Marriage and Civil Partnership (Scotland) Act 2014: the equality and human rights implications for marriage and the law in Scotland

Introduction

The Marriage and Civil Partnership (Scotland) Act 2014 (the Act) extends marriage to same sex couples in Scotland. This guide explains the changes introduced by the Act, and how it relates to equality and human rights law. It complements our accompanying guidance on the Act and the workplace and service delivery, the provision of school education, public authorities and religious or belief bodies. This document is useful for same sex couples, employers, employees, service providers, customers, public authorities and their service users, religious or belief bodies and their celebrants, as well as schools, their employees, pupils and teachers.

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.

Key points

- The Act applies to Scotland only: England and Wales and Northern Ireland have their own legislation on marriage.
- Religious or belief bodies that wish to can opt in to conduct religious or belief marriages for same sex couples.
- Religious or belief marriages of same sex couples can be held in any place agreed between the couple, the celebrant and the controller of the premises.
- The Act places no obligation on religious or belief bodies or their celebrants to solemnise religious or belief marriage ceremonies of same sex couples.
• Civil partnerships are still recognised and continue to be available now same sex couples can marry. Civil partners can change their partnership into a marriage, if they wish.

• Individuals will be able to change their legal gender without having to end their marriage.

• Individuals may express positive or negative views about the marriage of same sex couples. The right to free expression can be limited where appropriate and necessary to protect the rights of others.

**Application of the Act**

The Act applies to Scotland. The Marriage (Same Sex Couples) Act 2013 introduced same sex marriage in England and Wales. The EHRC has also produced separate guidance for England and Wales.

Scottish same sex marriage is recognised in England and Wales and same sex marriage in England and Wales is recognised in Scotland. However, at the time of publishing this guidance, the Northern Ireland Assembly is not planning to extend marriage to same sex couples. As a result, marriages of same sex couples that take place in Scotland will be treated as civil partnerships in Northern Ireland; and individuals who wish to change legal gender anywhere in the UK and who married in Northern Ireland will still have to end a pre-existing marriage in order to do so.

Provision is also made in the 2013 Act for Scottish marriages of same sex couples to take place overseas, for example in British consulates and on Armed Forces bases outside the United Kingdom. The couple marrying in such a consulate or base can elect to have their marriage recorded in Scotland. The 2014 Act ensures that overseas marriages of same sex couples will be recognised as marriages in Scotland in the same way marriages of opposite sex couples are.
Requirements for a marriage

Over time the legal definition of marriage has evolved from only recognising religious marriages to the introduction of State-provided civil marriage ceremonies for people who want a non-religious ceremony.

The Civil Partnership Act 2004 brought about legal recognition of same sex relationships through the creation of civil partnership in the UK. The 2014 Act now extends marriage to same sex couples in Scotland. Civil partnerships continue to be recognised and to be available, following the introduction of marriage for same sex couples. They will not automatically be changed to marriages, but the opportunity to change them will be available (see 'Impact on same sex couples' and 'Possible future changes' sections below for further details).

Marriage in Scotland is governed by the Marriage (Scotland) Act 1977. It sets out, for example, that marriages must be solemnised by authorised registrars or by religious or belief celebrants in a place agreed by the authorised registrar or celebrant, the couple and the controller of the premises. Ceremonies must meet the legal requirements to properly form a marriage by ensuring that the necessary marriage declarations are made and witnessed.

In addition, the couple marrying must have capacity to marry; they must be of an age to marry (16 and over); they must not be already married or in a civil partnership; and they must not be within prohibited degrees of relationship with each other. If requirements for marriage are not met, the marriage may be void. The Registrar General oversees the registration of marriages.

The dissolution of a marriage is governed mainly by the Divorce (Scotland) Act 1976. This sets out the facts on which courts will rely to grant a divorce. This Act now also applies to married same sex couples.
Impact on same sex couples

Ability to marry
The extension of marriage to same sex couples means that they can now marry in accordance with legal requirements applicable in Scotland. Civil partners will be able to marry in the usual way or can change their status to marriage in accordance with a procedure set out in regulations.

Scots law referring to marriage is interpreted to apply to the marriage of same sex and opposite sex couples, unless otherwise provided. This means that in most circumstances, married same sex couples will be treated in the same way as married opposite sex couples. However, there are some exceptions, primarily concerning pension entitlements for surviving spouses. This is in most instances a matter for the UK Government who has decided that, with the exception of opposite sex married couples of whom one spouse changes their legal gender, married same sex couples will generally be treated in the same way as civil partners. The Scottish Government does have legal powers in relation to some Scottish public services pensions and are considering whether legislative change is necessary in relation to same sex marriage.

Solemnisation of marriages
Civil marriages of same sex couples can be solemnised by people authorised to do so in any premises agreed by the authorised registrars and the couple (so long as these are not religious premises). Religious or belief marriages can take place anywhere and can be solemnised either by a religious celebrant or a belief celebrant where their religious or belief body is a prescribed body or has nominated them as a celebrant.

Divorce, adultery and voidable marriages
The law permits divorce when the marriage of a same sex couple irretrievably breaks down. The factual basis for divorce of same sex married couples is the same as that available to opposite sex married couples.
Adultery has been defined in long-established case law as sexual intercourse of a married person with a person of the opposite sex outside the marriage; so sexual intercourse with a person of the same sex outside marriage does not constitute adultery (and has never done so). Where sexual intercourse occurs outside marriage between a married person and a person of the opposite sex then the current definition of adultery applies to married same sex couples as it does to opposite sex couples. Although sexual activity outside marriage with a person of the same sex will not constitute adultery, it might constitute unreasonable behaviour, and both opposite sex and same sex couples could apply for divorce using this fact.

An opposite sex marriage is voidable in Scotland if one of the spouses is permanently and incurably impotent. The Scottish Government is presently considering whether this rule should be repealed. However, the 2014 Act provides that the rule will continue to apply to opposite sex marriages only.

Same sex couples who have married in Scotland but subsequently move to live in Northern Ireland will be treated as civil partners under the law of Northern Ireland. The dissolution of their civil partnership in Northern Ireland will be treated as legally ending the marriage in Scotland.

Provision is also made under the Act to recognise overseas marriage of same sex couples under the law of Scotland in the same way as marriage of opposite sex couples.

**Applicability of other rules and presumptions**

The Law Reform (Parent and Child) (Scotland) Act 1986 creates a presumption that a child born to a woman during the course of marriage is the child of the husband. This is not extended to married same sex couples. However, there are other means of securing parental recognition in law which are already available to civil partners and will be available to married same sex couples. Where a woman conceives by donor insemination whilst in a same sex marriage, then that woman’s wife is the legal parent of that child.
The Act does not alter the law which prohibits marriage between certain relations, for example, between siblings. These rules remain in place and apply to same sex couples as well.

**Terminology**
The terms 'husband', 'wife', 'widow' and 'widower' now also include married same sex couples. For example, two women who marry are each identified as 'wife', and if one dies, the surviving spouse is a 'widow'. Similarly, two men who marry are each identified as 'husband', and if one dies, the surviving spouse is a 'widower'.

This does not affect private legal instruments such as wills or deeds or the governing documents of a charity if they were drafted before the Act takes effect. References to marriage in those documents will continue to be understood to have the meaning they had before the Act applied.

**Impact on a married person who wishes to change legal gender**

The Gender Recognition Act 2004 (GRA) enables an individual to change their legal gender by the issue of a full Gender Recognition Certificate (GRC). To date, if an applicant was married or in a civil partnership, an interim GRC was issued to allow them to end their legal relationship so that a full GRC could then be issued (since marriage was available only to opposite sex couples and civil partnerships are only available to same sex couples).

Amendments to the GRA made by the Act now provide two ways in which a full GRC can be issued whilst an applicant remains married. Firstly, where one spouse in a marriage changes legal gender, the marriage can continue provided that the applicant's spouse consents to the continuation of the marriage in such circumstances by making a statutory declaration. Secondly, where one spouse in a marriage changes legal gender but s/he does not have a statutory declaration from the other spouse, s/he can apply to the Sheriff to have a full GRC issued. The Sheriff must issue the certificate where the applicant was in a marriage solemnised in
Scotland when their interim GRC was issued, is still in that marriage and the application is made within 6 months of the interim certificate being issued.

Where a civil partner wishes to change legal gender, the couple can apply to change their civil partnership into a marriage before or after making an application for a GRC. Where both parties to a civil partnership wish to change legal gender, they can co-ordinate their GRC applications so that recognition can be issued to both on the same day and they can remain in a civil partnership.

**Impact on religious or belief bodies**

The Act allows religious or belief bodies to choose whether to marry same sex couples.

If a body chooses not to marry same sex couples, their celebrants are bound by that decision. In that situation, the individual celebrant cannot marry a same sex couple.

If a religious or belief body does wish to marry same sex couples, they can opt in to do so: if they have previously opted in, they can choose to opt out. Bodies can be prescribed by regulation as a religious or belief body which solemnises same sex marriage.

Alternatively a religious or belief body can nominate individual celebrants by sending the Registrar General a list of those who wish to be authorised to solemnise same sex marriage. Should a celebrant decide that they do not wish to carry out same sex marriage the Act does not impose a duty on them to do so.

It is also possible for religious or belief bodies to ask for temporary authorisation of celebrants for a particular event or period of time.

The Act places no obligation on religious or belief bodies or their celebrants to conduct religious or belief marriage ceremonies of same sex couples.
Impact on authorised registrars

The Act provides that civil marriage ceremonies of same sex couples may take place at registrars’ offices and any premises agreed between the couple and the authorised registrar (so long as they are not religious or belief premises). Authorised registrars and the Registrar General are public officials and they are required to exercise their functions without discrimination. The Act does not allow them to refuse to marry same sex couples, even if they have a religious or philosophical objection. The position of authorised registrars is discussed more fully in the guidance on marriage and the workplace and service delivery.

Religious or belief premises

Where a religious or belief body has chosen not to opt in to solemnise same sex marriage, it can rely on the Equality Act to lawfully refuse to allow same sex marriage to take place on its premises. Additionally, the UK Government has amended the Equality Act so that if a religious or belief body has opted in to solemnise same sex marriage but a particular celebrant or a person controlling premises has chosen not to take part this person cannot be subject to a claim under the Equality Act in relation to their refusal.

Equality law and marriage

The Equality Act 2010 (the Equality Act) prohibits unlawful discrimination and harassment based on protected characteristics which include religion or belief, sexual orientation and gender reassignment. It also prohibits unlawful victimisation which comprises subjecting someone to a detriment for carrying out any action protected under the Equality Act. People with those (and other) protected characteristics have individual rights under the Equality Act. Employers, service-providers, education authorities and schools and public authorities all have duties under the Equality Act. The Equality Act also provides that it is unlawful sexual orientation discrimination to treat a person married to someone of the same sex less favourably than a person
married to someone of the opposite sex (subject to certain exceptions set out in that Act).

The Equality Act is generally a reserved matter for the UK Government. The Scottish Government and UK Governments agreed to make necessary amendments to the Equality Act to ensure protection for religious or belief bodies and their celebrants who do not wish to marry same sex couples.

Existing religious or belief exceptions contained in the Equality Act remain in place. These include:

- where employment is for the purposes of organised religion, occupational requirements relating to sex, marriage, sexual orientation and gender reassignment (amended by the Act to include a requirement not to be married to a person of the same sex) (Schedule 9, paragraph 2);
- occupational requirements based on religion or belief (Schedule 9, paragraph 3);
- certain actions of denominational schools, and worship and religious observance in all schools (Schedule 11, paragraphs 5 and 6);
- educational appointments based on religion (Schedule 22, paragraphs 3 and 4); and
- general exceptions for non-commercial organisations relating to religion or belief (Schedule 23, paragraph 2).

The public sector equality duty (section 149 of the Equality Act) places a duty on public authorities and those exercising public functions to have 'due regard', when exercising their functions to eliminating unlawful discrimination, advancing equality of opportunity and promoting good relations between people who share a protected characteristic and those who do not.

The duty to have 'due regard' is not a duty to deliver particular outcomes, or to prioritise one aspect of equality over another. It does not authorise unlawful discrimination. The application of this duty would be governed by the same principles applying to any other decisions or actions by a public body. These are discussed
more fully in the guidance for public authorities and in the EHRC Scottish Technical Guidance on the public sector equality duty.

**Protection of the human rights of religious individuals, religious or belief bodies and same sex couples**

The Human Rights Act 1998 (the Human Rights Act) incorporates the European Convention on Human Rights (the Convention) into domestic law. The Human Rights Act requires the domestic courts to interpret the law in accordance with Convention rights, taking the jurisprudence of the European Court of Human Rights into account. The Human Rights Act also requires public authorities to act compatibly with Convention rights.

Several Convention rights are relevant to marriage, including:

- Article 8, protecting the right to private and family life
- Article 12, providing the right to marry and found a family in accordance with national laws governing the exercise of this right
- Article 14, prohibiting discrimination in the application of Convention rights

The right to marry under Article 12 does not require States to provide marriage for same sex couples. However, if a State does provide marriage for same sex couples under the law, it must do so without unjustifiable discrimination under Article 14.

Convention rights also protect religious freedom, notably:

- Article 9, protecting freedom of thought, conscience and religion
- Article 10, protecting freedom of expression
- Article 11, protecting freedom of peaceful assembly and freedom of association with others
- Article 14, prohibiting discrimination in the application of Convention rights
- Article 2 of Protocol 1, providing a right to education
Many of these rights are ‘qualified’ and are not ‘absolute’. This means that they can be limited where it is necessary to do so, for example, to protect the rights and freedoms of others.

The Act takes account of Convention rights. It provides an opt in system to protect religious or belief bodies and their celebrants whilst allowing same sex couples to marry by civil or religious or belief ceremony. The Act:

1. makes clear that a religious or belief marriage ceremony of a same sex couple will only be possible if the religious or belief body has opted in, either by asking to be a prescribed body or by providing a list of its celebrants who wish to be authorised celebrants of marriages of same sex couples:

2. explicitly states that the Act places no duty on religious or belief bodies to opt in to marry same sex couples or to nominate celebrants, and places no duty on celebrants who are authorised to solemnise same sex marriages so to do; and

3. also states explicitly that the Convention rights to freedom of thought, conscience and religion, to freedom of expression and any equivalent rights are not affected by the provisions of the Act.

The Equality Act also makes clear that it is not unlawful discrimination for a religious or belief body or individual celebrant to refuse to marry a same sex couple.

In the event that a religious or belief body chooses to opt in to marriage ceremonies for same sex couples, but an individual celebrant from that body does not wish to conduct such marriages due to his or her religious or philosophical beliefs or those of their congregation, the Act places no duty on them to carry out such marriages. If they have agreed, they can change their mind and refuse to marry a same sex couple. If this happens, the religious or belief body should consider finding a suitable replacement. This could be another celebrant within the body authorised to solemnise marriage.
If other options are not available, the Act clearly states that it does not impose a duty on a celebrant to conduct such marriages. However, religious and belief bodies also have rights under Articles 9 (freedom of thought, conscience and religion) and Article 11 (freedom of assembly) of the Convention which allow them to control their internal affairs without unnecessary and disproportionate State interference.

It is strongly suggested that religious or belief bodies and their celebrants discuss and mutually agree who will and who will not solemnise marriages of same sex couples. This should include what needs to be done and by whom in the event a celebrant refuses, at short notice, to solemnise a marriage because he or she does not wish to marry same sex couples. This will help to avoid internal conflict and will ensure that the legitimate and reasonable expectations of same sex couples can be met.

**Protection of free speech**

The Act protects the right to freedom of expression as set out in Article 10 of the Convention. Individuals may express positive or negative views about marriage of same sex couples. As noted above, the Act makes clear that the introduction of same sex marriage does not affect those Article 10 rights.

People are free to express personal views on the marriage of same sex couples, depending on the form of words used and the particular context in which they are used. This applies to all forms of communication in public and in the workplace. Individuals who express support for, or opposition to, marriage of same sex couples, in public or at work, should do so in reasonable and moderate terms.

The right to free expression can be limited where appropriate and necessary to protect the rights of others.

Individuals who publicly express support for, or opposition to, marriage of same sex couples must avoid abusive or threatening behaviour which is illegal. Conduct during employment or service provision should not breach laws on discrimination and
harassment on the grounds of religion or belief, sexual orientation or gender reassignment.

Employees are expected to operate in accordance with relevant workplace dignity at work and/or equality and diversity policies, and those policies must be applied consistently with Convention rights. Religious clergy and priests are expected to comply with religious doctrines. Teachers must adhere to rules about the education curriculum and the religious ethos of the school.

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

**Impact on school education**

The Act does not change education law. Our separate guidance for schools (see below for details) explains the position in more detail.

**Possible future changes**

The Marriage (Same Sex Couples) Act 2013 contains measures affecting State pension and occupational pension rights of married same sex couples. In particular, the occupational pension rights of same sex surviving spouses are currently set at the same level as those for civil partners (generally backdated to occupational pension rights accrued since 5 December 2005). That restriction does not apply to occupational pension rights for married opposite sex couples. Schedule 9, paragraph 18(1) of the Equality Act permits this. At the time of writing, litigation concerning this provision has determined that it is lawful under European Union law through the case
Innospec Limited & Others v Mr J Walker (2014 UKEAT 0232). However, this case may proceed further through the appeal courts so that conclusion is not final or definitive at this point in time. The UK Government is also currently reviewing differences in survivor benefits of same sex couples and opposite sex couples.

**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 public authorities*  

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*  

Equality and Human Rights Commission  
January 2015
The Marriage and Civil Partnership (Scotland) Act 2014: the equality and human rights implications for marriage and the law in Scotland 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.

Website www.equalityadvisoryservice.com
Telephone 0800 800 0082
Textphone 0808 800 0084
Hours 09:00 to 20:00 (Monday to Friday)
10:00 to 14:00 (Saturday)
Post FREEPOST Equality Advisory Support Service FPN4431

Questions and comments regarding this publication may be addressed to scotland@equalityhumanrights.com

The Commission welcomes your feedback.

ISBN 978-1-84206-590-7