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

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 public authorities exercising their functions. This document is useful for central and local government, prisons, hospitals, education institutions, and any other organisation exercising public functions.

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 Registrar General and authorised registrars in Scotland have statutory duties in relation to authorising, conducting and registering marriages of same sex couples in exactly the same way as they have for opposite sex couples.

• The Act places no obligations on religious or belief bodies and their celebrants to solemnise the marriage of same sex couples.

• Public authorities must act in accordance with the Equality Act 2010 (the Equality Act) so as not to discriminate unlawfully in the exercise of their functions –
whether as an employer, a service provider or in exercising public functions. The prohibitions on discrimination because of religion or belief, sexual orientation or gender reassignment are particularly relevant in the context of marriage of same sex couples.

- Public authorities must act compatibly with the Human Rights Act 1998 (the Human Rights Act), including in protecting freedom of thought, conscience and religion, freedom of assembly, freedom of expression and protection from discrimination.

- The employment, services and public functions provisions of the Equality Act have been amended consequent to the Act specifically to protect religious or belief bodies and their celebrants who do not wish to marry same sex couples, from claims of discrimination.

- A public authority will be acting unlawfully if it tries to rely on the public sector equality duty to subject an individual or organisation to a disadvantage or detriment due to their beliefs about marriage, where this is not a relevant consideration. The equality duty cannot be used to justify an unlawful act.

- An individual's or organisation's position on same sex relationships and the marriage of same sex couples may sometimes be relevant to the decisions a public authority takes when this affects the rights of others. This could include, for example, when the authority is acting in the best interests of children and protecting service users from unlawful discrimination.

**Definition of a public authority in equality and human rights law**

Under the Human Rights Act 1998, the general definition of a public authority includes public bodies directly exercising public functions. It also covers others who, although not public bodies themselves, perform public functions – but only when they are exercising functions of a public nature.
The same general definition applies for the purposes of section 149 of the Equality Act (the equality duty), but a public authority (for the purposes of this provision) specifically includes those listed in Schedule 19 to the Equality Act.

**Marriage services as public functions**

The issue of whether or not a religious or belief body is performing a public function when conducting a religious or belief marriage ceremony was considered during the parliamentary passage of the Act. Such a religious or belief marriage ceremony has both civil elements and religious or belief elements.

The activities required by a religious or belief body to opt-in to undertaking same sex marriage, by becoming a prescribed religious or belief body or nominating specific celebrants, are not functions of a public nature; rather they are private functions (this is discussed more fully in the guidance on marriage and the law). They are therefore not covered by the Human Rights Act or the public functions or other provisions of the Equality Act; nor, in the opinion of the EHRC, could the activity be subject to judicial review.

It is for the courts to interpret the legislation and finally determine these points in the event that they are pursued and considered through litigation.

**Protecting religious or belief freedom**

Equality and human rights law cannot be used to compel religious or belief bodies and their celebrants to provide marriage ceremonies for same sex couples. There is sufficient protection in the Act and under equality and human rights law to prevent such compulsion. Specific religious or belief protection to take account of the rights under the European Convention of Human Rights (the Convention) is provided through the amendments to the Marriage (S) Act 1977 contained in section 12 of the Act. These make it clear that the Act places no obligation on religious and belief bodies or their celebrants to solemnise marriages of same sex couples.
Individual and collective religious or belief freedom is protected by the European Convention on Human Rights (the Convention). The most notable Convention rights in this respect are Articles 9 (freedom of thought, conscience and religion), 10 (freedom of expression), 11 (freedom of peaceful assembly and freedom of association) and 14 (prohibiting discrimination in the application of Convention rights). Furthermore, the right to marry under Article 12 of the Convention does not require States to provide marriage for same sex couples. However, if a State does provide marriage for same sex couples, it must do so without unjustifiable discrimination under Article 14.

Those rights, taken individually (where possible) and collectively, present formidable obstacles to any attempt to force a religious or belief body or their celebrants to participate against their wishes in religious or belief marriage ceremonies of same sex couples. Any attempt to force religious or belief bodies and their celebrants to do so would almost inevitably fail.

**Freedom of expression**

Public authorities have direct and enforceable duties to protect human rights, which include acting compatibly with the right to free expression. The Act protects the right to freedom of expression as set out in Article 10 of the Convention. Individuals may therefore express positive or negative views about marriage of same sex couples. Our guidance on marriage and the law explains this in detail.

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%20GUIDANCE%20IN%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.
Equality Act and the provision of services

The employment and service provisions contained in Parts 3 and 5 of the Equality Act have been specifically amended so that it is not unlawful discrimination for a religious or belief body or its celebrants to refuse to conduct or otherwise refuse to participate in a religious or belief marriage ceremony for the sole reason that it concerns a same sex couple. Neither is it unlawful discrimination for any person connected with the solemnisation of a religious or belief same sex marriage to refuse to participate in the ceremony. An Equality Act claim brought in these circumstances is bound to fail. This is discussed further in our guidance on marriage and the workplace and the provision of services.

However, outside the marriage itself, the Equality Act limits the extent to which religious or belief bodies may operate restrictions relating to sexual orientation where the body is providing services on behalf of, and under contract with, a public authority.

An individual's or body's position on same sex relationships and/or the marriage of same sex couples will sometimes be relevant to how it is treated by a public authority. On most occasions, it should not be relevant to decisions to provide access to public facilities available for hire. However, it could be relevant to decisions on public funding, for example in the form of grants, or procurement contracts to deliver public services, where the rights of others are engaged. This will need to be determined on a case by case basis, taking account of the particular circumstances and relevant factors to consider in each case.

Public authorities should avoid making unwarranted assumptions that the rights of others will be breached simply because an individual or body agrees or disagrees with marriage of same sex couples. Where there are relevant concerns, they should be explored to aid understanding, to establish evidence of potential adverse impact, and to enable public authorities to make well-founded and lawful decisions.
The Equality Act does not require public authorities to adopt a 'one size fits all' approach to exercising public functions. Such an approach could result in indirect discrimination. Public authorities are not prevented from providing services in different ways to different groups, so long as this does not result in any prohibited discrimination based on a protected characteristic.

For example, the Equality Act permits public authorities to take lawful positive action to address disadvantages experienced by people sharing a protected characteristic to meet different needs and to encourage greater participation for such groups. Other provisions of the Equality Act also permit services targeted towards people sharing a particular protected characteristic subject to certain requirements (for example, in providing single-sex services or services relating to religion).

**Impact of the equality duty**

The equality duty places a general duty on public authorities and those exercising public functions to have 'due regard' when exercising their functions to three needs: (a) eliminating conduct (such as discrimination, harassment and victimisation) that is prohibited by the Act, (b) advancing equality of opportunity between people who share a protected characteristic and those who do not, and (c) fostering good relations between people who share a protected characteristic and those who do not. The second two matters apply to the protected characteristics of age, disability, gender reassignment, pregnancy and maternity, race, religion or belief, sex and sexual orientation. They do not apply to the protected characteristic of marriage and civil partnership.

The duty to have 'due regard' is not a duty to deliver prescribed or particular outcomes. It is not a duty, for example, to prioritise one aspect of equality over another. The equality duty could not be used to unjustifiably disadvantage religious or belief bodies or their celebrants who choose to exercise their right under the Act not to conduct or participate in religious or belief marriage ceremonies of same sex couples.
The EHRC's Scottish Technical Guidance on the equality duty provides more guidance on how this aspect of equality law operates, including further details about the meaning of each protected characteristic and the contexts in which they do or do not apply.

**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 religious organisations*

*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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