The Marriage and Civil Partnership (Scotland) Act 2014: the equality and human rights implications for religious or belief bodies

Introduction

The Marriage and Civil Partnership (Scotland) Act 2014 (the Act) extends marriage to same sex couples in Scotland. This guide explains how the Act affects the rights and duties of religious or belief bodies under equality and human rights law.

Rights under equality law protect against unlawful discrimination and harassment based on various protected characteristics, including marriage and civil partnership, religion or belief, sexual orientation and gender reassignment. Human rights law also provides protection against discrimination in the enjoyment of certain rights, and protects the rights to freedom of thought, conscience and religion, freedom of assembly and freedom of expression. Our accompanying guidance on marriage and the law covers these rights in greater detail.

Key points

- The Act extends marriage to same sex couples in Scotland and introduces the religious and belief registration of civil partnerships, while at the same time protecting freedom of thought, conscience and religion.

- A religious or belief body is free to choose whether to marry same sex couples.

- Where a religious or belief body has chosen to opt in to marry same sex couples, that body and some or all of its celebrants are empowered to marry same sex couples.
• If a religious or belief body has not opted in, its celebrants cannot solemnise marriages of same sex couples. If a person who is not an authorised celebrant carries out a ceremony, the ceremony would not be recognised by the state.

• The Act gives explicit protection to religious or belief bodies and their celebrants and makes it clear that no obligation is placed on them to opt in to solemnise the marriages of same sex couples.

• Where a religious or belief body chooses to opt in to marry same sex couples and chooses to nominate all or some of its celebrants, but a celebrant of that body (even if nominated) does not wish to undertake such marriage duties because they concern a same sex couple, the Act places no obligation on the celebrant to do so.

**Impact on religious or belief bodies and their celebrants**

**Terminology**

A religious or belief body in this context means a religious or belief body which could solemnise marriage.

Celebrants in this context means those authorised by the religious or belief body to solemnise marriages.

**Opting in and nominating celebrants**

The law in Scotland allows religious or belief bodies to solemnise marriages. The law only prescribes requirements for the marriage ceremony where legal recognition is sought for the ceremony. It provides for certain religious and belief marriages to have legal recognition if prescribed requirements are satisfied.

If a religious or belief body wishes to marry same sex couples it can only do so if it opts in. A religious or belief body can opt in either by asking to be a prescribed body
whose celebrants are all nominated to carry out same sex marriage, or instead by nominating specific celebrants to carry out same sex marriage.

If it has previously opted in, a religious or belief body can subsequently choose to opt out.

If a religious or belief body chooses not to marry same sex couples, its celebrants are bound by that decision. In that situation, its celebrants cannot marry a same sex couple.

Celebrants are bound by the religious or belief ethos and doctrines of the particular religious or belief body they belong to and represent. Religious and belief bodies retain the right to maintain and enforce adherence to their religious or belief doctrines.

Religious or belief marriage ceremonies for same sex couples are permitted, where the religious or belief body has opted in. The Act imposes no duty on celebrants of religious or belief bodies to conduct same sex marriages. The religious or belief freedom of the same sex couple, and of the religious or belief body and its celebrants, are therefore protected.

In the event that a religious or belief body chooses to opt in to marriage ceremonies for same sex couples according to its doctrine or marriage procedures, but an individual celebrant of that body does not wish to conduct such marriages due to his or her religious or other beliefs (even if the celebrant previously consented to be nominated as a celebrant authorised to conduct same sex marriage) or that of his or her congregation, the religious or belief body should consider finding a suitable replacement.

The Act clearly states that it imposes no duty on religious or belief celebrants to conduct such marriages. However, religious or belief bodies have rights under Article 9 (freedom of thought, conscience and religion) and Article 11 (freedom of assembly) of the European Convention on Human Rights (the Convention), which allow them to
control their internal affairs without unnecessary and disproportionate State interference.

It is strongly suggested that opting-in religious or belief bodies and their celebrants discuss and mutually agree who will and will not solemnise marriages of same sex couples. This should include what needs to be done, and by whom, in the event of a celebrant refusing, at short notice, to solemnise a marriage because it is the marriage of a same sex couple. This will help to avoid internal conflict and will ensure that the legitimate and reasonable expectations of same sex couples can be met.

**Impact on employed chaplains**

Chaplains often represent religious or belief bodies, as well as working in non-religious or belief settings such as hospitals, prisons, the armed forces, further and higher education institutions and schools. They may be employed by the institution, a diocese, a local charitable trust, some form of chaplaincy council or other organisation. They may be ordained ministers or lay ministers. They may be employed or they may be unpaid volunteers or paid an honorarium. Their particular ‘work’ circumstances will be relevant to whether the employment provisions of equality law and human rights protections are engaged.

Chaplains are in a different position from other employees and office holders as they are bound by the doctrines, decisions and restrictions legitimately imposed by the religious or belief body to which they are affiliated. Therefore they cannot marry same sex couples where their religious or belief body has decided not to opt in. This is because in these circumstances they are not authorised by law to do so.

The Act imposes no duty on religious or belief celebrants to marry same sex couples. Thus if they belong to a body which has opted in to marry same sex couples, the Act places no obligation on the celebrant to marry the couple.
Human rights law protects freedom of thought, conscience and religion and freedom of expression. This includes the right for individuals to express their views freely in public and at work, subject to such limits as are necessary to protect the rights and freedoms of others.

Chaplains have the same rights to free expression and religious freedom as everyone else. As celebrants of particular religious or belief bodies, they are free to express views about the marriage of same sex couples in accordance with their religious or belief doctrine in a sermon, or in other religious or belief contexts. Those rights also apply, subject to lawful limitations, in non-religious or belief settings, where, for example, chaplains work in prisons, hospitals or education establishments.

When working in non-religious or belief settings, chaplains are expected to follow dignity at work, and equality and diversity workplace policies and practices of the non-religious or belief employer. A chaplain cannot refuse to provide chaplaincy services based on sexual orientation when working for the non-religious or belief organisation as this would be unlawful discrimination in the provision of services or exercise of public functions, unless an exception in equality law permitted such conduct. If an exception does not apply, a chaplain cannot use compliance with religious or belief doctrine in defence of discriminatory conduct in these circumstances.

Generally, a chaplain’s actions or conduct in religious or belief and non-religious or belief settings should be considered separately. What s/he says about marriage of same sex couples in, for example, a religious sermon in a church should not be the basis for being disadvantaged or subjected to a detriment in the non-religious or belief workplace. This could constitute unlawful discrimination against the chaplain based on religion or belief.

The position of chaplains is also examined in the guidance on the workplace and service delivery.
Changes to equality law

The Equality Act 2010 (Equality Act) contains duties not to unlawfully discriminate against, or unlawfully harass, individuals based on protected characteristics. These include marriage and civil partnership, religion or belief, sexual orientation and gender reassignment. It also prohibits victimising an individual for carrying out a protected act under the Equality Act.

In work contexts, behaviour constituting unlawful discrimination or harassment based on a protected characteristic (such as religion or belief, sexual orientation and/or gender reassignment) could result in civil law liability and sanctions for both the employer and employee who are held to have acted unlawfully.

However, equality law continues to provide many exceptions to enable religious or belief bodies and their celebrants to operate according to their doctrine or beliefs and in accordance with the deeply held beliefs of their members.

Schedule 3 to the Equality Act has been amended to prevent religious or belief bodies and their celebrants from being successfully challenged under the Part 3 services provisions of that Act when they choose not to marry same sex couples or to make premises which they control available for such marriages. Part 5, the employment provisions of the Equality Act, has also been amended to make clear that, for religious or belief bodies and their celebrants who refuse to participate in the marriage of a same sex couple, this does not constitute unlawful discrimination in the work context.

Religion or belief freedom and freedom of expression

The Act provides that the introduction of same sex marriage does not affect existing rights to freedom of expression. Freedom of thought, conscience and religion and the right to freedom of expression are set out respectively in Articles 9 and 10 of the Convention, although these rights are subject to limits to protect the rights and
freedoms of others. Individuals may therefore express positive or negative views about marriage of same sex couples. The Scottish Government considers the belief that marriage can only be between a man and a woman is a belief worthy of respect in a democratic society, as is the belief that marriage includes same sex marriage.

The Lord Advocate has also published prosecutorial guidance in relation to public order offences which can be found at [http://www.copfs.gov.uk/images/Documents/Prosecution_Policy_Guidance/Guidelines_and_Policy/PROSECUTION%20G beverage%20RELATION%20TO%20SAME%20SEX%20MARRIAGE.pdf](http://www.copfs.gov.uk/images/Documents/Prosecution_Policy_Guidance/Guidelines_and_Policy/PROSECUTION%20GUIDANCE%20IN%20RELATION%20TO%20SAME%20SEX%20MARRIAGE.pdf). This recognises the importance of being able to hold and impart views, including opposition to marriage of same sex couples. Where comments or behaviour do not incite hatred and are not intended to cause public disorder they will not be subject to criminal prosecution.

However, freedom of expression is subject to limits to protect the rights and freedoms of others.

**Further information**

The EHRC has published a series of complementary guidance documents:

*The Marriage and Civil Partnership (Scotland) Act 2014: the equality and human rights implications for public authorities*

*The Marriage and Civil Partnership (Scotland) Act 2014: the equality and human rights implications for the provision of school education*

*The Marriage and Civil Partnership (Scotland) Act 2014: the equality and human rights implications for the workplace and service delivery*

*The Marriage and Civil Partnership (Scotland) Act 2014: the equality and human rights implications for marriage and the law in Scotland*
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