MARRIAGE AND CIVIL PARTNERSHIP (SCOTLAND) BILL  
AMENDMENT TO THE UK EQUALITY ACT 2010

Introduction

1. This note has been agreed between the United Kingdom (UK) and Scottish Governments.

2. The Scottish Government has made it clear that if same sex marriage and the religious or belief registration of civil partnerships are introduced in Scotland, no religious or belief body or celebrant would have to carry them out. This recognises that a number of bodies and celebrants have doctrinal objections to same sex marriage.

3. Therefore, the Marriage and Civil Partnership (Scotland) Bill (“the Bill”) has a number of protections for religious and belief bodies and celebrants. These are outlined in Annex A.

4. However, the Equality Act 2010 (“the 2010 Act”) is a reserved matter for the UK Government. The 2010 Act makes provision on matters relating to discrimination. The Scottish Government concluded that an amendment was required to the 2010 Act to provide further protection in relation to discrimination. Following discussions with the UK Government, the consultation on the draft Bill included draft modifications to the 2010 Act.

5. This note outlines the approach agreed by the UK and Scottish Governments in relation to amendments to the 2010 Act for Scotland as a consequence of the Scottish Bill. In agreeing this approach, the Governments have taken account of:

- Comments made by consultees responding to the consultation on the Scottish Bill.
- The approach taken by the UK Government in the Marriage (Same Sex Couples) Bill to amending the 2010 Act.

Approach to amending the 2010 Act outlined in the consultation on the draft Bill

6. Annex A to the last consultation outlined the Scottish Government’s approach to the 2010 Act. In particular, the Scottish Government noted that:

6.1 Section 29 of the 2010 Act makes provision about not discriminating when providing a service.

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1 Section L2 of Part II of Schedule 5 to the Scotland Act 1988 reserves most aspects of equal opportunities.
2 The consultation on the draft Bill is at http://www.scotland.gov.uk/Publications/2012/12/9433
4 The UK Bill is at http://services.parliament.uk/bills/2013-14/marriagesamesexcouplesbill.html The amendment to the 2010 Act is at clause 2(5) and (6). This amendment relates to “a relevant marriage” which is defined in clause 2(4) by reference to marriages in England and Wales and marriages overseas through UK armed forces.
6.2 Schedule 23 to the 2010 Act already has exemptions for religious and belief bodies from equality requirements relating to sexual orientation but these only apply where it is necessary to comply with the doctrine of the organisation or to avoid conflict with the strongly held convictions of a significant number of the followers of the religion or belief.

6.3 There was a need to amend the 2010 Act to provide further protection in relation to discrimination for individual celebrants with religious or belief objections to same sex marriage and the registration of civil partnerships, even if the body to which they belong does not share these objections. As indicated above, the consultation on the draft Scottish Bill included a modification to the 2010 Act accordingly.

Views from consultees

7. Consultees had a number of comments on the proposed amendment to the 2010 Act, including:

7.1 The amendment to the 2010 Act is not yet in place and cannot be guaranteed, as it relates to a reserved matter outwith the control of the Scottish Government.

7.2 There could still be the possibility of claims relating to sex discrimination.

7.3 There could be concerns about the lack of protection being offered to persons such as Church or Mosque elders and Church organists who could be involved or affected if a same sex marriage took place.

7.4 There was a need to protect religious buildings. An example given was of a celebrant from one congregation who had previously solemnised an opposite sex marriage in a building normally used by a different congregation asking to use the building again to solemnise a same sex marriage.

7.5 It was uncertain what protection there would be for religious bodies offering pre-marital counselling and marriage support services.

7.6 The amendment to the 2010 Act on which the Scottish Government had consulted was narrow in that it related to “conflict with the approved celebrant’s religious or philosophical beliefs”. This, for example, excludes the possibility of a religious celebrant refusing to solemnise a same sex marriage in order to preserve the peace of his or her congregation.

7.7 The Scottish Bill does not make it clear that a religious or belief body may only nominate a celebrant with his or her consent and it also does not specify that there is no duty on any celebrant to allow themselves to be nominated and/or to remain registered.
The approach taken in the UK Bill

8. Relevant amendments to the 2010 Act are at clauses 2(5) and (6) of the UK Bill.

9. Clause 2(6) of the Bill provides that a person does not contravene section 29 only because the person:

9.1 Does not conduct a relevant marriage.

9.2 Is not present at a relevant marriage.

9.3 Does not carry out a relevant marriage.

9.4 Does not otherwise participate in a relevant marriage.

9.5 Does not consent to a relevant marriage being conducted.

10. “Relevant marriage” is defined in clause 2(4) of the Bill and relates to marriages in England and Wales and to armed forces marriage overseas. Therefore, same sex marriages in Scotland are not covered by this amendment to the 2010 Act and an amendment for Scotland is required.

11. Some of the terms used in clause 2(6) are specific to marriage law in England and Wales and relate to functions which do not exist in Scots marriage law. In particular:

11.1 Being “present at” is a reference to functions carried out on religious premises by persons working for religious bodies rather than by civil registrars. There is no direct equivalent of this in Scots marriage law.

11.2 “Consent” relates to consenting to a building being registered for the solemnisation of marriage. Again, this is not a feature of Scots marriage law.

12. Clause 2(5) of the UK Bill amends section 110 of the 2010 Act, in respect of a “relevant marriage”. The purpose of this amendment is to ensure that chaplains employed by secular bodies are not vulnerable to claims by colleagues arising under Part 5 of the 2010 Act (work). Such a claim might possibly arise, for example, if a university offers staff the facility of getting married in its chapel, but the chaplain is opposed to same sex marriage and refuses to take part. The amendment stops such a claim arising.
The planned approach in the light of the Scottish consultation and the UK Bill

General

13. The UK and Scottish Governments have agreed that if the Scottish Bill should receive Royal Assent, necessary changes to UK legislation, including amendments to the 2010 Act, would be made by an Order made by UK Ministers under section 104 of the Scotland Act 1998\(^5\).

14. The Scottish Government will not commence provisions of the Scottish Bill relating to same sex marriage and the religious and belief registration of civil partnerships until the amendments to the 2010 Act are in place.

15. The amendments to the 2010 Act will reflect that:

15.1 As well as same sex marriage, the Scottish Bill is introducing the religious and belief registration of civil partnership.

15.2 Under the Scottish Bill, same sex marriage and civil partnership ceremonies can be carried out by religious and belief celebrants.

The Scottish Bill

16. In relation to the Scottish Bill, the Scottish Government considers that a wide range of protections, outlined in Annex A, are in place. These are outlined in Annex A and centre around an opt-in system. In addition, the Bill has a number of “no obligation” provisions, including making it clear that there is no duty under the Bill on a celebrant who is authorised to solemnise same sex marriage or register civil partnership to carry out such ceremonies.

Basis of amendments to the 2010 Act

17. The Scottish Government agrees with points made by consultees that the amendment to the 2010 Act should not be restricted to cases where solemnising a same sex marriage or registering a civil partnership would conflict with the celebrant’s religious or philosophical beliefs. Similarly, the Scottish Government agrees with points made by consultees that the amendment to the 2010 Act should not be restricted to cases of sexual orientation discrimination.

18. Therefore, in line with clause 2(6) of the UK Bill, the amendment to the 2010 Act for Scotland will provide that a religious or belief celebrant does not contravene section 29 of the 2010 Act by refusing to solemnise a same sex marriage or register a civil partnership for the reason that the marriage or civil partnership is a legally recognised union of a same sex couple.

\(^5\) Orders under section 104 can make consequential provision to reserved legislation following an Act of the Scottish Parliament. More details on section 104 Orders can be found at https://www.gov.uk/government/policies/maintaining-and-strengthening-the-scottish-devolution-settlement/supporting-pages/legislating-for-scotland
Protecting persons in addition to the celebrant

19. The Scottish Government has considered carefully points made by consultees about protection for persons other than the celebrant who may normally be expected to be present at marriage ceremonies. As noted above, some of the provisions in the UK Bill relate to official functions under English and Welsh marriage law for which there is no direct equivalent in Scotland. As a result, no such protection for Scotland is required either.

20. In addition, the Scottish Government considers that protections for those objecting to same sex marriage and the religious or belief registration of civil partnerships need to be balanced with the rights of LGBT people. For example, the Government would not consider it appropriate to exempt chauffeurs taking people to a same sex wedding or civil partnership from equality requirements or to exempt hotel staff who lay out a room before a same sex marriage or civil partnership takes place there. Similarly, the Government would not exempt secular buildings (e.g. hotels) from equality requirements.

21. However, the Scottish Government does consider it reasonable to exempt from equality requirements persons who are an integral part of the religious or belief aspects of the ceremony. This could cover, for example, the organist, the choir and the choirmaster who are playing an integral part in the religious or belief ritual of the wedding service: eg at a church. Therefore, the amendment to the 2010 Act for Scotland will, in line with clause 2(6) of the UK Bill, cover persons who play an integral part in the religious or belief aspects of the marriage or civil partnership ceremony.

22. As noted in paragraph 7.5, some consultees asked about protection for religious bodies providing pre-marital courses. The Scottish Government considers that existing protection in this area is sufficient. Under paragraph 2(3) of Schedule 23 to the 2010 Act, a religious or belief organisation does not contravene Parts 3, 4 or 7 of the Act (about services, premises and associations) so far as relating to religion or belief or sexual orientation only by:

- restricting participation in activities undertaken by the organisation or on its behalf or under its auspices; or
- restricting the provision of goods, facilities or services in the course of activities undertaken by the organisation or on its behalf or under its auspices.

23. These restrictions are permitted in relation to sexual orientation only if they are necessary to comply with the doctrine of the organisation or to avoid conflict with the strongly held convictions of a significant number of the followers of the religion or belief.

24. The restrictions cannot be used by an organisation whose sole or main purpose is commercial.
25. The Scottish Government considers that these existing provisions in the 2010 Act already provide sufficient protection against discrimination actions for religious or belief bodies who wish to restrict access to marital courses which they run to opposite sex couples only.

Protection for religious and belief buildings

26. The Scottish Government has considered carefully points made by consultees on protection of religious and belief buildings. As paragraphs 54 and 55 of Annex A to the consultation indicated, paragraph 2(3)(d) of Schedule 23 to the 2010 Act provides that a religious or belief organisation does not contravene Parts 3, 4 or 7 of the Act (about services, premises and associations) so far as relating to religion or belief or sexual orientation, by restricting the use of premises owned or controlled by the organisation. Such restrictions in the context of sexual orientation may only be imposed if necessary to comply with the doctrine of the organisation or to avoid conflict with strongly held convictions of a significant number of followers.

27. A religious or belief body which is against same sex marriage and the religious or belief registration of civil partnership can rely on the existing provisions of the 2010 Act so that premises they own or control cannot be used for same sex ceremonies. However, this protection may not be available where a body has opted into same sex marriage generally.

28. In particular, the current protection may not be available where a minister of religion (or other person or body controlling the use of religious or belief premises) who is a member of a religious or belief body which has opted in advises a same sex couple that they cannot have their marriage ceremony or civil partnership in the premises because the ceremony would be a same sex marriage or a civil partnership.

29. Therefore, the Government intends that the amendment of the 2010 Act for Scotland will provide that a person controlling the use of religious or belief premises does not contravene section 29 of the 2010 Act by refusing to allow the premises to be used for a same sex marriage or a civil partnership.

Gender reassignment

30. The amendment to the 2010 Act on which the Government consulted extended an existing provision at paragraph 25 of Schedule 3. Paragraph 25 of Schedule 3 provides that “an approved celebrant (A) does not contravene section 29, so far as relating to gender reassignment discrimination, only by refusing to solemnise the marriage of a person (B) if A reasonably believes that B’s gender has become the acquired Gender Recognition Act 2004”.

31. The intention was and remains that this provision will be extended to cover the religious and belief registration of civil partnerships as well. Therefore, the amendment to the 2010 Act for Scotland will make this change.
Chaplains working for secular bodies

32. As noted at paragraph 12 above, clause 2(5) of the UK Bill amends the 2010 Act in relation to chaplains working for secular employers. The amendment to the 2010 Act for Scotland will include a similar amendment, covering both the solemnisation of same sex marriage and the registration of civil partnership.

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June 2013
ANNEX A: PROTECTIONS IN THE SCOTTISH BILL FOR RELIGIOUS OR BELIEF BODIES AND CELEBRANTS

Same sex marriage

1. Section 10 of the Scottish Bill makes amendments to the Marriage (Scotland) Act 1977 ("the 1977 Act") including amendments on who may solemnise a same sex marriage.

2. Under the proposed section 8(1B) of the 1977 Act, there are three ways in which a celebrant can be authorised to solemnise a same sex marriage:

   2.1 through his or her religious or belief body being prescribed by regulations made by the Scottish Ministers;
   2.2 through being nominated to the Registrar General;
   2.3 through a temporary authorisation granted by the Registrar General.

3. The Scottish Ministers can only prescribe a religious or belief body under section 8 of the 1977 Act, as amended, if the body requests to be designated (section 8(1C) of the 1977 Act, as added by section 10 of the Bill, refers).

4. Therefore, if there is no request, there will be no designation. The Scottish Ministers will only designate religious or belief bodies where it is clear that all of their celebrants wish to solemnise same sex marriage.

5. Where a body has decided that it wishes to solemnise same sex marriage but not all of its celebrants wish to do so, it may nominate celebrants to the Registrar General, under section 9 of the 1977 Act as amended by section 11 of the Bill.

6. Under section 12 of the 1977 Act, as amended by section 12 of the Bill, a member of a religious or belief body may seek temporary authorisation for a celebrant (i) to solemnise specific same sex marriage(s) or (ii) to solemnise same sex marriages for a specific period of time. The Registrar General may only grant authorisation to a celebrant for a specific period of time if the religious or belief body of which the person is a member is either prescribed by the regulations or has nominated members to solemnise same sex marriage.

7. In addition, section 8(1D) of the 1977 Act, as added by section 10 of the Bill, provides that nothing in subsection (1B)(a) or (1C)(a):

   7.1 imposes a duty on any religious or belief body to request to be prescribed by regulations;
   7.2 imposes a duty on any religious or belief body to nominate any of its members to be registered as empowered to solemnise same sex marriages;
   7.3 imposes a duty on any person to apply for temporary authorisation;
   7.4 imposes a duty on any person who is an approved celebrant in relation to same sex marriages to solemnise such marriages.
Religious and belief civil partnerships

8. Section 22 of the Bill introduces the religious and belief registration of civil partnerships.

9. The arrangements for authorising celebrants to register civil partnerships will be along the same lines as the arrangements for authorising celebrants to solemnise same sex marriage.

10. Therefore, under section 94A of the Civil Partnership Act 2004 (“the 2004 Act”), as inserted, by section 22(13) of the Bill, a celebrant can be authorised:

10.1 through his or her religious or belief body being prescribed by regulations made by the Scottish Ministers;

10.2 through being nominated to the Registrar General;

10.3 through a temporary authorisation granted by the Registrar General.

11. The Scottish Ministers can only prescribe a religious or belief body if the body requests to be designated (section 94A(2) of the 2004 Act refers).

12. Therefore, if there is no request, there will be no designation. The Scottish Ministers will only designate religious or belief bodies where it is clear that all of their celebrants wish to register civil partnerships.

13. Where a body has decided that it wishes to register civil partnerships but not all of its celebrants wish to do so, it may nominate celebrants to the Registrar General, under section 94B of the 2004 Act.

14. Under section 94E of the 2004 Act, as inserted by section 22(13) of the Bill, a member of a religious or belief body may seek temporary authorisation for a celebrant (i) to register specific civil partnership(s) or (ii) to register civil partnerships for a specific period of time. The Registrar General may only grant authorisation to a celebrant for a specific period of time if the religious or belief body of which the person is a member is either prescribed by the regulations or has nominated members to register civil partnerships.

15. In addition, section 94A(3) of the 2004 Act provides that nothing in section 94A(1)(a) or (2)(a):

15.1 imposes a duty on any religious or belief body to request to be prescribed by regulations;

15.2 imposes a duty on any religious or belief body to nominate any of its members to be registered as empowered to register civil partnerships;

15.3 imposes a duty on any person to apply for temporary authorisation;

15.4 imposes a duty on any person who is an approved celebrant in relation to civil partnerships to register civil partnerships.