GUIDANCE

The Marriage

(Same Sex Couples)

Act 2013:

The Equality and Human Rights Implications

for Workplaces

and Service Delivery

EQUALITY & HUMAN RIGHTS COMMISSION

www.equalityhumanrights.com

What is its purpose?

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 the equality and human rights impact of the Act on the workplace and on the provision of services to the public in England and Wales.

Who is it for?

This document is useful for employers, employees, service providers of all sizes in the public, private and voluntary sectors and customers.

What is inside?

This guide covers:

* General impact on employers and employees
* Impact on registrars
* Impact on employed chaplains
* Pensions
* Changes to the Equality Act
* Impact on commercial service providers
* Impact of the equality duty

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 the equality and human rights impact of the Act on the workplace and on the provision of services to the public in England and Wales. The guidance is applicable to workplaces and service providers of all sizes in the public, private and voluntary sectors. This document is useful for employers, employees, service providers and customers.

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 right 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

* All register offices have been designated for civil marriages of same sex couples. Marriage registrars, as public servants, are required to marry all couples without discrimination, in line with their statutory duties.
* The Act provides that religious organisations and their officials have explicit legal protection from being compelled by any means to conduct or participate in religious marriages of same sex couples, where they do not wish to do so.
* Employees are free to hold whatever belief they choose, whether religious or philosophical, on same sex relationships and on marriage of same sex couples; employers cannot interfere with this right.
* Employees are free to express these views in public and at work, provided that this does not interfere with the rights of others.
* Employers have duties to protect employees from unlawful discrimination and harassment based on protected characteristics, including religion or belief, sexual orientation, marriage and civil partnership and gender reassignment.
* Service providers must comply with duties under the Equality Act 2010 (the Equality Act) not to unlawfully discriminate against customers based on protected characteristics, including religion or belief, gender reassignment and sexual orientation.
* Commercial service providers cannot treat customers less favourably, or refuse to provide them with services, on the basis that they are married to a person of the same sex or in a civil partnership, as compared with being married to a person of the opposite sex (or vice versa). This would be unlawful sexual orientation discrimination under the Equality Act.
* Exceptions remain in place for religious organisations to certain requirements in the Equality Act, to preserve their religious ethos, and allow them to act in conformity with their doctrines and the beliefs of their followers.

General impact on employers and employees

The purpose of the Act is to extend marriage to same sex couples under the law of England and Wales, whilst at the same time protecting freedom of thought, conscience and religion.

Explicit legal protection is provided under the Act for religious organisations and their officials when they choose not to conduct or participate in religious marriages of same sex couples. The Act states that they cannot be compelled by any means to do so. Because of their distinct legal position, the Church of England and Church in Wales and their clergy and officials cannot opt in to marry same sex couples. If either church decides it wishes to do so, there are mechanisms available to each of them to bring this about. This is discussed further in the guidance on marriage and the law.

Rights under equality and human rights law also protect employees more generally. Duties apply to employers under the Equality Act not to discriminate against or harass individuals based on protected characteristics, including religion or belief, marriage and civil partnership, gender reassignment and sexual orientation, or to victimise individuals who carry out protected acts under the Equality Act. Statutory codes of practice listed at the end of this guidance further explain those concepts and requirements.

In addition, the European Court of Human Rights (ECtHR) decided in 2013 in *Eweida & Others v United Kingdom* that religious freedom rights under the European Convention on Human Rights (the Convention) do apply at work (for further details, see the EHRC’s guidance on *Religion or belief in the workplace: an explanation of recent European Court of Human Rights judgments)*. This is available at: <http://www.equalityhumanrights.com/advice-and-guidance/your-rights/religion-and-belief/>

The Act protects the right to freedom of expression as set out in Article 10 of the Convention. The Government recognises that the belief that marriage can only be between a man and a woman is a belief worthy of respect in a democratic society.

The right to free expression can be limited where appropriate and necessary to protect the rights of others. People are free to express personal views on 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 in work, should do so in reasonable and moderate terms.

Freedom of expression is explicitly protected under the Public Order Act 1986 (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.

Comments made at work that constitute unlawful discrimination or harassment based on a protected characteristic (such as religion or belief and/or sexual orientation) could result in civil law liability and sanctions for both the employer and the responsible employee. The codes of practice listed at the end of this guidance explain this in greater detail.

Impact on registrars

The Act provides that civil marriages of same sex couples may take place at register offices and on other premises approved for this purpose. Marriage registrars, as public officials, are required to perform their statutory duties without discrimination; this means that they will be expected to marry all couples, whether opposite sex or same sex.

A registrar whose religious or other belief prevents them undertaking all the responsibilities of their public office following the Act can explore the potential options with their employer. However the legal framework does not expressly permit employers to grant individuals an exemption from any part of their duties as a registrar. Parliament did not provide an exemption for this purpose in the Act and it is therefore most likely that granting one is not a permissible option, although this has yet to be explicitly tested in the courts.

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 who work on a voluntary basis are not protected under the work-related provisions of the Equality Act. However, volunteer chaplains have religious freedom (Article 9) and freedom of expression (Article 10) rights which are engaged in their work as chaplains for public authorities, such as schools, prisons or hospitals. The State, including public authorities, has obligations in law to protect those rights and to act compatibly with those rights.

During recruitment to employment and the course of their employment, chaplains are protected against unlawful discrimination and harassment based on religion or belief, and from unlawful victimisation if they have carried out a protected act under the Equality Act.

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 if they are clergy of the Church of England or Church in Wales. This is because in these circumstances chaplains are not authorised by law to do so.

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

Chaplains may work in non-religious settings, such as hospitals, prisons or universities, but this does not restrict their freedom to hold their own beliefs about marriage of same sex couples. As ministers of religion, chaplains have a justifiable expectation that they will be allowed to act in accordance with their beliefs. What they do and say in that context generally should not affect how they are treated in the workplace.

A chaplain's views on marriage of same sex couples could be relevant to recruitment and employment. It would be legitimate, for example, for a prospective employer to enquire at interview about a chaplain's views on same sex relationships and marriage of same sex couples to determine if the individual would adhere to workplace equality policies and/or deliver services equally to all without unlawfully discriminating or harassing service users.

Pensions

The Government has decided that, with the exception of married opposite sex couples where one spouse changes their legal gender, members of a married same sex couple will be treated in the same way as civil partners with regards to the state pension for a spouse or surviving spouse and survivor benefits in occupational pension schemes. The effect of this is that the period in which rights to survivor benefits can be accrued may be limited. Our guidance on marriage and the lawprovides further explanation on this particular point.

The Government is currently carrying out a review (as set out in the Act) to understand fully the implications of equalising occupational pension rights in both private and public pension schemes. The outcome will be published by 1 July 2014.

Changes to the Equality Act

As explained in more detail in our related guidance on marriage and the law, pre-existing exceptions from the requirement not to discriminate in relation to work based on sexual orientation or religion or belief remain in place for organisations relating to religion or belief.

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 that Act (concerning the provision of services and exercise of public functions) when they choose not to participate in religious marriages of same sex couples.

*Continued...*

Impact on commercial service providers

A refusal to provide services to customers because of sexual orientation constitutes unlawful sexual orientation discrimination under the Equality Act. Consequently, it is unlawful for individuals and organisations who provide services to the public (whether or not for payment) to refuse to provide those services to same sex couples if they would provide those services to opposite sex couples. This could arise, for example, in the context of a marriage of a same sex couple where the services of a commercial florist or photographer are sought for the marriage and where the service provider would be prepared to provide that service for an opposite sex couple.

Furthermore, it has already been established by the courts that it is unlawful for the owners of a commercial bed and breakfast business to refuse a double room to a couple in a civil partnership on the basis that it restricts double rooms to married couples.

The Equality Act distinguishes between religion or belief organisations whose sole or main purpose is commercial and those who are not in terms of the operation of exceptions to the duties of the Equality Act concerning the provision of services, the use and disposal of premises, and membership of, and benefits provided by, associations. This is intended to enable religion or belief organisations to act according to their doctrines or purposes or in accordance with the strongly held conviction of a significant number of their followers. It applies to organisations whose purpose is to practise, advance or teach the practice or principles of a religion or belief, and to enable people to receive any benefit or engage in any activity within the framework of that religion or belief. This exception also covers people working on behalf of, or under the auspices of, the religion or belief organisation.

Religion or belief organisations whose sole or main purpose is not commercial are free to restrict membership, participation in activities, the provision of goods, facilities or services and the disposal or use of premises for reasons relating to religion or belief, or sexual orientation without breaching the services, premises and/or associations provisions of the Equality Act (Parts 3, 4 and 7 respectively).

In addition, it is legitimate for religion or belief organisations to restrict membership, participation in activities, the provision of goods, facilities or services and the disposal or use of premises for reasons relating to religion or belief (but not sexual orientation) for the purpose of fostering or maintaining good relations between persons of different religions or beliefs.

All of those exceptions do not apply to anything done by the religious organisation on behalf of, or under the terms of a contract with, a public authority.

Impact of the equality duty

In addition to their duties as employers and service providers, public authorities have separate duties under the Equality Act; these are explained in our guidance for public authorities. They include anti-discrimination duties when carrying out public functions and a duty to have due regard to equality matters as set out in section 149 of the Equality Act (known as the equality duty).

The equality duty places a general duty on public authorities and those exercising public functions to have 'due regard' when exercising their functions to three matters: a) eliminating conduct (such as discrimination, harassment and victimisation) that is prohibited by the Act; b) advancing equality of opportunity between those who share a protected characteristic and those who do not; and c) fostering good relations between people who share a protected characteristic and those who do not.

The second two matters apply to the protected characteristics of age, disability, gender reassignment, pregnancy and maternity, race, religion or belief, sex and sexual orientation. They do not apply to the protected characteristic of marriage and civil partnership.

The duty to have 'due regard' is not a duty to deliver prescribed or particular outcomes. It is not a duty, for example, to prioritise one aspect of equality over another. The equality duty could not be used to disadvantage unjustifiably religious organisations or their officials who choose to exercise their right under the Act not to conduct or participate in religious marriages of same sex couples.

The EHRC's codes of practice on the equality duty provide more guidance on how this aspect of equality law operates, including further details about the meaning of each protected characteristic and the contexts in which they do, or do not apply – see below for details.

Further 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 Religious Organisations*
* *The Marriage (Same Sex Couples) Act 2013: The Equality and Human Rights Implications for the Provision of School Education*
* *A Quick Guide to the Marriage (Same Sex Couples) Act 2013*

See also the following statutory codes of practice:

* *Equality Act 2010 Code of Practice: Employment Statutory Code of Practice* <http://www.equalityhumanrights.com/uploaded_files/EqualityAct/employment_code.doc>
* *Equality Act 2010 Code of Practice: Services, Public Functions & Associations* <http://www.equalityhumanrights.com/uploaded_files/EqualityAct/services_code.doc>

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