



House of Lords  
House of Commons  
Joint Committee on Human  
Rights

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# Legislative Scrutiny: Marriage (Same Sex Couples) Bill

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**Second Report of Session 2013–14**

*Report, together with formal minutes*

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to be printed 11 June 2013*

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## Joint Committee on Human Rights

The Joint Committee on Human Rights is appointed by the House of Lords and the House of Commons to consider matters relating to human rights in the United Kingdom (but excluding consideration of individual cases); proposals for remedial orders, draft remedial orders and remedial orders.

The Joint Committee has a maximum of six Members appointed by each House, of whom the quorum for any formal proceedings is two from each House.

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# Conclusions and recommendations

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## Introduction

1. We do not express a view as to the merits of the Bill as a whole or the principle of same sex marriage itself, both of which are matters of individual conscience and on which there are differences of opinion among members of the Committee. Instead we seek to express concerns as to the drafting of the Bill, and to make recommendations as the Bill makes its passage through Parliament. (Paragraph 7)

## Provisions relating to religious organisations and individual ministers

2. The Government has an obligation to protect the rights of religious organisations to freedom of thought, conscience and religion under Article 9 of the European Convention on Human Rights. We consider that this is a clear justification for the provisions of the Bill which provide for the right of religious organisations to decide whether or not to conduct same sex marriage. (Paragraph 40)
3. Both the Church of England and Church in Wales are free to decide whether to solemnise same sex marriage. Any such decision would be implemented through legislative processes which differ from the opt-in process for all other religious organisations. The difference in treatment of the Church in England and the Church in Wales is, in our view, justified due to the legal circumstances of those churches (namely, the common law duty to marry parishioners), which do not apply to any other religious organisation. On the evidence which we heard, other Christian denominations and other faith groups believe that they do not have the same level of protection as the Church of England and the Church in Wales. It is important that other religious organisations and individual ministers of other faith groups have the same level of protection as the Church of England and Church in Wales. (Paragraph 44)
4. We have also considered the evidence given to us that the opt-in process for same sex marriage itself could be considered a public function. We do not come to a conclusion on this matter. This is in part due to the divergence of opinion in the evidence we have received and in other material which we have considered during our scrutiny of this Bill. However, we recommend that the Government consider formulating a new clause which provides additional reassurance to any religious ministers or office holders who perform the dual function of officiating at a marriage in a spiritual capacity as well as performing the public function of registrar under the Marriage Act 1949. (Paragraph 57)
5. We note that there was clear disagreement in evidence to us regarding the Government's position on the extent to which solemnisation of marriages by religious organisations would constitute a public function. We believe that the solemnisation of legally-binding marriage by any religious organisation under the provisions of the Marriage Act 1949 may be a public function. (Paragraph 58)
6. We are sympathetic to the concern expressed to us in evidence about references to

“religious marriage” by the Government, as this term fails to distinguish between marriages conducted by religious organisations which have civil legal effect under the terms of the Marriage Act 1949 and other forms of marriages conducted by religious organisations which do not have civil legal effect. We also note some calls to reconsider the current marriage law framework, and also the views expressed to us that these issues could have been better explored in consultation and pre-legislative scrutiny. We ask the Government to reconsider whether it can bring forward amendments to distinguish more clearly in the Bill between the civil and religious implications of marriages in registered religious buildings. (Paragraph 59)

7. We note the protections contained in clause 2(2), 2(5) and 2(6) of the Bill for individual ministers concerning the solemnisation of same sex marriage. We are broadly satisfied with these insofar as the protections relate to the solemnisation of same sex marriage. However, we note the concern that clause 2(2) of the Bill may have the effect of preventing a religious organisation that opts-in to conduct same sex marriage from maintaining its decision throughout the organisation. This is an interference with the organisation’s Article 9 rights. We note the Government’s response on this, particularly its explanation that religious organisations have welcomed this protection so far. This issue may, however, give rise to a future claim from a religious organisation should it wish to insist that its ministers adhere to its opt-in decision. We therefore request that the Government consider whether the Bill should be amended to deal with this concern. (Paragraph 63)
8. While the Bill provides protections for religious organisations and individual ministers in relation to the solemnisation of same sex marriage, we have heard arguments on both sides as to whether religious organisations and individual ministers may suffer some form of detriment as a result of their position on same sex marriage in a number of contexts which fall outside the scope of the Bill’s current protections. We note the concern that the Bill may create a number of legal uncertainties, which may only be resolved through litigation with its attendant costs. Although we do not come to a final conclusion on this matter, in part due to the complexity of the issues involved and the divergence of opinion in both the evidence we have received and in other material which we have considered during our scrutiny of this Bill, we recommend that the Government reconsider these issues with a view to bringing forward amendments in the House of Lords to deal with these concerns. (Paragraph 69)

### **Wider implications of the Bill**

9. Individuals are entitled to promote their views on same sex marriage in a lawful manner. This is guaranteed by the rights to freedom of thought, conscience and belief and freedom of expression. We welcome the Government’s commitment to bringing forward an amendment to ensure that the discussion or criticism of same sex marriage will be protected from any criminal sanction. (Paragraph 74)
10. We have heard significant arguments about whether existing employment and equality law provisions provide sufficient protection for employees who may wish to manifest their belief about same-sex marriage in the workplace. We note the particular concern for the position of teachers and civil registrars. Although we do not come to a

final conclusion on whether additional protections are required, in part due to the complexity of the issues involved and the divergence of opinion upon them in the evidence we have received and in other material which we have considered during our scrutiny of this Bill, we recommend that the Government reconsider these issues with a view to bringing forward amendments in the House of Lords to put in place transitional arrangements which deal with these concerns for those in post as registrars at the time any legislation is passed. (Paragraph 84)

11. We welcome the Government's commitment to review the protections that may be required in relation to the teaching of Sex and Relationship Education. In particular, we encourage the Government to consider whether specific protections are required for faith schools and for individual teachers who hold a religious belief about same sex marriage. (Paragraph 90)

### **Civil partnerships**

12. We are not convinced by the Government's reasons not to extend civil partnerships to opposite sex couples, and we welcome the Government's announcement that it will review this matter. In doing so, the Government should take into account the potential discrimination that may arise between cohabiting opposite sex couples and civil partners. We also note that there was some ambiguity in the Government evidence to us concerning the costs of extending civil partnerships to opposite sex couples. As part of its review, we expect the Government to provide clear and accurate information about these costs. (Paragraph 95)

### **Pensions**

13. The Government recognised that its policy of treating same sex marriages the same as civil partnerships for occupational pension survivor benefits could create a problem in relation to marriages where one spouse changes legal gender. We welcome the Government's amendments at Report Stage to deal with this. However, we consider that the Government should carry out a full review of pension provisions in relation to survivor pension benefit entitlements of same sex married couples and civil partners to ensure that there is no unjustifiable discrimination in pension scheme provisions. In doing so, we call on the Government to provide precise information about the potential costs of equalising pension rights. (Paragraph 101)



# 1 Introduction

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Date introduced to first House	24 January 2013
Date introduced to second House	21 May 2013
Current Bill Number	HL Bill 29

1. The Marriage (Same Sex Couples) Bill was introduced in the House of Commons on 24 January 2013 and received its Third Reading on 21 May 2013. The Secretary of State for Culture, Media and Sport has certified that, in her view, the Bill is compatible with Convention rights. The Bill is due to begin Committee Stage in the House of Lords on 17 June 2013.

## Information provided by the Department

2. The Explanatory Notes to the Bill introduced in the House of Commons provided little detail of the Bill's human rights compatibility.<sup>1</sup> We asked the Department to provide us with a human rights memorandum on 16 January 2013, which was received on 8 February 2013 and contains detailed analysis of the Government's view that the Bill is compatible with human rights law requirements. This is published on the Department's website, alongside other Government documents relating to the Bill.<sup>2</sup>

3. We wrote to the Secretary of State for Culture, Media and Sport on 20 March 2013 asking for further information on a number of specific issues raised by the Bill.<sup>3</sup> We received a full and helpful response by letter dated 18 April 2013.<sup>4</sup>

4. We also received a supplementary note from the Department on 6 June 2013, which addresses Government amendments tabled at Commons Report Stage.<sup>5</sup>

## Our scrutiny of the Bill

5. We have held two formal evidence sessions. On 23 April 2013, we took evidence from the Chief Executive of the Equality and Human Rights Commission, Robin Allen QC, Professor Christopher McCrudden and Professor Julian Rivers. On 14 May 2013, we took evidence from the Secretary of State for Culture, Media and Sport and the Minister of State for Pensions.

6. We also received a considerable number of written submissions on the Bill. We are very grateful to all those who have assisted with our scrutiny of the Bill's human rights implications.

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1 Bill 126 EN, paras 202-205.

2 Marriage (Same Sex Couples) Bill, Note for the Joint Committee on Human Rights, February 2013; <https://www.gov.uk/government/publications/marriage-same-sex-couples-bill>

3 Letter from the Chair, Rt Hon Maria Miller MP, Secretary of State for Culture, Media and Sport, 20 March 2013

4 Letter from Rt Hon Maria Miller MP to Chair of the Joint Committee on Human Rights, 18 April 2013

5 Marriage (Same Sex Couples) Bill, Supplementary Note to the Committee, June 2013

**7. We do not express a view as to the merits of the Bill as a whole or the principle of same sex marriage itself, both of which are matters of individual conscience and on which there are differences of opinion among members of the Committee. Instead we seek to express concerns as to the drafting of the Bill, and to make recommendations as the Bill makes its passage through Parliament.**

## 2 Legal context

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### Human rights law

#### *Right to marry*

8. Article 12 of the European Convention on Human Rights provides:

“Men and women of marriageable age have the right to marry and to found a family, according to the national laws governing the exercise of this right”

Article 9 of the Charter of Fundamental Rights of the European Union provides:

“The right to marry and to found a family shall be guaranteed in accordance with the national laws governing the exercise of these rights.”<sup>6</sup>

The relevant part of the Commentary of the Charter states:

“Since there is no explicit reference to 'men and women', as the case is in other human rights instruments, it may be argued that there is no obstacle to recognise same sex relationships in the context of marriage. There is, however, no explicit requirement that domestic laws should facilitate such marriages.”<sup>7</sup>

9. In the case of *Schalk and Kopf v Austria*,<sup>8</sup> the European Court of Human Rights unanimously held that the European Convention on Human Rights does not oblige member states to legally recognise, or legislate for, same sex marriage. The findings of this case are relevant to issues that have been debated during the passage of the Bill through the House of Commons.

10. The applicants, a same sex couple, alleged that the fact that it was impossible for them to get married under Austrian domestic law constituted a violation of their right to marry, of their right to respect for private and family life, and of the principle of non-discrimination.<sup>9</sup> They argued that as the institution of marriage had undergone considerable changes, there was no longer any reason to refuse same sex couples access to marriage. Furthermore, the applicants considered that the wording of Article 12 did not necessarily have to be read in the sense that men and women only had the right to marry a person of the opposite sex, and that the reference to “the relevant national laws” could not mean that States were given unlimited discretion in regulating the right to marry.<sup>10</sup>

11. The Court observed that:

“The choice of wording in Article 12 must thus be regarded as deliberate. Moreover, regard must be had to the historical context in which the Convention was adopted.

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6 Article 9 of the Charter of Fundamental Rights of the European Union, December 2000, which entered into force on 1 December 2009

7 Commentary of the Charter of Fundamental Rights of the European Union, para. 2.3

8 (Application no. 30141/04), 24 June 2010

9 As guaranteed under Articles 12, 8 and 14 of the Convention respectively

10 Para 44 of the judgment

In the 1950s marriage was clearly understood in the traditional sense of being a union between partners of different sex<sup>11</sup>

12. Relying on the Court's case law, according to which the Convention is a living instrument that is to be interpreted in light of present-day conditions, the applicants argued that Article 12 should be read as granting same sex couples access to marriage and as obliging member States to provide for such access in their national laws.<sup>12</sup> The Court was not persuaded by this argument. It held:

“Although, as it noted in *Christine Goodwin*,<sup>13</sup> the institution of marriage has undergone major social changes since the adoption of the Convention, the Court notes that there is no European consensus regarding same sex marriage. At present no more than six out of forty-seven Convention States allow same sex marriage.”<sup>14</sup>

13. The Court stated that, as a result of Article 9 of the Charter, the right to marry enshrined in Article 12 must not, in all circumstances, be limited to marriage between two persons of the opposite sex. However, the Court concluded that as matters stand, the question whether or not to allow same sex marriage is left to regulation by the national law of the Contracting State. The Court observed that marriage has deep-rooted social and cultural connotations which may differ largely from one society to another.<sup>15</sup> The Court emphasised that it must not rush to substitute its own judgment in place of that of the national authorities, who are best placed to assess and respond to the needs of society.<sup>16</sup>

14. The applicants also complained under Article 14 taken in conjunction with Article 8 of the Convention that they were discriminated against on account of their sexual orientation, since they were denied the right to marry and did not have any other possibility to have their relationship recognised by law before the entry into force of the Registered Partnership Act. Article 8 provides the right to respect for private and family life.

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11 Para 55 of the judgment

12 Para 57 of the judgment

13 The case concerned the right of post-operative transsexuals to marry a person of the sex opposite to their acquired gender. In its earlier case-law, the Court found that the attachment to the traditional concept of marriage which underpins Article 12 provided sufficient reason for the continued adoption of biological criteria for determining a person's sex for the purposes of marriage. The Court considered that this was a matter for Contracting States to regulate by national law (*Sheffield and Horsham v. the United Kingdom*, 30 July 1998; *Cossey v. the United Kingdom*, 27 September 1990; *Rees v. the United Kingdom*, 17 October 1986). In the case of *Christine Goodwin*, the Court departed from this position. It considered that the terms used by Article 12 which referred to the right of a man and woman to marry no longer had to be understood as determining gender by purely biological criteria. In that context, the Court noted that there had been major social changes in the institution of marriage since the adoption of the Convention. Furthermore, it referred to Article 9 of the Charter of Fundamental Rights of the European Union, which departed from the wording of Article 12. Finally, the Court noted that there was widespread acceptance of the marriage of transsexuals in their assigned gender across Member States. In conclusion, the Court found that the impossibility for a post-operative transsexual to marry in her assigned gender violated Article 12 of the Convention. In contrast, the Court in *Schalk* found that there was no convergence of standards as regards same sex marriage across Member States.

14 Para 58 of the judgment. There are now nine Member States that have legislated for same sex marriage: Belgium, Denmark, France, Iceland, Netherlands, Norway, Portugal, Spain, Sweden.

15 As held in *F v. Switzerland*, 18 December 1987, para 33

16 Paras 61–62 of the judgment

15. The Court has held repeatedly that differences based on sexual orientation require particularly serious reasons by way of justification.<sup>17</sup> Addressing this part of the complaint, the Court stated:

“Same sex couples are just as capable as different sex couples of entering into stable committed relationships. Consequently, they are in a relevantly similar situation to a different sex couple as regards their need for legal recognition and protection of their relationship.”<sup>18</sup>

The Court accepted, for the first time, that same sex relationships are a form of “family life” which falls under the scope of Article 8:

“[...] the Court considers it artificial to maintain the view that, in contrast to a different sex couple, a same sex couple cannot enjoy “family life” for the purposes of Article 8. Consequently the relationship of the applicants, a cohabiting same sex couple living in a stable de facto partnership, falls within the notion of “family life”, just as the relationship of a different sex couple in the same situation would.”<sup>19</sup>

But the Court ultimately concluded:

“Having regard to the conclusion that Article 12 does not impose an obligation on Contracting States to grant same sex couples access to marriage, Article 14 taken in conjunction with Article 8, a provision of more general purpose and scope, cannot be interpreted as imposing such an obligation either.”<sup>20</sup>

16. In conclusion, the Court in *Schalk* made it clear that Article 12 of the Convention does not currently impose an obligation on States to grant access to same sex marriage.

### ***Freedom of thought, conscience and religion***

17. Article 9 of the Convention provides as follows:

(1) Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance.

(2) Freedom to manifest one’s religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.

18. Freedom of thought, conscience and religion is an absolute right which may not be subject to any form of limitation or restriction. The Court has emphasised that freedom of

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17 As held in the cases of *Karner v Austria* Application No. 40016/98, 24 July 2003; *L. and V. v. Austria* (Applications nos. 39392/98 and 39829/98), 9 January 2003; *Smith and Grady v. the United Kingdom* (Application 33985/96) 27 September 1999

18 Para 97–99 of the judgment

19 Paras 92–94 of the judgment

20 Para 101 of the judgment

thought, conscience and religion is one of the foundations of a “democratic society” within the meaning of the Convention.<sup>21</sup>

19. In order to warrant protection, religious beliefs must reach “a certain level of cogency, seriousness, cohesion and importance”.<sup>22</sup> Once this has been established, the Convention does not allow any discretion on the part of the State to determine whether those religious beliefs, or the means used to express such beliefs, are legitimate.<sup>23</sup>

20. Freedom of religion also encompasses the freedom to manifest one’s belief, alone and in private but also to practice in community with others and in public. The manifestation of religious belief may take the form of worship, teaching, practice and observance. Since the manifestation by one person of his or her religious belief may have an impact on others, the Convention qualifies this aspect of freedom of religion in the manner set out in Article 9(2). This second paragraph provides that any limitation placed on a person’s freedom to manifest religion or belief must be prescribed by law and necessary in a democratic society in pursuit of one or more of the legitimate aims set out therein. The European Court of Human Rights has affirmed that States have a certain margin of appreciation in reconciling the right to manifest one’s religion or belief with the rights of others.<sup>24</sup>

21. Religious liberty is a collective as well as individual right. Religious organisations have the right to determine and administer their own internal religious affairs without interference from the state. The European Court of Human Rights has held that the autonomy of religious organisations is “indispensable for pluralism in a democratic society and is thus an issue at the very heart of the protection which Article 9 of the Convention affords”.<sup>25</sup>

### ***Prohibition of discrimination***

22. Article 14 of the Convention provides as follows:

“The enjoyment of the rights and freedoms set forth in the Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.”

23. Article 14 of the Convention has no independent existence. For Article 14 to become applicable, it suffices that the facts of a case fall within the ambit of another substantive provision of the Convention or its Protocols.<sup>26</sup>

24. The Court has established in its case law that only differences in treatment based on an identifiable characteristic, or “status”, are capable of amounting to discrimination within the meaning of Article 14.<sup>27</sup>

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21 Kokkinakis v Greece, (application No. 14307/88) 25 May 1993, para. 31

22 Campbell and Cosans v. The United Kingdom (Application no.s 7511/76 and 7743/76), 25 February 1982

23 Hasan and Chaush v Bulgaria (Application no. 30985/96 ), 26 October 2000, para 78

24 Eweida and others v. the United Kingdom (Applications nos. 48420/10, 59842/10, 51671/10 and 36516/10), 15 January 2013. An appeal to the Grand Chamber has been refused.

25 Hasan and Chaush v Bulgaria (Application no. 30985/96 ), 26 October 2000, para 62

26 Thlimmenos v. Greece (Application no. [34369/97](#)) 6 April 2000, para 40

25. Generally, in order for an issue to arise under Article 14 there must be a difference in the treatment of persons in analogous, or relevantly similar, situations.<sup>28</sup> Such a difference of treatment between persons in relevantly similar positions is discriminatory if it has no objective and reasonable justification; in other words, if it does not pursue a legitimate aim or if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be realised.

26. Member States enjoy a margin of appreciation in assessing whether and to what extent differences in otherwise similar situations justify a different treatment. The scope of this margin will vary according to the circumstances, the subject-matter and the background.

27. In domestic law, the Equality Act 2010 provides legal protection from discrimination in the workplace and in wider society. Section 29 of the Equality Act 2010 makes it unlawful to discriminate in the provision of services and in the exercise of public functions. The public sector equality duty requires public bodies to have due regard to the need to eliminate discrimination, advance equality of opportunity, and foster good relations between different people when carrying out their activities.<sup>29</sup>

## Marriage Law in England and Wales

28. The common law definition of marriage is: “The voluntary union for life of one man and one woman to the exclusion of all others”.<sup>30</sup>

29. The Government has stated that there is no legal definition of religious and civil marriage rather marriage is defined according to where it can take place as set out in the Marriage Act 1949.<sup>31</sup>

30. The main statutory provisions are contained in the Marriage Act 1949 and the Matrimonial Causes Act 1973. Marriage is generally sanctioned according to where it can take place, and subject to certain formalities. Under the Marriage Act 1949, marriage can be conducted in the following ways:

- Marriage according to the rites of the Church of England or Church in Wales.<sup>32</sup>
- Marriage according to the usages of the Society of Friends (the Quakers).<sup>33</sup>
- Marriage according to the usages of the Jewish religion.<sup>34</sup>
- Marriage according to all other religious rites must be conducted in a registered building in the presence of an authorised person or registrar.<sup>35</sup> A building has to be

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27 Carson and Others v. the United Kingdom , (Application no. [42184/05](#)), 16 March 2010, para 61

28 Burden v. the United Kingdom(Application no. [13378/05](#)), 29 April 2008, para 60

29 s.149 Equality Act 2010

30 Hyde v Hyde (1866) LR 1 P&D 130;Wilkinson v Kitzinger [2006] EWHC 2022 (Fam); Bellinger v Bellinger [2003] 2 AC 467

31 Government Equalities Office, Equal Civil Marriage: a consultation, 15 March 2012, p. 7

32 Part II Marriage Act 1949

33 s26(1)(c) and s47, Part III, Marriage Act 1949

34 s26(1)(d), Part III, Marriage Act 1949

certified as a place of religious worship under Section 2 of the Places of Worship Registration Act 1855 before it can be registered for marriages by the Registrar General under the Marriage Act 1949. One year after a building has been registered for the solemnisation of marriages, the trustees or governing body can appoint an “authorised person” to register marriages in the building’s own set of marriage registers. Authorised persons are usually members of the religious community, ministers or priests.

- Marriage in a register office conducted by a superintendent registrar and registered by a registrar. This ceremony cannot contain any religious elements.<sup>36</sup>
- Marriage on approved premises (e.g. a hotel) conducted by a superintendent registrar and registered by a registrar. This ceremony also cannot contain any religious elements.<sup>37</sup>
- There is also provision made for marriage of housebound and detained persons, and for “death bed” marriages.<sup>38</sup>

31. All marriage ceremonies must comply with the requirements of the Marriage Act 1949. For example, a marriage will not be legally valid if it is conducted in a building that has not been certified as a place of religious worship (under the Places of Worship Registration Act 1855) and registered for marriage (under the Marriage Act 1949).

32. The Marriage Act 1949 does not define marriage as between a man and a woman. However, section 11(c) of the Matrimonial Causes Act 1973 provides that a marriage is void if the parties are not male and female. The Bill makes provision to repeal this<sup>39</sup>

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35 s26(1)(a), s41 and s43, Part III, Marriage Act 1949

36 s26(1)(b) and s45(2) Marriage Act 1949

37 s26(1)(bb) and s46B(4) Marriage Act 1949

38 s26(1)(dd) Marriage Act 1949 and s1 Marriage (Registrar General's Licence) Act 1970

39 Schedule 7 Part 2 paragraph 24 of the Bill

### 3 Provisions relating to religious organisations and individual ministers

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#### Marriage of same sex couples according to religious rites and usages (clauses 1–8 and Schedule 1)

33. The Bill creates a permissive regime whereby religious organisations may decide whether or not to solemnise marriages of same sex couples. This is achieved through specific legislative processes for the Church of England and the Church in Wales, and an “opt-in” process for all other religious organisations.<sup>40</sup> We consider in paragraphs 42–45 the reasons for the different legislative processes.

34. The Government explained the justification for the Bill’s permissive regime as follows:

“We consider that it could not be proportionate to interfere with the religious freedom of religious organisations by requiring them to solemnise marriages that they consider to be doctrinally impermissible [...] This would accord insufficient weight to the Article 9 rights of the religious organisation, its ministers and its members”<sup>41</sup>

35. During the Public Bill Committee stage in the Commons, the Equality and Human Rights Commission (‘the Commission’) said that a legal challenge by a same sex couple who wanted to be married by a religious organisation which did not wish to solemnise same sex marriage is very likely to fail, as the religious body would argue that it was contrary to its religious doctrine. The Commission, in its evidence, states:

“There are compelling and indeed overwhelming reasons why it would be a breach of the Article 9 rights of a religious organisation if it were to be compelled to conduct or permit a same sex marriage, contrary to its doctrinal beliefs; no person (or state) can compel a religious organisation to change its doctrinal beliefs and it is not necessary that such organisations should be compelled to change their practices of conducting marriages in accordance with those beliefs, as marriage for same sex couples will be readily obtainable in other ways. Thus it is plainly legitimate for the Government to frame the Bill as to create (or perpetuate) a difference of treatment between same sex couples and different sex couples so as to avoid the position whereby a religious organisation was forced, contrary to its beliefs, to conduct or permit a same sex marriage ceremony.”<sup>42</sup>

36. The Commission’s published legal opinion further states:

“It does not breach the rights of same sex couples to restrict opportunities for a religious marriage ceremony to those organisations and individual office-holders that consent to such a ceremony. We consider it to be extremely unlikely that any

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40 Clauses 2–5 and Schedule 1

41 Marriage (Same Sex Couples) Bill, Note for the Joint Committee on Human Rights, February 2013, paras 30–34

42 EHRC, Marriage (Same Sex Couples) Bill, Public Bill Committee: supplementary submission, 13 February 2013, paras 3 & 4

different view would be taken by the courts, including the European Court of Human Rights, when considering the provisions of the Convention.”<sup>43</sup>

37. The written submission of Professor Julian Rivers, University of Bristol, states:

“The proposed opt-in system for religious bodies represents a difference of treatment on grounds of sexual orientation within the ambit of Article 12 (the right to marry). However, there can be no reasonable doubt that this difference is justified by the obligation to respect Article 9 rights of those bodies[...] There is widespread agreement that the Bill should protect the right of religious organisations and their representatives to manifest their religious beliefs by deciding whether or not to opt-in or opt-out of solemnising same sex marriages.”<sup>44</sup>

38. We also heard evidence from Professor Christopher McCrudden who believes the Government overestimates the extent to which Article 9 provides sufficient protection for religious organisations.<sup>45</sup> In his view, there is an arguable case that the European Court of Human Rights would find the United Kingdom to be acting unlawfully by instituting a system that explicitly permits religious organisations to discriminate; and that domestic courts would find religious organisations to be acting in a discriminatory manner in the exercise of public functions.<sup>46</sup> We consider the public function issue in paragraphs 46–60. Professor McCrudden further states that the Bill should include provision to take into account the European Court of Human Rights’ “living instrument” interpretative approach to Convention rights.<sup>47</sup>

39. We asked the Government and the Commission about the certainty of their position in light of the “living instrument” approach to Convention rights.<sup>48</sup> The Secretary of State said:

“My priority has been from the start to make sure that the legislation that we have here, based on the case law that we have, based on the clear understandings and directions from the European Court of Human Rights, is that we have constructed the legislation in a way that would afford the sort of protections, particularly for our religious institutions.”<sup>49</sup>

40. Religious liberty, as guaranteed under Article 9 of the European Convention on Human Rights, is a collective as well as individual right. Religious organisations have the right to determine their doctrine and internal religious affairs without interference from the State. The European Court of Human Rights has held that the autonomy of religious organisations is “indispensable for pluralism in a democratic society and is thus an issue at

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43 EHRC, Marriage (Same Sex Couples) Bill, Public Bill Committee: supplementary submission, 13 February 2013, Annex, para. 9

44 Professor Julian Rivers, Marriage (Same Sex Couples) Bill, Submissions to the Joint Committee on Human Rights, paras 14 and 16.

45 Professor McCrudden, Evidence to the Joint Committee on Human Rights, para 12(c); Professor McCrudden, Advice to the Catholic Bishops’ Conference of England and Wales, paras 18-26

46 Professor McCrudden, Advice to the Catholic Bishops’ Conference of England and Wales, paras 72–96

47 Professor McCrudden, Advice to the Catholic Bishops’ Conference of England and Wales, para 24

48 Evidence Session 1, 23 April 2013, Q.4; Evidence Session 2, 21 May 2013, Q.27

49 Evidence Session 2, 21 May 2013, Q.29

the very heart of the protection which Article 9 of the Convention affords”.<sup>50</sup> **The Government therefore has an obligation to protect the rights of religious organisations to freedom of thought, conscience and religion under Article 9 of the European Convention on Human Rights. We consider that this is a clear justification for the provisions of the Bill which provide for the right of religious organisations to decide whether or not to conduct same sex marriage.**

## **Separate legislative processes for the Church of England and the Church in Wales**

41. The Bill’s opt-in process does not apply to the Church of England and Church in Wales. For these Churches, any decision to solemnise same sex marriage would be enacted through separate legislative processes. The Church of England would put a Measure before Parliament to enable it to conduct same sex marriage.<sup>51</sup> If the Governing Body of the Church in Wales decides to conduct same sex marriage, the Lord Chancellor must enact secondary legislation to allow this.<sup>52</sup>

42. The Government states that this distinct approach is required to take into account the particular legal circumstances of the Church of England and Church in Wales, and that the proposed arrangements do not provide more or less protection than is given to other religious organisations.<sup>53</sup> The Church of England and Church in Wales have a common law duty to marry a parishioner in their parish church (or one in which they have a qualifying connection).<sup>54</sup> The Government states:

“Having regard to their specific circumstances in relation to marriage law, it would not be possible for the Church of England and Church in Wales simply not to opt in to the process for solemnising marriage for same sex couples, as other religious organisations may choose to do. This is because the right of every parishioner to be married in his or her parish church would then be engaged as regards same sex couples as well as opposite sex couples.”<sup>55</sup>

43. In evidence to us, the Secretary of State said:

“We have to treat [the Church of England and Church in Wales] in a slightly different way but, importantly, all organisations end up with the same, in terms of the protection that they receive.”<sup>56</sup>

**44. Both the Church of England and Church in Wales are free to decide whether to solemnise same sex marriage. Any such decision would be implemented through legislative processes which differ from the opt-in process for all other religious**

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50 Hasan and Chaush v Bulgaria (Application no. 30985/96 ), 26 October 2000, para 62

51 Section 3(6) of the Church of England Assembly (Powers) Act 1919 provides that the Church in England has the power to amend or repeal primary legislation on matters concerning the Church through a Measure passed by its Synod, provided the Measure is approved by both Houses of Parliament and receives Royal Assent.

52 Clause 8(2) as amended at Report stage to give full effect to the religious autonomy principle.

53 Department for Culture, Media and Sport, Myths about Equal Marriage: Setting out the truth, p.1

54 Agar v Holdsworth (1758) 2 Lee 515; Church of England Marriage Measure 2008 (2008 No.1)

55 Marriage (Same Sex Couples) Bill, Note for the Joint Committee on Human Rights, February 2013, para. 43

56 Evidence Session 2, 14 May 2013, Q.36

**organisations. The difference in treatment of the Church in England and the Church in Wales is, in our view, justified due to the legal circumstances of those churches (namely, the common law duty to marry parishioners), which do not apply to any other religious organisation. On the evidence which we heard, other Christian denominations and other faith groups believe that they do not have the same level of protection as the Church of England and the Church in Wales. It is important that other religious organisations and individual ministers of other faith groups have the same level of protection as the Church of England and Church in Wales.**

## Public functions

45. Clause 2(6) of the Bill provides that it is not unlawful discrimination in the provision of services and the exercise of public functions under section 29 of the Equality Act for a religious organisation or individual minister to refuse to conduct same sex marriages.

46. In evidence to us, there was clear disagreement about the Government's position as regards whether the solemnisation of legally-binding marriages by religious organisations would be regarded as a public function.<sup>57</sup>

47. The written submission of Professor Rivers states:

“The Government has taken the view that the conduct of legally-binding marriages is not a public function. This is open to serious doubt. The administration of marriages having civil effect is a textbook example of a public or governmental function carried out by religious bodies [...] An authorised minister of religion stands in the place of a registrar when conducting a marriage, and is thus a state official for these purposes.”<sup>58</sup>

48. Professor McCrudden also considers that the solemnisation of marriage by religious organisations is a public function.<sup>59</sup>

49. As a result of the public function nature of marriages conducted by religious organisations, there is considerable concern about the risks of litigation for religious groups.<sup>60</sup> Professor Rivers believes that the question of whether the solemnisation of marriage is a public function raises obligations under the Human Rights Act and he suggests that a similar provision to clause 2(6) is required to rule out any claim that may arise as a result.<sup>61</sup>

50. Professor McCrudden stated that, if the Bill becomes law, the Catholic Church will consider whether it can continue to conduct marriages within the existing marriage law due to the potential legal risk.<sup>62</sup>

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57 Evidence Session 2, 14 May 2013, Q. 33

58 Professor Julian Rivers, Marriage (Same Sex Couples) Bill, Submissions to the Joint Committee on Human Rights, para 26

59 Professor McCrudden, Advice to the Catholic Bishops' Conference of England and Wales, paras 65–67

60 Professor McCrudden, Advice to the Catholic Bishops' Conference of England and Wales, paras 57–71

61 Professor Julian Rivers, Marriage (Same Sex Couples) Bill, Submissions to the Joint Committee on Human Rights, para 28

62 Evidence Session 1, 23 April 2013, Q.16

51. Professor McCrudden further advised that a decision by a religious authority whether to opt-in or not to conduct same-sex marriage could also be considered a public function. He suggests that this may give rise to challenges under the Equality Act (as clause 2(6) concerns the solemnisation of same-sex marriage only) as well as other legal challenges such as judicial review and claims under the Human Rights Act.<sup>63</sup>

52. We asked the Secretary of State about this. She said:

“We have looked at this very carefully and we do not believe that the opt-in is a public function. We do not believe that there is an explicit requirement to have any clarification on the face of the Bill. Indeed, the discussions that I have had would indicate that such a clarification could cause some confusion as to whether or not other things that do not have such a statement attached to them could be inferred to be public functions, as a result of not having that disclaimer put with them.”<sup>64</sup>

53. In its written submission to us, the Equal Rights Trust (the “ERT”) set out its view that the conduct of a marriage in any of the prescribed forms under the Marriage Act 1949 is a public function.<sup>65</sup> The ERT is concerned that the Bill allows religious organisations to directly discriminate on the grounds of sexual orientation in the exercise of a public function. The ERT accepts that religious organisations should be free to determine the doctrines applicable to marriage in accordance with the tenets of their religion, and suggests that such marriages should not be automatically recognised by the State.<sup>66</sup>

54. We asked the witnesses whether, in order to avoid potential difficulties raised by the public function question, the system is preferable in some European countries where marriages conducted by religious organisations do not have legal effect. Professor McCrudden was concerned that the introduction of same sex marriage could result in an “unpicking” of the current system of marriage in England and Wales with potentially “very uncertain implications”.<sup>67</sup>

55. Professor Rivers regretted the lack of opportunity to consider these issues in pre-legislative scrutiny. In his view, the Bill re-enacts and strengthens the overall problematic system.<sup>68</sup>

56. In evidence to us, the Commission emphasised that the Bill concerns the civil concept of marriage, which is distinct from religious concepts of marriage.<sup>69</sup> Professor McCrudden disagreed with this. With reference to the Catholic Church, he said:

“Catholic marriages taking place in registered buildings have a clear dual aspect. There is no such thing as the difference between civil marriage and religious marriage. There is marriage in terms of the law.”<sup>70</sup>

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63 Professor McCrudden, Advice to the Catholic Bishops’ Conference of England and Wales, paras 57–71; Evidence session 1, 23 April 2013, Qs 17–19

64 Evidence session 2, 14 May 2013, Q. 32.

65 Equal Rights Trust, Submission to the Joint Committee on Human Rights, May 2013, paras 10–19

66 Equal Rights Trust, Submission to the Joint Committee on Human Rights, May 2013, paras 20–32

67 Evidence Session 1, 23 April 2013, Q. 22

68 Evidence Session 1, 23 April 2013, Q. 22; Professor Julian Rivers, Marriage (Same Sex Couples) Bill, Submissions to the Joint Committee on Human Rights, para 39

69 Evidence Session 1, 23 April 2013, Q.1

57. We have also considered the evidence given to us that the opt-in process itself could be considered a public function. We do not come to a conclusion on this matter. This is in part due to the divergence of opinion in the evidence we have received and in other material which we have considered during our scrutiny of this Bill. However, we recommend that the Government consider formulating a new clause which provides additional reassurance to any religious ministers or office holders who perform the dual function of officiating at a marriage in a spiritual capacity as well as performing the public function of registrar under the Marriage Act 1949.

58. We note that there was clear disagreement in evidence to us regarding the Government's position on the extent to which solemnisation of marriages by religious organisations would constitute a public function. We believe that the solemnisation of legally-binding marriage by any religious organisation under the provisions of the Marriage Act 1949 may be a public function.

59. We are sympathetic to the concern expressed to us in evidence about references to "religious marriage" by the Government, as this term fails to distinguish between marriages conducted by religious organisations which have civil legal effect under the terms of the Marriage Act 1949 and other forms of marriages conducted by religious organisations which do not have civil legal effect. We also note some calls to reconsider the current marriage law framework, and also the views expressed to us that these issues could have been better explored in consultation and pre-legislative scrutiny. We ask the Government to reconsider whether it can bring forward amendments to distinguish more clearly in the Bill between the civil and religious implications of marriages in registered religious buildings.

## Protections for individual ministers in relation to the solemnisation of marriage

60. The Bill provides the following protections for individual ministers within religious organisations:

- i) A minister may not be compelled to conduct, to be present at, to carry out or otherwise to participate in a relevant marriage, or be compelled to consent to one being conducted. This protection extends to cover ministers within religious organisations that have opted-in to conduct same sex marriage.<sup>71</sup> A Government amendment at Commons Report stage was introduced to ensure that this provision also covers chaplains employed by secular organisations;<sup>72</sup> and
- ii) Clause 2(6) of the Bill provides that it is not unlawful discrimination in the provision of services and the exercise of public functions under section 29 of the Equality Act for an individual minister or religious organisation to refuse to conduct same sex marriages.

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70 Evidence Session 1, 23 April 2013, Q.16

71 Clause 2(2) of the Bill

72 Clause 2(5) of the Bill; Marriage (Same Sex Couples) Bill, Supplementary Note to the Committee, June 2013, para. 3

61. The Equality and Human Rights Commission suggests that, in its present form, clause 2(2) may restrict the freedom of religious organisations to maintain its own doctrine and instruction amongst their office-holders and employees. This may amount to an interference with the religious organisation's autonomy under Article 9 ECHR. The Commission also highlights Article 4 of the European Union Framework Directive 2000/78 which permits religious organisations to require their employees to act in good faith and with loyalty to the organisation's ethos. The Commission has suggested that clause 2(2) should be amended to allow religious organisations that are in favour of same sex marriage to be able to maintain their own internal doctrinal orthodoxy.<sup>73</sup>

62. The Secretary of State highlighted that religious organisations, including those organisations that have indicated an intention to opt-in, have welcomed the protection for individual ministers in clause 2(2).<sup>74</sup> Whilst acknowledging the importance of religious autonomy, the Government considers that the additional protection for individual ministers is necessary in this instance. In evidence to us, the Secretary of State said:

“This is a very delicate area, because in no way does the Government want to get involved in the internal runnings of a religious organisation—I am very clear about that and have been clear about it from the beginning—but we feel it was necessary to provide this clarification, so that individual ministers can feel supported. [...] My priority throughout is to give people protection so that they can make informed choices in this area, and do not feel themselves in any way pressurised into doing something that is against their religious belief.”<sup>75</sup>

**63. We note the protections contained in clause 2(2), 2(5) and 2(6) of the Bill for individual ministers concerning the solemnisation of same sex marriage. We are broadly satisfied with these insofar as the protections relate to the solemnisation of same sex marriage. However, we note the concern that clause 2(2) of the Bill may have the effect of preventing a religious organisation that opts-in to conduct same sex marriage from maintaining its decision throughout the organisation. This is an interference with the organisation's Article 9 rights. We note the Government's response on this, particularly its explanation that religious organisations have welcomed this protection so far. This issue may, however, give rise to a future claim from a religious organisation should it wish to insist that its ministers adhere to its opt-in decision. We therefore request that the Government consider whether the Bill should be amended to deal with this concern.**

## **Broader protections for religious organisations and individual ministers**

64. There is considerable concern that the provisions for religious organisations and individual ministers are too narrowly focused on the solemnisation of marriage and do not provide protection where a religious organisation, or individual minister, may be subject to

73 Evidence Session 1, 23 April 2013, Qs.2 & 5

74 Letter from Rt Hon Maria Miller MP to Chair of the Joint Committee on Human Rights, 18 April 2013, Annex p. 2; Evidence session 2, 14 May 2013, Qs 28 & 31

75 Evidence session 2, 14 May 2013, Q 28

some form of detriment in a wide variety of contexts that fall outside the solemnisation of marriage.

65. The Explanatory Notes to the Bill state that the protection from “compulsion” used in clause 2 of the Bill is broad and that it would include, but not be limited to, the use of criminal or civil law, contractual clauses or the imposition of any detriment.<sup>76</sup> However, Professor McCrudden believes that the protection from “compulsion” in clause 2 is unclear.<sup>77</sup>

66. Professor Rivers states that the term “compulsion” is not suitable as it implies the presence of obligation, coercion, or the threat of sanction. He referred to wording of other similar legislative provisions, including the Abortion Act 1967 which states “no one shall be under any duty whether by contract or by any statutory or other legal requirement”. It is suggested that such wording is more appropriate to ensure full protection for religious organisations and individuals from any form of legal action.<sup>78</sup>

67. References have also been made in evidence to us about the possible impact of the public sector equality duty, which requires public bodies to have due regard to the need to eliminate discrimination, advance equality of opportunity, and foster good relations between different people when carrying out their activities. Examples have been cited that, as a result of the public sector equality duty, a public body may refuse to hire premises, enter into contracts or offer grants to a religious organisation that has not opted-in to same sex marriage. Professor Rivers believes that clear statutory protection must be given to religious organisations to ensure that their position on same-sex marriage is not relevant to any public body decision-making which affects them.<sup>79</sup>

68. The Government has stated that it would be a misuse of a public body’s powers to penalise a religious body for doing something lawful.<sup>80</sup> Professor McCrudden suggested that this should be made on the face of the Bill.<sup>81</sup> In evidence, the Secretary of State said she was sympathetic to the concerns, but saw no need to do this.<sup>82</sup>

**69. While the Bill provides protections for religious organisations and individual ministers in relation to the solemnisation of same sex marriage, we have heard arguments on both sides as to whether religious organisations and individual ministers may suffer some form of detriment as a result of their position on same sex marriage in a number of contexts which fall outside the scope of the Bill’s current protections. We note the concern that the Bill may create a number of legal uncertainties, which may only be resolved through litigation with its attendant costs. Although we do not come to a final conclusion on this matter, in part due to the complexity of the issues involved**

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76 HL Bill 29 EN para. 32

77 Professor McCrudden, Evidence to the Joint Committee on Human Rights, para 10; Professor McCrudden, Advice to the Catholic Bishops’ Conference of England and Wales, paras 32–48

78 Professor Julian Rivers, Marriage (Same Sex Couples) Bill, Submissions to the Joint Committee on Human Rights, para 20–22

79 Professor Julian Rivers, Marriage (Same Sex Couples) Bill, Submissions to the Joint Committee on Human Rights, paras 48–52

80 Department for Culture, Media and Sport, Myths about Equal Marriage: Setting out the truth p 3

81 Professor McCrudden, Advice to the Catholic Bishops’ Conference of England and Wales, para 104

82 Evidence session 2, 14 May 2013, Q.42

**and the divergence of opinion in both the evidence we have received and in other material which we have considered during our scrutiny of this Bill, we recommend that the Government reconsider these issues with a view to bringing forward amendments in the House of Lords to deal with these concerns.**

## 4 Wider implications of the Bill

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### Freedom of expression

70. During the passage of the Bill, there have been questions about the possible implications of the Bill for free speech. There is particular concern that the expression of opinion on same sex marriage by employees (and particularly those working in the public sector) may result in disciplinary proceedings or dismissal. In particular, there has been concern that criticism of same sex marriage by teachers could be considered unlawful discrimination based on sexual orientation.<sup>83</sup>

71. Freedom to express one's religious beliefs falls specifically within the scope of Article 9. It also falls under the general protection of free speech under Article 10. Freedom of expression constitutes one of the essential foundations of a democratic society.<sup>84</sup>

72. An interference with freedom of expression may be justified where remarks constitute an incitement to violence against an individual or a sector of the population. The Public Order Act 1986 prohibits hate speech on the grounds of race, religion and sexual orientation.<sup>85</sup> However, section 29JA of the Act makes clear that the discussion or criticism of sexual conduct or practices is not, in itself, to be considered as threatening or intended to stir up hatred.<sup>86</sup> In evidence, Professor McCrudden suggested that provision should be made to ensure that individuals who discuss or criticise same sex marriage are able to do so reasonably without fear of criminal prosecution.<sup>87</sup>

73. In evidence, the Secretary of State said that existing provisions within the law already offer clear protection for people to express their religious views.<sup>88</sup> However, the Government has committed to bringing forward a section 29JA amendment in the Lords.<sup>89</sup>

**74. Individuals are entitled to promote their views on same sex marriage in a lawful manner. This is guaranteed by the rights to freedom of thought, conscience and belief and freedom of expression. We welcome the Government's commitment to bringing forward an amendment to ensure that the discussion or criticism of same sex marriage will be protected from any criminal sanction.**

### Employment

75. We heard evidence in relation to the possible impact of the Bill in a number of employment scenarios. This concerns conscientious objection issues directly connected to same sex marriage, as well as broader issues related to employees' expression of opinion about same sex marriage.

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83 Professor McCrudden, Advice to the Catholic Bishops' Conference of England and Wales, paras 135–138

84 *Handyside v. the United Kingdom* (Application no. 5493/72) 7 December 1976, para 49

85 Public Order Act 1986 Parts III and IIIA

86 Section 29JA Public Order Act 1986

87 Professor McCrudden, Advice to the Catholic Bishops' Conference of England and Wales, paras 139–141

88 Evidence session 2, 14 May 2013, Q.38

89 HC Deb, 20 May 2013, col. 963

76. Professor McCrudden highlighted that employees, and teachers in particular, who are critical of same sex marriage may be exposed to unlawful discrimination claims based on sexual orientation under the Equality Act 2010. He suggested that the discussion or criticism of same sex marriage should be explicitly protected from any claim under the Equality Act to ensure protection for employees.<sup>90</sup>

77. Professor Rivers believed that clear guidance is needed on the proper design and reach of workplace equality and diversity policies, as well as the extent to which employers may restrict speech and association in this area.<sup>91</sup> Professor Rivers also suggested the need to consider the extent to which employers should make ‘reasonable accommodation’ on grounds of religion or belief for employees.<sup>92</sup>

78. We asked the Commission whether additional safeguards were required to protect the rights of employees against any unfair disciplinary or dismissal proceedings based on the manifestation of belief or the expression of opinion concerning same sex marriage, particularly to avoid difficult and stressful litigation. Robin Allen QC believed that the existing legal protections contained in employment and equality law are suitable to deal with issues that may arise, and advised against including safeguards in relation to employment law in this Bill.<sup>93</sup>

79. The Government had initially stated that the current legal framework was sufficient to deal with conscientious objection and other employment issues.<sup>94</sup> In evidence, we asked the Government whether further legislative provision or guidance is necessary to clarify how employment law should deal with these complex issues so that employers and employees know where they stand. The Secretary of State said that the Government is looking at ways to provide certainty in this area.<sup>95</sup> At Commons Report Stage, the Minister of State for Sport and Tourism stated that he wished to place on the record that, under the Equality Act 2010, it was unlawful to discriminate against someone because they held a belief that marriage should only be between a man and a woman, whether for religious or philosophical reasons. The Government’s position remains that further protections are unnecessary in this regard.<sup>96</sup>

### ***Marriage Registrars***

80. The protections in the Bill for individual ministers do not extend to civil registrars. All registrars will be required to conduct same sex marriage ceremonies. The Government has stated that this is in line with the decision of the European Court of Human Rights in *Ladele*.<sup>97</sup> The Government has also suggested that it would be unlawful for a local

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90 Professor McCrudden, Advice to the Catholic Bishops’ Conference of England and Wales, paras 135–136

91 Professor Julian Rivers, Marriage (Same Sex Couples) Bill, Submissions to the Joint Committee on Human Rights, para 47

92 Professor Julian Rivers, Marriage (Same Sex Couples) Bill, Submissions to the Joint Committee on Human Rights, para 53

93 Evidence Session 1, 23 April 2013, Q.8

94 Marriage (Same Sex Couples) Bill, Note for the Joint Committee on Human Rights, February 2013, paras 126–133

95 Evidence session 2, 14 May 2013, Q.41

96 HC Deb, 20 May 2013, col. 963-964

97 *Eweida and others v United Kingdom* (Applications nos 48420/10, 59482/10, 51671/10 and 36516/10), 15 January 2013 insofar as it related to Lillian Ladele, a registrar of births, deaths and marriages for the London Borough of Islington. An appeal to the Grand Chamber has been refused. The Court considered that the applicant’s refusal to

authority to arrange its services so that marriage registrars who have a conscientious objection to same sex marriage could be relieved from performing this duty.<sup>98</sup>

81. At Commons Report Stage, the Minister of State for Sport and Tourism reiterated the Government's stance that it is essential for registrars, as public servants, to perform their statutory duties without discrimination. He said that it would not be appropriate to allow registrars to opt-out of conducting same sex marriages either permanently or on a transitional basis. The Minister also stated that the representative body for registrars did not ask for a conscientious objection.<sup>99</sup>

82. Professor Rivers believes that whilst the position may be in line with the European Court of Human Rights decision in *Ladele*, it does not necessarily mean that the balance is correct from the perspective of human rights and employment equality law more generally. He believes that the failure to provide any specific protection for dissenting registrars is regrettable, and suggests that a "reasonable accommodation" approach may be suitable in this context.<sup>100</sup>

83. Professor McCrudden also believes that a limited right to conscientious objection should be provided to allow registrars with a conscientious objection to be able to refuse to conduct same sex marriages, provided that this does not prevent same sex couples from accessing civil ceremonies or ceremonies in religious organisations that have opted-in to same sex marriage where a registrar is required to attend to register the marriage.<sup>101</sup>

**84. We have heard significant arguments about whether existing employment and equality law provisions provide sufficient protection for employees who may wish to manifest their belief about same-sex marriage in the workplace. We note the particular concern for the position of teachers and civil registrars. Although we do not come to a final conclusion on whether additional protections are required, in part due to the complexity of the issues involved and the divergence of opinion upon them in the evidence we have received and in other material which we have considered during our scrutiny of this Bill, we recommend that the Government reconsider these issues with a view to bringing forward amendments in the House of Lords to put in place transitional arrangements which deal with these concerns for those in post as registrars at the time any legislation is passed.**

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conduct same sex civil partnerships was directly motivated by her religious beliefs and fell within the scope of Article 9 protection. The Court also took into account the fact that the applicant had been employed as a registrar prior to the introduction of civil partnerships. Balanced against these considerations, the Court considered the local authority's Equal Opportunities policy and its requirement that all employees act in way which does not discriminate against others. The Court concluded that, in this case, the State had not exceeded the discretion it enjoys to determine the right balance between manifesting religious belief and protecting the rights of others. The refusal by the local authority to allow the applicant to conscientiously object to registering civil partnerships was lawful.

98 Marriage (Same Sex Couples) Bill, Note for the Joint Committee on Human Rights, February 2013, paras 118–125

99 HC Deb, 20 May 2013, col. 963–964

100 Professor Julian Rivers, Marriage (Same Sex Couples) Bill, Submissions to the Joint Committee on Human Rights, para 53

101 Professor McCrudden, Advice to the Catholic Bishops' Conference of England and Wales, paras 113–131

## Teaching of Sex and Relationship Education

85. We heard evidence concerning the teaching of Sex and Relationship Education (“SRE”) in schools. Section 403(1) of the Education Act 1996 provides that, where sex education is given, it is given in such a way as to encourage due regard for moral considerations and the value of family life. Current Statutory Guidance states:

“Within the context of talking about relationships, children should be taught about the nature of marriage and its importance for family life and for bringing up children. The Government recognises that there are strong and mutually supportive relationships outside marriage. Therefore, children should learn the significance of marriage and stable relationships as key building blocks of community and society.”<sup>102</sup>

86. The Guidance further states that pupils must be protected from teaching and materials which are inappropriate having regard to the age and the religious and cultural background of the pupils concerned. The Guidance make clear that teachers should be able to deal honestly and sensitively with sexual orientation, answer appropriate questions and offer support.<sup>103</sup> On the issue of personal, moral or religious convictions of teachers, the Guidance notes:

“Parents and pupils may need to be reassured that the personal beliefs and attitudes of teachers will not influence the teaching of sex and relationship education within the PSHE framework. Teachers and all those contributing to sex and relationship education are expected to work within an agreed values framework as described in the school’s policy, which must be in line with current legislation. Some teachers may need support and training to deliver the programme sensitively and effectively.”<sup>104</sup>

87. Professor McCrudden is particularly concerned that faith schools may be required to promote or endorse same sex marriage as a result of current statutory requirements, and believes protections should be built into the Bill.<sup>105</sup>

88. Professor Rivers considered that the change in the legal definition of marriage by the Bill introduces an element of ambiguity into the current Guidance, which needs to be reviewed in order to make the position clear for all schools. He also suggested that section 403 of the Education Act needs to be amended to provide a level of protection for faith schools, and that there should be a statutory requirement on the Secretary of State to have due regard for the divergent views on the nature of marriage when issuing Guidance on this matter. Professor Rivers also highlighted that the teaching of SRE is another area where reasonable accommodation may be made for individual teachers who object to the content of teaching or the materials they are required to use.<sup>106</sup>

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102 DfEE, Sex and Relationship Education Guidance, (July 2000) DfEE 0116/2000.

103 DfEE, Sex and Relationship Education Guidance, (July 2000), Paragraphs 1.30 and 1.32

104 DfEE, Sex and Relationship Education Guidance, (July 2000) DfEE 0116/2000, para. 2.1

105 Professor McCrudden, Evidence to the Joint Committee on Human Rights, para 11(a); Professor McCrudden, Advice to the Catholic Bishops’ Conference of England and Wales, paras 105–112

106 Professor Julian Rivers, Marriage (Same Sex Couples) Bill, Submissions to the Joint Committee on Human Rights, paras 56–63

89. We wrote to the Secretary of State to ask for the Government's view on whether further Guidance could be helpful to clarify the SRE teaching requirements in relation to same sex marriage. In its response, the Government stated:

“Across all education matters, the Government has been clear that trust needs to be placed in the hands of the professionals on the ground. Teachers are already very experienced in addressing sensitive topics in class and we therefore do not consider the provision of additional guidance pertaining to the teaching of same sex marriage to be necessary.”<sup>107</sup>

90. The Secretary of State reiterated this position to us in evidence.<sup>108</sup> However, the Government committed to considering this issue further in the Lords.<sup>109</sup> **We welcome the Government's commitment to review the protections that may be required in relation to the teaching of Sex and Relationship Education. In particular, we encourage the Government to consider whether specific protections are required for faith schools and for individual teachers who hold a religious belief about same sex marriage.**

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107 Letter from Rt Hon Maria Miller MP to Chair of the Joint Committee on Human Rights, 18 April 2013, Annex p.4

108 Evidence session 2, 14 May 2013, Q.39

109 HC Deb, 20 May 2013, col. 963

## 5 Civil partnerships

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91. We note the Bill's new provision that places an obligation on the Secretary of State to undertake an immediate review of civil partnerships.<sup>110</sup>

92. Evidence received by us has suggested that there is a potential human rights issue in relation to the continued exclusion of opposite sex couples from access to civil partnerships.<sup>111</sup> It may amount to unjustifiable discrimination for the law not to provide the same facility for legal recognition of opposite sex couples who could claim that their relationship is analogous to that of civil partners. This may lead to less favourable treatment of opposite sex couples in certain contexts, for example, in relation to property rights. There must be a clear justification for excluding opposite sex couples from being able to access the statutory benefits, legal protections and exemptions that apply to civil partners.

93. In evidence to us, the Government maintained that any difference in treatment of opposite sex couples is justified because unmarried opposite sex couples are free to marry in order to gain legal recognition of their relationship, and have therefore chosen instead the less favourable legal treatment of their unmarried relationship.<sup>112</sup>

94. The Government has also highlighted potential costs of extending civil partnerships to opposite sex couples.<sup>113</sup> When asked about this in evidence, the Pensions Minister suggested that the extension of civil partnerships to opposite sex couples may result in the need for total pension equality in public service pension schemes, which may cost between £3 billion to £4 billion.<sup>114</sup>

**95. We are not convinced by the Government's reasons not to extend civil partnerships to opposite sex couples, and we welcome the Government's announcement that it will review this matter. In doing so, the Government should take into account the potential discrimination that may arise between cohabiting opposite sex couples and civil partners. We also note that there was some ambiguity in the Government evidence to us concerning the costs of extending civil partnerships to opposite sex couples. As part of its review, we expect the Government to provide clear and accurate information about these costs.**

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110 Clause 14 of the Bill, as introduced at House of Commons Report Stage, 20 May 2013

111 Equal Rights Trust, Submission to the Joint Committee on Human Rights, May 2013, paras 80-97

112 Letter from Rt Hon Maria Miller MP to Chair of the Joint Committee on Human Rights, 18 April 2013, Annex p.10; Evidence Session Qs. 43-45 & 51

113 Letter from Rt Hon Maria Miller MP to Chair of the Joint Committee on Human Rights, 18 April 2013, Annex p.10

114 Evidence session 2, 14 May 2013, Q 44 and Q46

## 6 Pensions

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96. The Equality and Human Rights Commission has said that the Government should take the “opportunity to equalise pension provision for same sex married couples, civil partners and widowers with the benefits enjoyed by widows”.<sup>115</sup>

97. In relation to the state pension, widowers are entitled to survivor’s pension rights based on contributions from 1988, whereas widows receive their rights from 1978. On the introduction of civil partnerships, the Government decided to treat civil partners as widowers for the purposes of the state pension. The provisions of this Bill will extend entitlement to the state pension to same sex married couples on the same basis as civil partners and widowers. The Government states that the differences in treatment are a result of the pre-existing preferential treatment of women married to men in relation to entitlement to a state pension.<sup>116</sup>

98. The main discrimination problem in relation to pension rights arises in the way in which the Bill deals with married same sex survivors’ rights under occupational pension schemes.<sup>117</sup> Under the provisions of the Bill, the surviving spouse of a same sex marriage will be treated in the same way as surviving civil partners. Schedule 9 paragraph 18(1) of the Equality Act 2010 allows employers and pension funds to exclude civil partners from spousal benefits attributable to service prior to 5 December 2005. Depending on the provisions of the scheme, pension rights of same sex spouses may not be the same as pension rights of opposite sex spouses, which may give rise to an issue as to whether this is compatible with Article 14 of the ECHR in conjunction with Article 1 Protocol 1.

99. In its written submission to us, Liberty suggested an amendment to remove Schedule 9 paragraph 18(1) of the Equality Act and the parallel provision in the Bill relating to same-sex spouses.<sup>118</sup>

100. We wrote to the Government to ask whether it has considered amending Schedule 9 paragraph 18(1) of the Equality Act 2010. In its response, the Government explained that this provision is necessary to protect pension schemes from significant additional and retrospective financial burdens.<sup>119</sup>

**101. The Government recognised that its policy of treating same sex marriages the same as civil partnerships for occupational pension survivor benefits could create a problem in relation to marriages where one spouse changes legal gender. We welcome the Government’s amendments at Report Stage to deal with this.<sup>120</sup> However, we consider that the Government should carry out a full review of pension provisions in relation to survivor pension benefit entitlements of same sex married couples and civil partners to**

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115 Equal Civil Marriage: Equality and Human Rights Commission position paper, June 2012

116 Marriage (Same Sex Couples) Bill, Note for the Joint Committee on Human Rights, February 2013, para 145

117 Liberty, Committee Stage Briefing on the Marriage (Same Sex Couples) Bill, February 2013, para 12

118 Liberty, Committee Stage Briefing on the Marriage (Same Sex Couples) Bill, February 2013, para 12

119 Letter from Rt Hon Maria Miller MP to Chair of the Joint Committee on Human Rights, 18 April 2013, Annex p. 12; HC Deb. 21 May 2013 col. 1144

120 Schedule 4, Paragraphs 17–26 as amended at Report stage; Marriage (Same Sex Couples) Bill Supplementary Note to the Committee, paras 6–9

**ensure that there is no unjustifiable discrimination in pension scheme provisions. In doing so, we call on the Government to provide precise information about the potential costs of equalising pension rights.**

# Formal Minutes

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**Tuesday 11 June 2013**

Members present:

Dr Hywel Francis, in the Chair

Rehman Chishti  
Rt Hon Simon Hughes  
Mr Virendra Sharma  
Sir Richard Shepherd

Baroness Berridge  
Baroness Kennedy of the Shaws  
Lord Lester of Herne Hill  
Baroness Lister of Burtersett  
Baroness O'Loan

Draft Report (Legislative Scrutiny: Marriage (Same Sex Couples) Bill), proposed by the Chair, brought up and read.

*Ordered*, That the Chair's draft Report be now considered.

Paragraphs 1 to 101 read and agreed to.

*Resolved*, That the Report be the Second Report of the Committee to each House.

*Ordered*, That the Chair make the Report to the House of Commons and that the Report be made to the House of Lords

[Adjourned till Tuesday 18 June at 1.00 pm]

## Declaration of Lords' Interests

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No members present declared interests relevant to this Report

A full list of members' interests can be found in the Register of Lords' Interests:

<http://www.publications.parliament.uk/pa/ld/ldreg/rego1.htm>

## Witnesses

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### Tuesday 23 April 2013

**Mark Hammond**, Chief Executive, Equality and Human Rights Commission, and **Robin Allen QC**

**Professor Christopher McCrudden**, Counsel, Blackstone Chambers, and **Professor Julian Rivers**, University of Bristol

### Tuesday 14 May 2013

**Rt Hon Maria Miller MP**, Secretary of State for Culture, Media and Sport and Minister for Women and Equalities, and **Mr Steve Webb MP**, Minister of State for Pensions, Department for Work and Pensions

## List of written evidence

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1	Letter to the Chair, and submission from Rt Hon Hugh Robertson MP, Minister for Sport and Tourism, Department for Culture Media and Sport	BILLS (12–13) 106
2	Letter from the Chair, to Rt Hon Maria Miller MP, Secretary of State for Culture, Media and Sport	BILLS (12–13) 130
3	Professor Christopher McCrudden	BILLS (12–13) 147:147A
4	Letter to the Chair, and Annex, from Rt Hon Maria Miller MP, Secretary of State for Culture, Media and Sport	BILLS (12–13) 149:149A
5	Letter from the Chair, to Professor Christopher McCrudden, Counsel, Blackstone Chambers	BILLS (12–13) 150
6	Letter from the Chair, to Professor Julian Rivers, University of Bristol	BILLS (12–13) 151
7	Letter from the Chair, to Mark Hammond, Chief Executive, Equality and Human Rights Commission, and Robin Allen QC	BILLS (12–13) 152
8	Letter and submission from Professor Julian Rivers, University of Bristol	BILLS (13–14) 002:002A
9	Supplementary written evidence from Professor Christopher McCrudden	BILLS (13–14) 003
10	Equal Rights Trust	BILLS (13–14) 006
11	Letter to the Chair, and supplementary written evidence from Mark Hammond, Chief Executive Equality and Human Rights Commission	BILLS (13–14) 007
12	Letter to the Chair, and supplementary evidence from Rt Hon Hugh Robertson MP, Minister for Sport and Tourism, Department for Culture, Media and Sport	BILLS (13–14) 016:016A

# List of Reports from the Committee during the current Parliament

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## Session 2013–14

First Report	Human Rights of unaccompanied migrant children and young people in the UK	HL Paper 9/HC 196
Second Report	Legislative Scrutiny: Marriage (Same Sex Couples) Bill	HL Paper 24/HC 157

## Session 2012–13

First Report	Draft Sexual Offences Act 2003 (Remedial) Order 2012: second Report	HL Paper 8/HC 166
Second Report	Implementation of the Right of Disabled People to Independent Living: Government Response to the Committee's Twenty-third Report of Session 2010–12	HL Paper 23/HC 429
Third Report	Appointment of the Chair of the Equality and Human Rights Commission	HL Paper 48/HC 634
Fourth Report	Legislative Scrutiny: Justice and Security Bill	HL Paper 59/HC 370
Fifth Report	Legislative Scrutiny: Crime and Courts Bill	HL Paper 67/HC 771
Sixth Report	Reform of the Office of the Children's Commissioner: draft legislation	HL Paper 83/HC 811
Seventh Report	Legislative Scrutiny: Defamation Bill	HL Paper 84/HC 810
Eighth Report	Legislative Scrutiny: Justice and Security Bill (second Report)	HL Paper 128/HC 1014
Ninth Report	Legislative Scrutiny Update	HL Paper 157/HC 1077

## Session 2010–12

First Report	Work of the Committee in 2009–10	HL Paper 32/HC 459
Second Report	Legislative Scrutiny: Identity Documents Bill	HL Paper 36/HC 515
Third Report	Legislative Scrutiny: Terrorist Asset-Freezing etc. Bill (Preliminary Report)	HL Paper 41/HC 535
Fourth Report	Terrorist Asset-Freezing etc Bill (Second Report); and other Bills	HL Paper 53/HC 598
Fifth Report	Proposal for the Asylum and Immigration (Treatment of Claimants, etc) Act 2004 (Remedial) Order 2010	HL Paper 54/HC 599
Sixth Report	Legislative Scrutiny: (1) Superannuation Bill; (2) Parliamentary Voting System and Constituencies Bill	HL Paper 64/HC 640
Seventh Report	Legislative Scrutiny: Public Bodies Bill; other Bills	HL Paper 86/HC 725
Eighth Report	Renewal of Control Orders Legislation	HL Paper 106/HC 838
Ninth Report	Draft Asylum and Immigration (Treatment of	HL Paper 111/HC 859

	Claimants, etc) Act 2004 (Remedial) Order 2010— second Report	
Tenth Report	Facilitating Peaceful Protest	HL Paper 123/HC 684
Eleventh Report	Legislative Scrutiny: Police Reform and Social Responsibility Bill	HL Paper 138/HC 1020
Twelfth Report	Legislative Scrutiny: Armed Forces Bill	HL Paper 145/HC 1037
Thirteenth Report	Legislative Scrutiny: Education Bill	HL Paper 154/HC 1140
Fourteenth Report	Terrorism Act 2000 (Remedial) Order 2011	HL Paper 155/HC 1141
Fifteenth Report	The Human Rights Implications of UK Extradition Policy	HL Paper 156/HC 767
Sixteenth Report	Legislative Scrutiny: Terrorism Prevention and Investigation Measures Bill	HL Paper 180/HC 1432
Seventeenth Report	The Terrorism Act 2000 (Remedial) Order 2011: Stop and Search without Reasonable Suspicion (second Report)	HL Paper 192/HC 1483
Eighteenth Report	Legislative Scrutiny: Protection of Freedoms Bill	HL Paper 195/HC 1490
Nineteenth Report	Proposal for the Sexual Offences Act 2003 (Remedial) Order 2011	HL Paper 200/HC 1549
Twentieth Report	Legislative Scrutiny: Terrorism Prevention and Investigation Measures Bill (Second Report)	HL Paper 204/HC 1571
Twenty-first Report	Legislative Scrutiny: Welfare Reform Bill	HL Paper 233/HC 1704
Twenty-second Report	Legislative Scrutiny: Legal Aid, Sentencing and Punishment of Offenders Bill	HL Paper 237/HC 1717
Twenty-third Report	Implementation of the Right of Disabled People to Independent Living	HL Paper 257/HC 1074
Twenty-fourth Report	The Justice and Security Green Paper	HL Paper 286/HC 1777