on the legislation in 2004 when it was before the House of Lords", it can only be referring to this final vote. The response ignores the fact that in the principal Lords debates on the Bill (in Grand Committee and Report), the initially successful wrecking amendment was co-sponsored by one bishop and supported by five others.

Paragraph 15 is therefore seriously misleading. The Church of England should be invited to withdraw it. If it declines to, the Government Equalities Office should take note of the fact that it is not supported by evidence supplied by the Church's own Secretary for Parliamentary Affairs.

---

[6] http://thinkinganglicans.org.uk/uploads/cptimeline.html (last visited 14 June 2012).
[7] http://www.guardian.co.uk/world/2012/may/20/sentamu-flaws-gay-marriage; http://www.guardian.co.uk/commentisfree/belief/2012/may/23/john-sentamu-claims-civil-partnerships-false (last visited 14 June 2012).

Furthermore, the House of Bishops' pastoral statement on same-sex relationships in the Church of England, issued after the enactment of the Civil Partnerships Act 2004, shows none of that compassion and pastoral support for these relationships which the church now claims it has been offering.[8]

Substantive rights are affected by the failure to offer same-sex civil marriage.

Marriage is a widely recognized, portable status, as Professor Leslie Green argued in a recent panel at the British Academy (*Gay Marriage: Prospects and Realities*, 29 May 2012). It allows for international recognition for immigration and other purposes, where civil partnership may not. It is also recognized and understood in society in a way that civil partnership is not, and it does not force parties to disclose their sexual orientation in order to claim legal, job-related and other benefits. It offers the potential for religious recognition, depending upon the religious organization involved, and it provides a committed couple's relationship with a kind of legitimacy that is different from a merely civil and legal relationship. It is not the case, as the church argues, that no substantive inequality of rights will be rectified by opening up civil marriage to same-sex couples.

Even if the rights currently afforded to same-sex partners were substantively the same, they would not be equal.

In the famous case of *Brown v. Board of Education*, in which the United States Supreme Court held that racially segregated schools violated that country's constitution, the court reasoned:

> Segregation of white and colored children in public schools has a detrimental effect upon the colored children. The impact is greater when it has the sanction of the law; for the policy of separating the races is usually interpreted as denoting the inferiority of the negro group. A sense of inferiority affects the motivation of a child to learn. Segregation with the sanction of law, therefore, has a tendency to [retard] the educational and mental development of negro children and to deprive them of some of the benefits they would receive in a racial[ly] integrated school system. (347 U.S. 483, 494 (1954))

The same could be said of the segregation imposed by the distinction between marriage and civil partnership. Legalized segregation of gay men, lesbians and bisexuals, preventing them from entering into same-sex marriage, and society's failure to meet the emotional needs referred to by the church may well have a tendency to retard the growth of their relationships and deprives them of both tangible and intangible benefits that they would have in a marriage.

Concrete evidence of this 'emotional need' (something that a church might be expected to be particularly sensitive to), include increased rates of drug addiction and alcoholism, higher rates of STD contraction and higher rates of suicide. These phenomena are not attributable to a 'life style' as some more conservative supporters of the church's statement might argue; rather, they are indicia of the differential treatment and prejudice suffered by some lesbians, gay men and bisexuals. Affording these people the ability to marry would go a long way to eliminating both.

Another case in the United States Supreme Court addressed racial prejudice: this time in the context of marriage. Mildred Jeter (who was black) and Richard Loving (who was white),

---

[8] http://www.churchofengland.org/media-centre/news/2005/07/pr5605.aspx (last visited 18 June 2012). See esp. paras 16 and 17, 26, 27.

travelled from their home state of Virginia, where interracial marriage was unlawful, to the District of Columbia, where it was not, and married. Returning to Virginia, they were sentenced to one year in jail, to be suspended for 25 years if they left the state and did not return. The sentencing judge ruled:

> Almighty God created the races white, black, yellow, malay and red, and he placed them on separate continents. And, but for the interference with his arrangement, there would be no cause for such marriage. The fact that he separated the races shows that he did not intend for the races to mix.

The Supreme Court found that their conviction violated the constitution, holding,

> Marriage is one of the 'basic civil rights of man,' fundamental to our very existence and survival. … To deny this fundamental freedom on so unsupportable a basis as the racial classifications embodied in these statutes, classifications so directly subversive of the principle of equality at the heart of the Fourteenth Amendment, is surely to deprive all the State's citizens of liberty without due process of law. (388 U.S. 1, 12 (1967))

Gender classification is no less invidious than racial classifications are in the present context. Civil marriage can be open to same-sex couples, just as it is to opposite-sex couples, based on the same principles that made it open to couples of different races in the American south in the 1960s. Imagined religious prohibitions should not apply to one any more than they do to the other.

Separate is not equal.

Conclusion

The Church of England's submission raises other issues: adultery and consummation (which probably should not be part of the modern law of marriage, anyway) and the manner in which the consultation has been conducted (undoubtedly laying a foundation for a subsequent challenge in the high court). These are legal issues that can be dealt with in the future by lawyers.

The main thrust here is that far from being an impregnable fortress, the English, British and indeed United Kingdom law of marriage is more like a Trollopian country house—one that has been added onto and remodelled, modernized and adapted to suit new circumstances. Far from tearing down the ancient, central hall, the government's proposal will welcome new, additional inhabitants into it. The issues here have to do with fairness and justice, and the (il-)logical and legal arguments advance by the Church of England should not get in the way of offering hospitality to a new group of beneficiaries of what all parties agree is an important institution.

Respectfully submitted,

Professor Leslie Green, Professor of the Philosophy of Law, University of Oxford

Professor Diarmaid N.J. MacCulloch, Kt, DD, FBA, Professor of the History of the Church, University of Oxford

Professor Iain McLean, FBA, FRSE, Official Fellow in Politics, Nuffield College; Professor of Politics, University of Oxford

Revd Canon Dr Judith Maltby, Chaplain and Fellow of Corpus Christi College, Reader in Church History, University of Oxford

Dr Adrian Kelly, Tutorial Fellow in Ancient Greek Language and Literature, Clarendon University Lecturer in Classics, University if Oxford

Dr Scot M. Peterson, J.D., Lecturer in Politics, Balliol College, Oxford

Will Jones, M.Phil., Lecturer in Politics, Hertford College, Oxford

Annex: Response to the Consultation Questions

Question 1: Do you agree or disagree with enabling all couples, regardless of their gender to have a civil marriage ceremony? We agree.

Question 2: Please explain the reasons for your answer. Please respond within 1,225 characters (approx. 200 words). The foregoing is respectfully submitted. As the Church of England's response to the consultation exceeded the prescribed word/character limit and was submitted 72 hours before the end of the consultation period, we request that this submission be considered. Alternatively, if this submission cannot be considered, then we respectfully request that the submission by the Church of England not be considered as a part of the government's consultation.