

MARRIAGE (SAME SEX COUPLES) BILL

**FURTHER SUPPLEMENTARY NOTE FOR THE JOINT
COMMITTEE ON HUMAN RIGHTS**

June 2013

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Introduction

1. The Government Equalities Office (part of the Department for Culture, Media & Sport) submitted a note on 5 February 2013 to the Joint Committee on Human Rights shortly after introduction of the Marriage (Same Sex Couples) Bill in the House of Commons on 24 January 2013; and a supplementary note addressing various Government amendments tabled at Commons Report on 20 and 21 May 2013, where they have human rights implications, and also a recent development in case law. This further supplementary note addresses Government amendments tabled at Lords Committee on 17, 19 and 24 June 2013.

2. The Government is satisfied that these amendments are compatible with the rights under the European Convention on Human Rights (“the Convention”).

Void marriages (Schedule 7, paragraphs 4, 15 and 25)

3. An amendment has been made to the Marriage Act 1949 (“the MA 1949”) to provide that marriages of same sex couples purported to be carried out according to the rites of the Church of England or Church in Wales will be void, as the law will not provide a lawful route for these marriages to have taken place. This protects the position of those Churches, whilst ensuring that a purported marriage would not result in a ‘non-marriage’, with the result that the courts would not have jurisdiction to grant ancillary relief to the parties to the purported marriage who might have considered themselves married.

4. As regards other religious organisations, another amendment has been made to the MA 1949 (new section 49A) to ensure that same sex couples are not disadvantaged by a “rogue” individual who purports to marry them without the religion that (s)he represents having opted in. Marriages according to the rites of other religious organisations will only be void if the couple knew that the religious organisation had not opted in to conduct same sex marriages. This puts the opt-in requirement for religious organisations on the same footing as other formalities in marriage law (such as the requirement for

notice to be given and certificates to be issued by the superintendent registrar). The effect is that marriage will only be void for lack of an opt-in if the couple knew of it and married in wilful disregard of the fact that the religious organisation had not opted in. There is potential engagement with Article 14 read with Article 12 (and potentially read with Article 1 of the First Protocol). However, these amendments prevent non-compliance with the MA 1949 from affecting same sex couples who have considered themselves to be lawfully married differently from opposite sex couples in that situation, whilst balancing the protection of religious organisations which do not wish to conduct marriages of same sex couples. The same principles will apply to marriages of same sex couples conducted according to religious rites under the Marriage (Registrar General's Licence) Act 1970.

Offences relating to stirring up hatred on grounds of sexual orientation: protection for discussion or criticism of marriage concerning the sex of parties to marriage (Schedule 7, paragraph 28)

5. Article 10 provides that everyone has the right to freedom of expression, including the freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. The Article does not prevent the licensing of broadcasting, television or cinema.
6. Article 10(2) provides that the exercise of the freedoms provided by this Article may be subject to formalities, conditions, restrictions or penalties. Such limitations will only be permitted if they are prescribed by law and necessary in a democratic society:
 - in the interests of national security, territorial integrity or public safety;
 - for the prevention of disorder or crime;
 - for the protection of health or morals or the reputation or rights of others;
 - for the prevention of disclosure of information received in confidence; or
 - for the maintenance of the authority and impartiality of the judiciary.
7. As with the rights protected by Article 9, the courts, when deciding whether any interference is justified, must decide whether the means are proportionate with the aim of the interference.

8. Part 3A of the Public Order Act 1986 (“the POA 1986”) creates a number of offences which relate to the possession or dissemination of material which is threatening, where the person possessing or disseminating the material intends to stir up hatred on the grounds of sexual orientation by so doing (those offences can also be committed where the intention is to stir up religious hatred but that it not considered relevant to this analysis).
9. Part 3A of the POA 1986, insofar as it contains offences related to stirring up hatred on the grounds of sexual orientation, is considered to engage Articles 9(1) and 10(1) of the Convention. However the offences are considered to have the legitimate aims of protecting the rights of others to be free from abuse and the protection of public order and to be a proportionate response to those aims.
10. Part 3A of the POA 1986 contains section 29JA which provides:

“In this Part, for the avoidance of doubt, the discussion or criticism of sexual conduct or practices or the urging of persons to refrain from or modify such conduct or practices shall not be taken of itself to be threatening or intended to stir up hatred.”
11. This provision is intended to clarify the balance between the legitimate aims pursued by the offences in Part 3A of the POA 1986 and the rights set out in Articles 9(1) and 10(1) of the Convention. The purpose of the amendment to section 29JA of the POA 1986 made by paragraph 28 of Schedule 7 is to make equivalent provision in respect of discussion or criticism of marriage which relates to the sex of parties to marriage as is already made in relation to discussion or criticism of sexual conduct or practices.
12. To the extent that this provision removes any discouragement to discourse about marriage which relates to the sex of parties to marriage (where that discourse is not threatening and intended to stir up hatred), it could be argued that it has a positive effect on the Article 9 and 10 rights of those wishing to engage in this discourse. However, overall we consider that the balance of the rights protected by the offences relating to stirring up hatred on the grounds of sexual orientation will be unaffected by the provision.