

**Legislative Scrutiny - Marriage (Same Sex Couples Bill)**  
**Government response to the Joint Committee on Human Rights, Second**  
**Report of Session 2013–14**

1. The Committee's comments and recommendations on particular issues raised by the Bill are set out below, together with the Government's response.

**Marriage of same sex couples according to religious rites and usages**

2. The Committee gave consideration to the permissive nature of the Bill, and the "opt-in" arrangements the Government has developed for religious organisations, in particular that this represented a difference of treatment because of sexual orientation. The Committee noted that the Government has an obligation to protect the rights of religious organisations, and the Committee concluded that there is a clear justification for the provisions of the Bill which provide for the right of religious organisations to decide whether or not to conduct same sex marriages (para 40).

Government response

3. We are grateful for the Committee's analysis and agree with this conclusion.

**Separate legislative processes for the Church of England and the Church in Wales**

4. The Committee noted the particular way the Bill deals with the Church of England and Church in Wales, and that this creates a difference in treatment between religious organisations. The Committee concluded that the difference in treatment of the Church of England and the Church in Wales is justified due to the legal circumstances of those Churches, which do not apply to any other religious organisation (para 44). The Committee also stated that it is important that other religious organisations and individual ministers of other faith groups have the same level of protection as the Church of England and Church in Wales.

Government response

5. The Government agrees with the Committee's conclusions that the difference in treatment between the Church of England and Church in Wales and other religious organisations is justified, and that other religious organisations and ministers should be equally protected. The Government believes that the religious protections in the Bill for other religious organisations provide the

same level of protection as that afforded to the Church of England and Church in Wales, albeit by a different method reflecting their different legal positions.

### **Public functions**

6. The Committee considered evidence provided to it on the question of whether the opt-in process itself could be considered a public function, but the Committee did not come to a conclusion on this matter.
7. The Committee went on to recommend that the Government consider formulating a new clause in order to provide additional reassurance to any religious ministers or office holders who perform the dual function of officiating at a marriage in a spiritual capacity as well as performing the public function of registrar under the Marriage Act 1949 (para 57).
8. The Committee expressed the view that the solemnization of legally binding marriage by any religious organisation under the provisions of the Marriage Act 1949 may be a public function (para 58), and asked the Government to reconsider whether it could bring forward amendments to distinguish more clearly the civil and religious implications of marriages in registered religious buildings (para 59).

### Government response

9. The Government notes the Committee's consideration of these issues. The Government is clear that a religious organisation is not a public authority for these purposes and that the decision on opting in is not a public function, since it is a purely internal decision, based on religious doctrine. Subsection 2(3) of the Bill explains the meaning of the opt-in activities and opt-out activities which the clause prohibits a person from being compelled to undertake or refrain from undertaking. These can be summarised as:
  - a decision by a religious organisation to consent to certain things relating to same sex marriage ceremonies (e.g. consent to marriages of same sex couples by that organisation and consent to the deathbed marriage of a same sex couple according to religious rites or usages);
  - an application by a proprietor or trustee of a building for the building to be registered as a place where same sex couples can get married;
  - authorising persons to be present at the solemnization of a same sex marriage to ensure that the legal requirements of such marriages are met; and
  - registering a building as a place where same sex couples can get married.
10. We consider that such activities cannot be considered to be public functions. The fact that these are decisions which may be the precursor to the solemnization of marriage, which itself may contain elements that are public in

nature, does not make those earlier decisions also public in nature - in the same way that a decision by a commercial organisation whether or not to bid for a contract to run a prison on behalf of the State is not the exercise of a public function, though once it takes over the operation of the prison it is clearly exercising a public function.

11. The Government does not agree that a new clause intended to tease apart the civil and religious aspects of a marriage ceremony is needed. Clause 2 already provides sufficient protection for any religious organisation or representative who does not choose to opt in/take part in a religious marriage ceremony - whether the function which would be performed as a consequence of that decision is a spiritual one or a function carried out on behalf of the State. In neither capacity could the religious organisation or individual be compelled to take part in a religious marriage ceremony. Thus, while the Government notes the Committee's view that solemnization may itself be a public function, we do not consider that the Bill needs to be amended as a result.

12. In this connection as well as in respect of other aspects of the Bill, we note a point to which Baroness Stowell of Beeston drew attention during the Committee stage, in a debate on issues of freedom of expression (amendment 46C, 24 June col 602). In discussing the protection we have provided for religion or belief in the Bill, she drew attention to the effect of the Human Rights Act 1998, and in particular that:

- Section 3 of that Act provides: "*So far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights*".
- Equally, section 13 provides: "*If a court's determination of any question arising under this Act might affect the exercise by a religious organisation (itself or its members collectively) of the Convention right to freedom of thought, conscience and religion, it must have particular regard to the importance of that right*".

13. It is the Government's view that the effect of these provisions, alongside the very clear provisions in clause 2 of the Bill, is to doom to immediate failure any attempted compulsion of religious organisations or their representatives.

### **Protections for individual ministers in relation to the solemnization of marriage**

14. The Committee noted the protections provided in the Bill for individual ministers concerning the solemnization of same sex marriage, and was broadly satisfied with these insofar as the protections relate to the solemnization of same sex marriage (para 63). However, the Committee also noted the concern that subsection 2(2) of the Bill may have the effect of

preventing a religious organisation which opts in to conduct same sex marriage from maintaining its decision throughout the organisation, as it could not compel individual ministers to take part in such ceremonies. The Committee considered that this is an interference with the organisation's Article 9 rights, and requested that the Government consider whether the Bill should be amended to deal with this concern (para 63).

#### Government response

15. The Government notes the Committee's views. We have given much thought to this issue and do not consider that the Bill should be amended. The Government has said from the start that no religious organisation or representative should be compelled to conduct same sex marriage ceremonies and the Bill reflects that commitment. We continue to think it highly unlikely that religious organisations which have opted in would, in practice, wish to force individual ministers to act against their conscience in this way. We further consider that, even if such a case did arise, we have correctly balanced the protection of the individual and the rights of the organisation. This is because an unwilling minister is not imposing his or her views on the religious organisation; and it is open to the organisation to find an alternative minister to conduct the ceremony. So each party achieves what they wish without imposing their views on the other.

#### **Broader protections for religious organisations and individual ministers**

16. The Committee noted concerns that the Bill might create a number of legal uncertainties, for example around the extent of the concept of "compulsion" and the effect of the public sector equality duty (section 149 of the Equality Act 2010), which may only be resolved through litigation, with its attendant costs. The Committee did not reach a conclusion on this matter, but recommended that the Government reconsider these issues with a view to bringing forward amendments in the House of Lords to deal with these concerns (para 69).

#### Government response

17. The Government believes the courts will have no difficulty in determining whether conduct seeks to compel someone to do something and will give the word its natural meaning. However, we have listened closely to the debates in Parliament and the concerns that have been expressed, and have decided to bring forward an amendment to make it clear on the face of the Bill that the word "compelled" in clause 2 has a broad meaning.
18. The Government is not persuaded on the need for an amendment in relation to the public sector equality duty. It would be unlawful for a public body to rely on that so as to penalise a religious organisation or representative because of a decision not to opt into or conduct same sex marriages according to its rites. As we have noted above, we consider that the courts would have no difficulty in reaching such a conclusion. In

*Wheeler v Leicester City Council* [1985] AC 1054, a case in which the council banned a rugby club from using its ground after some of its members attended a tour of South Africa during the apartheid regime, using a predecessor of the public sector equality duty to justify its actions, the House of Lords held that the decision was irrational. It also found that the decision was procedurally unfair and there was an improper purpose, resulting in the council's decision being quashed. This reasoning would also apply here. The decision of the House of Lords in *Wheeler* was followed in *R v Lewisham London Borough Council, ex parte Shell UK Ltd* [1988] 1 All ER 938, in which the council refused to enter into contracts with Shell on the grounds that it had business interests in South Africa. The court held that the council's motive was to exert pressure on the company to sever all links with South Africa. It followed that the council's decision had been influenced by an extraneous and impermissible purpose and the decision was held to be unlawful.

19. We do of course recognise that it is important that public authorities understand and exercise the public sector equality duty appropriately. We consider that the best way to address this is to work with the Equality and Human Rights Commission to ensure that the relevant guidance makes clear that the public sector equality duty cannot be used to penalise organisations simply because they oppose same sex marriage.

#### **Wider implications of the Bill: freedom of expression**

20. The Committee welcomed the Government's commitment to bringing forward an amendment to section 29JA of the Public Order Act 1986, which relates to the offence in that Act of stirring up hatred because of sexual orientation (para 74).

#### Government response

21. The Government is pleased that the Committee agrees that this amendment is appropriate. The amendment was made in Lords Committee and is now part of the Bill.

#### **Wider implications of the Bill: employment**

22. The Committee considered evidence as to whether the Bill had implications for employment law. The Committee noted that the Government's position remains that further protections are unnecessary in this regard (para 79).

#### Government response

23. The Government continues to hold this view.

#### **Wider implications of the Bill: marriage registrars**

24. The Committee noted that there were particular concerns for the position of teachers and marriage registrars. Although the Committee did not come to a final conclusion, it recommended that the Government reconsider these issues with a view to bringing forward amendments in the House of Lords to put in place transitional arrangements which deal with these concerns for those in post as marriage registrars at the time the Bill, when enacted, comes into force (para 84).

#### Government response

25. The Government has considered the position but does not see a need for amendments to provide a conscience clause for marriage registrars, even on a transitional basis. Registrars are public servants with statutory duties who should not be able to discriminate against members of the public when providing their services. As to the position of teachers, the Government has stated clearly that teachers are free to express their personal beliefs, and those of their faith, as long as they do so in an appropriate and sensitive way, and that remains our view.

#### **Teaching of sex and relationship education**

26. The Committee welcomed the Government's commitment to review the protections that may be required in relation to the teaching of sex and relationship education. The Committee went on to encourage the Government to consider whether specific protections may be required for faith schools and for individual teachers who hold a religious belief about same sex marriage (para 90).

#### Government response

27. The Government believes that the current protections for faith schools and individual teachers are sufficient, but is continuing to engage with religious organisations and others to explore whether there is a case for further clarification in this area.

#### **Civil partnerships**

28. The Committee was not convinced by the Government's reasons for not extending civil partnerships to opposite sex couples, and welcomed the Government's announcement that it will review this matter. The Committee suggested that in doing so, the Government should take into account the potential discrimination that may arise between cohabiting opposite sex couples and civil partners. The Committee also noted that there was some ambiguity in the Government's evidence concerning the costs of extending civil partnerships to opposite sex couples. The Committee expects that, as part of the review, the Government should provide clear and accurate information about these costs (para 95).

#### Government response

29. The Government published the terms of reference of the Civil Partnership Review on 13<sup>th</sup> June. The aim of the Review is for Government to develop an informed view, including a proper understanding of the practical and financial implications of any changes. The Review will need to look at all the issues raised by the identified options and any related legal issues. The Government has made clear that it does not propose to make any changes to cohabitation law in this parliamentary term.

## **Pensions**

30. The Committee noted that the Government recognised that the policy of treating same sex marriages the same as civil partnerships for the purpose of occupational pension survivor benefits could create a problem in relation to marriages where one spouse changes legal gender, and welcomed the Government's amendments at Commons Report stage to deal with this.

31. The Committee considered that the Government should carry out a full review of pension provision in relation to the survivor pension benefit entitlements of same sex married couples and civil partners, to ensure that there is no unjustifiable discrimination in pension scheme provision. The Committee called on the Government to provide precise information about the potential costs of equalising pension rights.

## Government response

32. The Government does not intend to revisit the issue of equalising survivor benefits in pension schemes and has already made its position on this clear. The state and private pension systems contain a number of differences in treatment, reflecting the historic structure of pensions which has arisen as a result of changes in social attitudes and society. Equalising survivor benefits between women and one category of men would merely add a further, different unfairness. We already know that equalising survivor benefits for all survivors – in effect treating men and women equally - would impose a retrospective cost on pension schemes and potentially place a significant burden on the public finances during a difficult economic period.

33. Due to the way in which pension schemes are funded, the approach all Governments have taken is not to make legislative changes retrospectively. While implementing the changes going forward takes time to have an effect, the differences in treatment will disappear over time.

34. In respect of private pension schemes in particular, the Government considers that it would not be right in principle to place retrospective requirements on such schemes, whatever the exact scale of those costs. It would not be appropriate for Government to require schemes to provide a particular benefit which they would have to fund, which for a small scheme could result in a large increase in liabilities. It is right that all the Government should do in legislation is set out the minimum we expect from schemes. The decision to provide survivor benefits and their nature is a matter for individual schemes.