

MARRIAGE (SAME SEX COUPLES) ACT 2013

EXPLANATORY NOTES

COMMENTARY ON SECTIONS AND SCHEDULES

Part 1 – Marriage of same sex couples in England and Wales

Religious protection

Section 2 – Marriage according to religious rites: no compulsion to solemnize etc

29. *Section 2* protects individuals and religious organisations who do not wish to conduct or participate in a religious marriage ceremony on the ground that it is a marriage of a same sex couple.
30. Subsection (1) states that individuals and religious organisations may not be compelled by any means to carry out an “opt-in activity”, which is defined in subsection (3) to mean the various types of activity relating to the decision of a religious organisation to opt in to solemnizing marriages of same sex couples. Subsection (1) also states that they cannot be compelled to refrain from carrying out an “opt-out activity”, defined to mean an activity which reverses or modifies the effect of an opt-in activity.
31. Subsection (2) makes clear that individuals may not be compelled by any means to carry out, attend or take part in a religious marriage ceremony of a same sex couple. It also makes clear that individuals and religious organisations may not be compelled to consent to religious marriage ceremonies of same sex couples being conducted. In each case this must be where the individuals or religious organisations do not wish to carry out the specified conduct because it concerns the marriage of a same sex couple.
32. The concept of “compulsion” is a broad one, which would include, but not be limited to, attempts to use criminal or civil law, contractual clauses, or the imposition of any detriment to force a person to carry out such an activity. The section provides no specific remedy, but makes clear that no attempt at such compulsion will be upheld. The remedy for any action taken to compel someone would depend on the nature of the action taken.
33. Subsection (3) contains the definitions of “opt-in” activity and “opt-out activity”, and subsection (4) defines various other terms used in the section. It also makes clear that the conduct of a marriage registrar, superintendent registrar or the Registrar General is not included in the protection provided by this section.
34. Subsection (5) inserts new subsections (5A) and (5B) into section 110 of the Equality Act 2010. Section 110(1) of the Equality Act 2010 makes an employee, or an agent for a principal, personally liable for unlawful acts they commit in the course of their employment, or under the authority of a principal, for which their employer or principal could also be held liable. New subsections (5A) and (5B) provide that an individual cannot be held personally liable under the Equality Act 2010 for a refusal to carry out the conduct specified in subsection (2) of this section where the reason is that the marriage is the marriage of a same sex couple.

*These notes refer to the Marriage (Same Sex Couples) Act
2013 (c.30) which received Royal Assent on 17 July 2013*

35. Subsection (6) inserts a new Part 6A (Marriage of same sex couples in England and Wales) and paragraph 25A (Marriage according to religious rites: no compulsion to solemnize etc) into Schedule 3 to the Equality Act 2010. Schedule 3 deals with exceptions from the prohibition on discrimination in the provision of services and the exercise of public functions. New paragraph 25A provides that it is not unlawful discrimination under that Act for an individual or religious organisation not to carry out the conduct specified in subsection (2) where the reason is that the marriage is the marriage of a same sex couple.

Examples

- The governing body of a religious organisation meets to consider whether to opt in to conducting marriage of same sex couples according to its rites. It decides not to. This would be lawful and no member of the governing body, nor the organisation itself, could be forced, by legal action or otherwise, to change its decision.
- A religious organisation opts in to conducting marriage of same sex couples. However, one of the organisation's ministers does not approve of such marriage and does not wish to solemnize such a marriage. This would be lawful. The religious organisation arranges for an alternative minister to conduct the marriage ceremony for the same sex couple.
- A person who acts as an authorised person at marriages in her local church does not wish to do so in relation to same sex marriage ceremonies, even though the church has opted in to marriage of same sex couples. It would be lawful for her to refuse. A marriage registrar is asked to step in to cover that role, but does not wish to do so because he does not approve of marriage of same sex couples. It would be unlawful discrimination for him to refuse.
- An organist who usually plays at wedding services at a church does not wish to play at a wedding service of a same sex couple. This would be lawful because he is involved in the religious act of worship i.e. the religious ritual of the wedding service. This is the case whether he is a volunteer or employed by the church.
- A commercial photographer is asked to photograph a wedding of a same sex couple. It would be unlawful sexual orientation discrimination for her to refuse because she does not approve of marriage of same sex couples. This is because her role is not part of the religious marriage service.
- A volunteer flower arranger who usually decorates the place of worship for wedding services refuses to do so for a wedding of a same sex couple because she does not approve of such marriages. Her role is not part of the religious marriage service, but her refusal would nonetheless be lawful because the service she offers is to the church rather than to the public or a section of the public, so it is not covered by the Equality Act 2010. If a commercial flower arranger asked by a same sex couple to decorate their wedding venue refused to do so because he does not approve of marriage of same sex couples, this would be unlawful sexual orientation discrimination. This is because his role is not part of the religious marriage service and the service he provides is to the public and so is covered by the Equality Act 2010.
- A chaplain employed by a university is asked to solemnize the marriage of an employee of the university with a person of the same sex. Although his religious organisation has opted in to marriage of same sex couples, he refuses because he does not wish to marry a same sex couple. This is lawful. The university makes alternative arrangements by finding an alternative chaplain to conduct the ceremony.