

The Marriage
(Same Sex Couples)
Act 2013:

The Equality and Human Rights
Implications for Religious
Organisations



What is the purpose of this publication?

This publication provides guidance on the Marriage (Same Sex Couples) Act 2013 which extends marriage to same sex couples in England and Wales. It explains how the Act affects the rights and duties of religious organisations under equality and human rights law.

Who is it for?

This document is useful for same sex couples, employers, employees, service providers, customers, public authorities and their service users, religious organisations and their officials.

What is inside?

This guide covers:

- Impact on religious organisations and their officials
- Impact on employed chaplains
- The impact on premises shared by religious organisations
- Changes to equality law and
- Freedom of expression and freedom of thought, conscience and religion

When was it published?

This guide was first published in March 2014.

Why has the Commission produced it?

The Equality and Human Rights Commission has responsibility for the promotion and enforcement of equality and human rights laws in England, Scotland and Wales.

What formats are available?

This Guide is available as a PDF file (in English) and as a Microsoft Word file (in English or Welsh) from www.equalityhumanrights.com.

Introduction

The Marriage (Same Sex Couples) Act 2013 (the Act) extends marriage to same sex couples in England and Wales. This guide explains how the Act affects the rights and duties of religious organisations 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 England and Wales, while at the same time protecting freedom of thought, conscience and religion.
- The governing body of a religious organisation is free to choose whether to marry same sex couples.
- Where a governing body of a religious organisation has chosen to opt in to marry same sex couples, that organisation and its officials are empowered to marry same sex couples.
- If a religious organisation has not opted in, it cannot marry same sex couples according to its rites; such a marriage, if it occurs, is unlikely to be recognised by law and is voidable.
- The Church of England and the Church in Wales cannot opt in to marry same sex couples according to their rites. The Act recognises that they are in a different legal position from other religious organisations and sets out how the law can be changed in the event that either governing body of those organisations decides it wishes to marry same sex couples.

- The Act gives explicit protection to religious organisations and their officials from being compelled by any means to carry out activities related to religious marriages of same sex couples.
- Where a religious organisation chooses to opt in to marry same sex couples, but an official of that organisation does not wish to undertake such marriage duties because they concern a same sex couple, the Act protects the official from being compelled to do so.

Impact on religious organisations and their officials

Terminology

A religious organisation in this context means the religious organisation according to whose rites or usages the marriage is to be solemnized.

Religious officials in this context mean those appointed and authorised by the religious organisation to solemnize marriages according to their marriage rites and those authorised to be present during the solemnization of marriages.

The governing body of a religious organisation varies from organisation to organisation; it could be the national leadership, representatives from the local congregation or an external body (see sections 4(4) and 5(5) of the Act for further details).

Opting in and opting out

The law in England and Wales continues to allow all religious organisations to conduct marriages in accordance with their particular beliefs, rites or usages. Not all of those marriages are recognised by the law. The law only prescribes requirements for the marriage where legal recognition is sought. It provides for certain religious marriages to have legal recognition if prescribed requirements are satisfied.

If a religious organisation, other than the Church of England or Church in Wales, wishes to marry same sex couples according to its rites and marriage procedures, it can only do so if it opts in. If it has previously opted in, it can subsequently choose to opt out.

If a religious organisation chooses not to marry same sex couples, its officials are bound by that decision. In that situation, its officials cannot marry a same sex couple according to the religious rites and marriage procedures of that organisation.

Officials will also be bound by the religious ethos and doctrines of the particular religious organisation they belong to and represent. Religious organisations retain the right to maintain and enforce adherence to their religious tenets.

Religious marriages of same sex couples are permitted, where the religious organisation has opted in. Officials of religious organisations are free to choose whether they do or do not wish to conduct, officiate or participate in the marriage. The religious freedom of the same sex couple, and of the religious organisation and its officials, are therefore protected.

Quadruple lock

The Act provides explicit legal protection through the 'quadruple lock' to those religious organisations and their officials who do not wish to marry same sex couples according to their rites or marriage procedures. They cannot be compelled by any means to do so. The quadruple lock:

1. Makes clear that a religious marriage of a same sex couple will only be possible if:
 - The governing body of the religious organisation has opted in by giving explicit consent to marriages of same sex couples, and
 - The individual official is willing to conduct the marriage, and
 - The marriage takes place in a place of worship, those premises have been registered for marriages of same sex couples.
2. Explicitly states that no religious organisation can be compelled to opt in to marry same sex couples or to permit this to happen on its premises; and no religious organisation or its official can be compelled by any means to conduct or participate in marriages of same sex couples
3. Amends the Equality Act to make clear that it is not unlawful discrimination for a religious organisation and/or its officials to refuse to marry a same sex couple

4. Ensures that the common law legal duty on the clergy of the Church of England and the Church in Wales to marry parishioners does not extend to same sex couples. The Act also protects the Church of England's Canon law, which says that marriage is the union of one man with one woman, so that it does not conflict with civil law

In the event that a religious organisation chooses to opt in to marrying same sex couples according to its rites or marriage procedures, but an individual official of that organisation does not wish to conduct such marriages due to his or her religious or other beliefs, the religious organisation should consider finding a suitable replacement. This could be another official authorised to solemnize marriages within the organisation, or a marriage registrar who is available where an authorised person is required to be present during solemnization of the marriage.

If neither of those options is available, the Act clearly states that it would be unlawful for the religious organisation to try to compel its official by any means to conduct such marriages. However, religious organisations also have rights under Articles 9 (freedom of thought, conscience and religion) and 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 organisations and their officials discuss and mutually agree who will and who will not officiate over marriages of same sex couples. This should include what needs to be done, and by whom, in the event an official refuses, at short notice, to officiate over 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 organisations, as well as working in non-religious settings such as hospitals, prisons, the armed forces, higher and further 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 organisation to which they are affiliated. Therefore they cannot marry same sex couples where their religious organisation has decided not to opt in or it is the Church of England or Church in Wales. This is because in these circumstances they are not authorised by law to do so.

The Act provides religious officials with protection from being compelled to marry same sex couples. Thus if they belong to an organisation which has opted in to marriages of same sex couples, the Act states that they cannot be compelled to conduct such a marriage if they choose not to do so.

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 officials of particular religious organisations, they are free to express views about the marriage of same sex couples in accordance with their religious doctrine in a religious sermon, or in other religious contexts. Those rights also apply, subject to lawful limitations, in non-religious settings, where, for example, chaplains work in prisons, hospitals or education establishments.

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

Generally, a chaplain's actions or conduct in religious and non-religious settings should be considered separately. What s/he says about marriage of same sex couples in a religious sermon in a church should not be the basis for being disadvantaged or subjected to a detriment in the non-religious 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 (the Equality Act) contains duties not to unlawfully discriminate against, or unlawfully harass, individuals based on protected characteristics, which include marriage and civil partnership, religion or belief, gender reassignment and sexual orientation. 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, gender reassignment and/or sexual orientation) could result in civil law liability and sanctions for both the employer and employee who are held to have acted unlawfully.

However, equality law provides many exceptions to enable religious organisations and their officials to operate according to their doctrine and in accordance with the deeply held beliefs of their members.

Schedule 3 to the Equality Act has been amended by the Act to prevent religious organisations and their officials from being successfully challenged under Part 3 of the Equality Act when they choose not to marry same sex couples. Part 5 of the Equality Act has also been amended to make clear that for religious organisations and their officials who refuse to participate in the marriage of a same sex couples, this does not constitute unlawful discrimination in the work context.

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Freedom of expression and freedom of thought, conscience and religion

The Act protects freedom of thought, conscience and religion and the right to freedom of expression as 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. So individuals may express positive or negative views about marriage of same sex couples. The Government has recognised that the belief that marriage can only be between a man and a woman is a belief worthy of respect in a democratic society.

An individual's rights to express freely his or her beliefs, opinions or ideas in public are further protected by the change made by the Act to the Public Order Act 1986 (POA), which limits the possibility of criminal liability for specified offences as a result of publicly expressing a view concerning marriage and the gender of the parties to it.

Freedom of expression is expressly protected under the POA provisions concerning the offences of inciting hatred on the grounds of religion or sexual orientation (see Part 3A and sections 29J and 29JA POA). Under the Act, Parliament has further protected the rights of individuals to express their views on marriage of same sex couples through discussion or criticism without facing any criminal sanction under the POA, by inserting a new sub-section into section 29JA. In order to guarantee that simply giving a view on marriage of same sex couples is not caught by the offences of threatening behaviour and hate speech on the grounds of sexual orientation, the new Section 29JA (2) of the POA specifies that: 'any discussion or criticism of marriage which concerns the sex of the parties to marriage shall not be taken of itself to be threatening or intended to stir up hatred.' It mirrors the existing sub-section (1) which makes clear that 'the discussion or criticism of sexual conduct or practices shall not be taken of itself to be threatening or intended to stir up hatred'. For conduct or behaviour in public to violate criminal law, the POA requires proof beyond reasonable doubt that the behaviour is threatening *and* is intended to stir up hatred on the grounds of religion or sexual orientation. The investigation, prosecution and determination of potential offences, under the POA and criminal law more generally, must be carried out in accordance with an individual's right to freedom of expression.

Impact on premises shared by religious organisations

Religious organisations with different approaches to marriage of same sex couples sometimes share places of worship. Special rules have been formulated to ensure that in shared premises, marriages of same sex couples can only take place where agreement has been obtained from the governing authorities of all the religious organisations that share the premises. These are set out in the Act and in Regulations made under it: <http://www.legislation.gov.uk/ukdsi/2014/9780111108734>

A sharing organisation can agree to another organisation marrying same sex couples in the building, without opting in itself to marrying same sex couples according to its rites or marriage procedures. If a chapel shared by the Church of England (or Church in Wales) were to be registered for the marriage of same sex couples, it would still not be legally possible for persons of the same sex to marry according to the rites of the Church of England (or Church in Wales) in that chapel.

The Government carried out a public consultation on the draft Regulations for Shared Religious Buildings, which closed on 1 November 2013. The Government published its response to the consultation on 23 January 2014 and the relevant response can be viewed here: <https://consult.justice.gov.uk/digital-communications/marriage-same-sex-couples-act-2013>

More information

The EHRC has published a series of complementary guidance documents:

- *The Marriage (Same Sex Couples) Act 2013: The Equality and Human Rights Implications for Marriage and the Law in England and Wales*
- *The Marriage (Same Sex Couples) Act 2013: The Equality and Human Rights Implications for Public Authorities*
- *The Marriage (Same Sex Couples) Act 2013: The Equality and Human Rights Implications for the Provision of School Education*
- *The Marriage (Same Sex Couples) Act 2013: The Equality and Human Rights Implications for the Workplace and Service Delivery*
- *A Quick Guide to the Marriage (Same Sex Couples) Act 2013*

The Marriage (Same Sex Couples) Act 2013: The Equality and Human Rights Implications for Religious Organisations was published by the Equality and Human Rights Commission. This publication and related equality and human rights resources are available from the Commission's website (www.equalityhumanrights.com).

For advice, information or guidance on equality, discrimination or human rights issues, please contact the Equality Advisory and Support Service, a free and independent service.

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Questions and comments regarding this publication may be addressed to correspondence@equalityhumanrights.com. The Commission welcomes your feedback.

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