



The Catholic Bishops' Conference of England and Wales

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Commons Report Stage Briefing for Members of Parliament on Proposed New Clauses and Amendments to the Marriage (Same Sex Couples) Bill

15th May 2013

Introduction and Summary:

This briefing note sets out specific amendments to the Marriage (Same Sex Couples) Bill proposed by Members of Parliament in order to protect religious freedom and freedom of speech. These amendments have the support of the Catholic Bishops' Conference of England and Wales.

The Church's principled objection to the legislation was set out in our Second Reading Briefing Note (<http://www.catholicnews.org.uk/marriage-same-sex-couples-bill-briefing>). Given the support that the Bill received at Second Reading, our aim now is to ensure that the Bill, should it become law, effectively delivers the protections that the Government promised to provide for religious individuals and organisations. **Our legal advice warns that these amendments are necessary to protect freedom of religion and freedom of speech.**

These amendments seek to give effect to the protections that the Government has repeatedly stated that it seeks to provide. The amendments cover four areas:

(1) Freedom of Speech:

There is a real concern that individuals will be subjected to some form of detriment if they express views or opinions against same sex marriage.

(2) Education:

The Bill causes two potential problems for religious schools: first in relation to current guidance issued by the Secretary of State about marriage, and second in relation to future guidance. Unless protection is

built into the Bill, religious schools may be compelled to **promote** and **endorse** same sex marriage under current and/or future guidance issued by the Secretary of State.

(3) Protection for Registrars:

There is presently no protection in the Bill for current (or future) civil registrars who have a conscientious objection to conducting same sex marriage ceremonies.

(4) Protection from Compulsion:

Protection from "compulsion" is central to the protection provided for religious individuals and organisations. But there is no definition of 'compelled' in the Bill. This creates significant uncertainty and weakens the scope of the protection that is afforded by the Bill. The Bill also recognises the possibility of legal challenge under section 29 of the Equality Act 2010 and provides explicit protection in Clause 2(5); however the scope of that protection is too narrowly drawn and leaves religious organisations at risk of legal challenge.

Whilst these four issues are not our only areas of concern (other pieces of legislation, including the Public Order Act 1986 and other sections of the Equality Act 2010, should also be amended in order to provide proper protection for religious individuals and organisations), we have focused on them as our major concerns.

The following note explains in each case the concern and the proposed solution by way of amendment.

CATEGORY 1
Freedom of Speech for All –
Equality Act 2010

a. The Concern:

There is a genuine concern that individuals, if they express an opinion against same sex marriage either inside or outside the workplace, will be subjected to some form of detriment. It is imperative that neither freedom of expression, nor the freedom of thought, conscience and religion, are inappropriately limited when individuals are discussing same-sex marriage in future, whether they do so publicly or privately.

There have already been several cases in which individuals have expressed opinions about same sex relationships – outside work – and have had disciplinary action taken against them as a result. One such case is *Smith v Stafford Housing Trust* [2012] EWHC 3221, in which Mr Smith posted a comment on *Facebook* about same sex marriage, after which his employer demoted him and cut his pay. Even though he was ultimately successful in his legal action against his employer, the damages were minimal, he did not get his original job back, and his wages were not restored to the original amount.

The Secretary of State responded to these concerns in the following way, “*Our clear understanding is that discussion or criticism of same sex marriage would not be ‘of itself’ discrimination under the current law.... Nothing in the Bill affects people’s ability to hold and express their belief that marriage should be between a man and a woman*”.

Whilst this statement is welcome, she is overly optimistic in assuming that courts and tribunals will necessarily reach the same conclusion without further guidance in the Bill. This assurance does not fully meet our concern and it fails to protect freedom of expression sufficiently.

Ample anecdotal evidence suggests that there is already a chilling effect on freedom of speech, which is likely to be exacerbated unless explicit protection is inserted into the Bill.

b. The Proposed Solution:

New Clause (4):

Chapter 2 of the Equality Act 2010

(1) In the Equality Act 2010, after section 19, insert the following section –

19A For the purposes of this Act discussion or criticism of same sex marriage shall not be taken of itself to be discrimination.

New Clause (4) makes it clear that discussions and criticisms of same sex marriage do not constitute unlawful discrimination for the purposes of the Equality Act 2010. The clause thus ensures that individuals will not be dismissed or subjected to disciplinary proceedings for discrimination simply for discussing these issues. It aims, in short, to protect freedom of expression.

New clause (4) is in line with the Secretary of State’s assurance and the intention of Government, and it will help to ensure that the intended protection is achieved.

CATEGORY 2
Education Act 1996 –
Promoting or Endorsing Same Sex
Marriage

a. The Concern:

The Bill, as it currently stands, causes two potential problems for religious schools: firstly in relation to the current guidance issued by the Secretary of State about marriage, and secondly in relation to future guidance.

The Bill does so because the meaning of marriage will be altered by Clause 11(1) of the Bill which provides that “*In the law of England and Wales, marriage has the same effect in relation to same sex couples as it has in relation to opposite sex couples*” and Clause 11(2) which provides that “*The law of England and Wales (including all England and Wales legislation whenever passed or made) has effect in accordance with subsection (1)*”. In all circumstances, therefore, ‘*marriage*’ will mean both same sex and opposite sex marriage.

This will affect schools because section 403 of the Education Act 1996 places a statutory obligation on the Secretary of State to issue guidance to schools, in order to ensure that children learn about ‘*the nature of marriage and its importance for family life and the bringing up of children* (emphasis added)’. ‘*Marriage*’ in that guidance will mean both opposite sex and same sex marriage if the Bill becomes law.

It is the phrase “*its importance for family life and the bringing up of children*” that will potentially cause a problem for schools with a designated

religious character. That phrase puts an obligation on schools to teach children **more** than the law of the land; it requires children to be taught about the *value* or *benefit* of the institution for family life and for children. It requires, in other words, schools to **promote** and **endorse** marriage, and not just tell students that the institution exists.

The Secretary of State, during the second reading debate, stated “No teacher will be required to promote or endorse views that go against their beliefs”¹ and the Minister during Committee promised that “no teacher is under any duty to promote or endorse a particular view of marriage, and neither would they be as a result of any revised guidance in the future”². Whilst these assurances are welcome, they do not address the concern for a number of reasons:

Firstly, the assurances do not address the substance of our concern, which relates to duties on schools (not on individual teachers) arising from section 403. The Bill does not address this issue either, and it does not provide the necessary protection. Clause 11 will effectively alter any guidance that has already been issued by the Secretary of State. Consequently schools may be compelled to teach students about the *value and benefit* of **same sex** marriage – or put another way, schools may be compelled to **promote** or **endorse** same sex marriage.

Secondly, Ministerial statements do not make the law. Therefore it is perfectly possible that section 403 and the Secretary of States’ guidance will be interpreted in a way that obliges schools to promote and endorse same sex marriage.

Thirdly, there is nothing in the Bill to protect schools against *future* guidance issued by a Secretary of State, who might see it as his or her responsibility to issue guidance that specifically requires schools to promote or endorse same sex marriage. The Minister assured the Committee that “The Secretary of State does not issue guidance to ensure that teachers promote or endorse any particular view of marriage”³; however his words will not have a binding effect on future Secretaries of State.

An amendment is needed in order to ensure that schools with a designated religious character are not compelled to promote or endorse an understanding of marriage that runs contrary to their religious ethos under either current or future guidance.

b. *The Proposed Solution:*

New Clause (1):

To move the following Clause:—
‘Education Act 1996’

- (1) Section 403 of the Education Act 1996 (sex education: manner of provision) is amended as follows.
- (2) After subsection (1D) insert -

‘(1E) For the purposes of subsection (1A):

- (a) no school shall be under any duty as a result of the guidance issued to promote or endorse an understanding of the nature of marriage and its importance for family life and the bringing up of children, that runs contrary to the designated religious character of the school.
- (b) this subsection is without prejudice to any guidance issued by the Secretary of State regarding the legal status of marriage .’

Amendment (1):

Page 52, Schedule 7, line 26, at end insert -

- ‘42 The Education Act is amended as follows.
- 43 Section 403 (sex education: manner of provision), after subsection (1D) insert -

‘(1E) For the purposes of subsection (1A):

- (a) no school shall be under any duty as a result of the guidance issued to promote or endorse an understanding of the nature of marriage and its importance for family life and the bringing up of children, that runs contrary to the designated religious character of the school.
- (b) this subsection is without prejudice to any guidance issued by the Secretary of State regarding the legal status of marriage .’

New clause (1) and amendment (1) protect religious schools from any obligation arising, whether through interpretation of the current guidance or through future guidance, which would force schools to **promote** or **endorse** same sex marriage.

Amendment (1) and new clause (1) will **not** affect any guidance issued by the Secretary of State that requires schools to teach children about the legal status of marriage (i.e. that it is legally open to both opposite sex and same sex couples). Therefore, if a Secretary of State issues guidance that requires all schools to teach students that marriage has been extended to same sex couples **and** requires the schools to promote and endorse the new meaning of marriage, all schools **will** remain under a duty to teach pupils that marriage has been extended to same sex couples but they will **not** be under a duty to promote or endorse same sex marriage (if it would be contrary to the designated religious character of the school). They will provide a sensible balance.

¹ The Rt. Hon. Maria Miller MP, House of Commons (05/02/13)

² The Rt. Hon. Hugh Robertson MP, Eighth Sitting (28/02/13)

³ *ibid*

CATEGORY 3
Registrars –
Conscientious Objection

a. The Concern:

There is currently nothing in the Bill that will allow a registrar to refrain from conducting civil same sex marriages on the ground that she or he has a conscientious objection to doing so.

Without a conscientious objection clause for all registrars there will inevitably be legal disputes in the future. Indeed, there is likely to be a significantly increased number of such disputes because local authorities that were willing to allow registrars not to conduct civil partnerships will not be permitted to accommodate registrars who object to conducting same sex marriages. This will affect registrars who accepted civil partnerships but do not believe that marriage should be extended to same sex couples, by reason of their religious or other beliefs, and registrars who were accommodated by their local authorities following the Civil Partnership Act 2004.

The absence of protection for registrars in either the civil or religious context contrasts markedly with the protection from compulsion that is afforded to the clergy or others within religious organisations. Registrars will not be afforded the protection from compulsion that *clergy* have in relation to same sex marriages *in the religious context*.

b. The Proposed Solution:

Amendment (2) combined with New Clause (2):

As a proposed amendment to the Marriage (Same Sex Couples) Bill, page 3, line 21, clause 2 –

Leave out lines 21 and 22

AND

Insert the following new clause –

“Conscientious objection

- (1) Subject to subsections (2) and (3) of this section, no registrar shall be under any duty, whether by contract or by any statutory or other legal requirement, to conduct, be present at, carry out, participate in, or consent to the taking place of, a relevant marriage ceremony to which he has a conscientious objection.*
- (2) Nothing in subsection (1) shall affect the duty of each registration authority to ensure that there is a sufficient number of relevant marriage registrars for its area to carry out in that area the functions of relevant marriage registrars.*
- (3) The conscientious objection must be based on a sincerely held religious or other belief.*
- (4) In any legal proceedings the burden of proof of conscientious objection shall rest on the person claiming to rely on it.”*

Amendment (2) and New Clause (2) will permit all registrars to exercise their right to freedom of thought, conscience and religion. They will **not** prevent same sex couples from accessing civil or religious marriage ceremonies.

A conscientious objection clause, such as this, is not unprecedented and it will not have a detrimental effect on the Bill. There are numerous well established precedents already on the statute book. The Government has provided no good reason for allowing conscientious objection clauses in those contexts and not in this.

New Clause (2(1)) partly draws on the conscientious objection clause in the Abortion Act 1967, in requiring (in subsections (3) and (4)) that the objection must be based on a sincerely held religious or other belief, and in placing the burden of proof on the person claiming to rely on it.

New Clause (2(2)) will not allow individuals to exercise a conscientious objection if doing so will result in same sex couples being unable to access this service. If sufficient numbers of registrars are not available in any given area, a registrar in that area with a conscientious objection will come under a duty to conduct the same sex marriage. Therefore, no same sex couple will be prevented from marrying by reason of this amendment. This tackles the Minister’s concern that religious individuals might (although it is unlikely) apply for positions as registrars in order to conscientiously object to same sex marriage⁴ and prevent same sex couples from getting married.

A limitation on the religious or other beliefs of individuals in relation to same sex marriage is not necessary because allowing individuals to exercise a conscientious objection in this way will not defeat the intention of the Bill. This amendment would endorse the approach that has already been adopted by those local authorities, who were prepared to live and let live in the context of civil partnerships.

⁴ The Rt. Hon Hugh Robertson MP, Sixth Sitting (26/02/13), “it is not clear how an authority could be confident that it could meet that duty if any registrar it currently employs and any it might employ in the future could seek to rely on that exemption at any time, regardless of whether they have an objection at the time the Bill is enacted...a registrar could apply for a post that would specifically require them to conduct same-sex marriage ceremonies and then change their mind the week after they started. That would obviously cause all sorts of problems...”

CATEGORY 4
Inadequacy of the ‘locks’ – Protection from Compulsion

There are two problems with the protection from compulsion that is provided in the Bill: the first is uncertainty as to the meaning of ‘*compelled*’, and the second is the narrow exemption from Section 29 of the Equality Act 2010 (which will not protect religious organisations when deciding whether or not to opt-in).

a. Meaning of ‘Compelled’ – The Concern:

Protection from ‘compulsion’ is central to the protection provided for religious individuals and organisations in the Bill – it constitutes one of the quadruple locks that the Government has so widely publicised; however there is no definition of “*compelled*” in the Bill. This creates uncertainty and potentially limits the scope of protection that is afforded by the clause. The lock may turn out to be not much of a lock at all.

It is unclear what individuals and organisations are protected from. Consequently, the clause may not protect religious individuals or organisations from *civil* legal penalties; it may not prevent public bodies from treating religious organisation less favourably if they decide not to opt-in to providing same sex marriage; and it may not protect religious organisations from the threat of other legal action, such as judicial review, if they decide not to opt-in to same sex marriage. The protections provided in Clause 2 may thus be quite narrow in scope and provide relatively little protection.

The Minister stated that Government intends the protection to extend beyond the prevention of criminal penalties and have “*the effect of preventing any type of conduct that would have the effect of forcing a person to do something protected under that clause*”⁵. The Minister also made it clear that “*imposition of any penalties on or subsequent unfavourable treatment of a religious organisation or individual in order to compel that organisation to opt in to same-sex marriage is already unlawful under the Bill*”⁶.

Even if Ministerial assurances could provide sufficient protection (which unfortunately they cannot), the Minister’s assurances still leave the position unclear. An organisation penalised for not opting-in by being denied access to grants, for example, would not necessarily be ‘compelled’ to do anything; it would simply be penalised for not

⁵ The Rt. Hon Hugh Robertson MP, Seventh Sitting (29/02/13)

⁶ The Rt. Hon Hugh Robertson MP, Seventh Sitting (29/02/13)

opting-in. Would a public authority be acting *ultra vires* were it to treat a religious organisation less favourably on the ground that the religious organisation did not opt-in, even if the public authority’s intention was not to ‘force’ that organisation to opt-in but was simply to show the public authority’s disapproval of the religious organisation’s stance? Is this covered by the protection from ‘compulsion’? Clarification and guidance is needed.

b. The Proposed Solution:

New Clause (8):

Domestic protection for persons

(1) *For the purposes of this act “compelled” includes, but is not limited to –*

- (a) *less favourable treatment of a person by a public authority,*
- (b) *the imposition of any criminal or civil penalty , and*
- (c) *any legal proceedings against a person,*

as a result of a decision not to opt-in, conduct, be present at, carry out, participate in, or consent to the taking place of, relevant marriages.

(2) *Expressions used in this section have the same meaning as the expressions used in Section 2 of this Act.’*

Amendment (5):

Page 3, Clause 2, line 43, at end insert –

(4A) *For the purposes of this act “compelled” includes, but is not limited to –*

- (a) *less favourable treatment of a person by a public authority,*
- (b) *the imposition of any criminal or civil penalty , and*
- (c) *any legal proceedings against a person,*

as a result of a decision not to opt-in, conduct, be present at, carry out, participate in, or consent to the taking place of, relevant marriages.

New Clause (7):

Legal proceedings against a person

‘(1) *A decision by a person not to undertake an opt-in activity shall not be questioned in any legal proceedings whatsoever.*

(2) *Expressions used in this section have the same meaning as the expressions used in Section 2 of this Act.’*

New Clauses (7) and (8) and amendment (5) will provide the necessary clarification and thus protect religious organisations from all legal penalties – criminal and civil – if they decide not to opt-in. They will also protect religious organisations from other legal actions being taken against them (such as judicial review), and they will ensure that religious organisations do not suffer at the hands of public

authorities, by making it clear that public authorities will be acting *ultra vires* if they penalise religious bodies for deciding not to opt-in.

The amendment and new clauses will achieve this by providing guidance and clarity on the meaning of “compelled” and enshrining, on the face of the Bill, the Government’s assurance that religious organisations will not be penalised, under any circumstances, for failing to opt-in to the provision of same sex marriages if they object to them. These new clauses and amendments will ensure that the necessary and intended protection is achieved. They are essential if the ‘lock’ is to work.

c. Exemption from section 29 of the Equality Act 2010 – The Concern:

A second lock provided by the Government is the exemption in Clause 2(5) to section 29 of the Equality Act 2010. This makes it clear that discrimination claims cannot be brought against religious organisations or individuals for refusing to marry same-sex couples or refusing to allow their premises to be used for same sex marriage ceremonies.

The protection is incomplete. Clause 2(5) *only* makes an exception for individuals if they decide not to:

- (a) conduct a relevant marriage,
- (b) be present at, carry out, or participate in, a relevant marriage, or
- (c) consent to a relevant marriage being conducted

(these are Clause 2(2) activities). There is no protection, however, for religious *organisations* if they decide not to *opt-in* to providing same sex marriages (which is a Clause 2(1) activity).

However, organisations, when deciding whether or not to opt-in under Clause 2(1) may also be considered to be exercising a public function. If this is the case then it is vital that religious organisations are also exempt from Section 29, otherwise they will remain under the threat of legal challenge

The Minister, in his response during Committee, said, “A religious organisation’s decision whether to opt into conducting same-sex marriages is neither a service to the public or a section of the public, nor a public function”⁷. This assurance is welcome, but what the courts consider to constitute a public function is notoriously uncertain. Clarification on the face of the Bill would resolve this uncertainty.

⁷ The Rt. Hon Hugh Robertson MP, Ninth Sitting (05/03/13)

d. The Proposed Solution:

Amendment (4):

Meaning of “Compelled”

Page 3, clause 2, line 44, leave out subsection (5) and insert –

‘(5) In Schedule 3 to the Equality Act 2010 (services and public functions: exceptions), after Part 6 insert –

“Part 6A

MARRIAGE OF SAME SEX COUPLES IN ENGLAND AND WALES

Marriage according to religious rites: no compulsion to solemnize etc

25A (1) A person does not contravene section 29 only because the person –

- (a) does not conduct a relevant marriage,
- (b) is not present at, does not carry out, or does not otherwise participate in, a relevant marriage, or
- (c) does not consent to a relevant marriage being conducted,

for the reason that the marriage is the marriage of a same sex couple.

(2) For the avoidance of doubt, a person does not provide a service or exercise a public function when the person

- (a) refrains from undertaking an opt-in activity, or
- (b) undertakes an opt-out activity.

(3) Expressions used in this paragraph and in section 2 of the Marriage (Same Sex Couples) Act 2013 have the same meanings in this paragraph as in that section.”.

If the Government genuinely does not intend for religious organisations to be held to be performing a public function or providing a public service when opting-in or out, then this amendment will do no more than ensure that the intention is met. If it is not inserted into the Bill, the matter will remain open to legal dispute.

For a more detailed assessment of the human rights law implications of Bill please see Prof. Christopher McCrudden’s legal advice to the CBCEW –
<http://www.catholicnews.org.uk/marriage-same-sex-couples-bill-legal-advice>