

1. Letter from Alex Neil to MSPs [Including Mr Yousaf]

From: [Redacted] **On Behalf Of** Minister for Parliamentary Business

Sent: 16 December 2013 11:55

To: Alison McInnes; Jim Hume; Liam McArthur; Tavish Scott; Willie Rennie; Adam Ingram; Aileen Campbell; Aileen McLeod; Alasdair Allan; Alex Neil; Alex Salmond; Angela Constance; Angus MacDonald; Annabelle Ewing; Bill Kidd; Bob Doris; Bruce Crawford; Chic Brodie; Christian Allard; Christina McKelvie; Christine Grahame; Clare Adamson; Colin Beattie; Colin Keir; Dave Thompson; David Torrance; Dennis Robertson; Derek MacKay; Fergus Ewing; Fiona Hyslop; Fiona McLeod; George Adam; Gil Paterson; Gordon MacDonald; Graeme Dey; Humza Yousaf; James Dornan; Jamie Hepburn; Jim Eadie; Joan McAlpine; Joe Fitzpatrick; John Mason; John Swinney; John Wilson; Keith Brown; Kenneth Gibson; Kenny MacAskill; Kevin Stewart; Linda Fabiani; Marco Biagi; Margaret Burgess; Mark McDonald; Maureen Watt; Michael Matheson; Michael Russell; Mike McKenzie; Nicola Sturgeon; Nigel Don; Paul Wheelhouse; Richard Lochhead; Richard Lyle; Rob Gibson; Roderick Campbell; Roseanna Cunningham; Sandra White; Shona Robison; Stewart Maxwell; Stewart Stevenson; Stuart McMillan; Tricia Marwick; Willie Coffey; Alex Fergusson; Alex Johnstone; Annabel Goldie; Cameron Buchanan; Elizabeth Smith; Gavin Brown; Jackson Carlaw; Jamie McGrigor; John Lamont; John Scott; Margaret Mitchell; Mary Scanlon; Murdo Fraser; Nanette Milne; Ruth Davidson; Alison Johnstone; Patrick Harvie; Anne McTaggart; Cara Hilton; Claire Baker; Claudia Beamish; David Stewart; Drew Smith; Duncan McNeil; Elaine Murray; Elaine Smith; Graeme Pearson; Hanzala Malik; Hugh Henry; Iain Gray; Jackie Baillie; James Kelly; Jayne Baxter MSP; Jenny Marra; Johann Lamont; John Pentland; Ken Macintosh; Kezia Dugdale; Lewis Macdonald; Malcolm Chisholm; Margaret McCulloch; Margaret McDougall; Mark Griffin; Mary Fee; Michael McMahon; Neil Bibby; Neil Findlay; Patricia Ferguson; Paul Martin; Rhoda Grant; Richard Baker; Richard Simpson; Sarah Boyack; Siobhan McMahon; Jean Urquhart; John Finnie; Margo MacDonald

Cc: Cabinet Secretary for Health and Wellbeing; Minister for Parliamentary Business

Subject: Marriage and Civil Partnership (Scotland) BILL: Equality Act Amendments

Dear MSPs

Please see attached documents from Alex Neil MSP, Cabinet Secretary for Health and Wellbeing, regarding the Marriage and Civil Partnership (Scotland) BILL: Equality Act Amendments.

1. Letter



Letter.pdf

2. Draft Amendments to the Equality Act 2010



Draft Amend. to
the Equality A...

3. Explanatory Notes



Explanatory
Notes.pdf

Kind regards
[Redacted]

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To All MSPs

16 December 2013

Dear colleagues

MARRIAGE AND CIVIL PARTNERSHIP (SCOTLAND) BILL AMENDMENTS TO THE EQUALITY ACT 2010

As you will be aware, the Scottish Government has agreed with the UK Government that, as a consequence of the Marriage and Civil Partnership (Scotland) Bill, amendments are required to the Equality Act 2010 ("the 2010 Act")¹. These amendments are designed to protect religious and belief bodies, celebrants and others carrying out religious and belief functions at marriage and civil partnership ceremonies.

I now attach **draft** amendments along with a draft Explanatory Note. These amendments will form part of an Order under section 104 of the Scotland Act 1998 to be taken forward at Westminster after the Bill completes its passage in the Scottish Parliament, assuming that the Bill is approved by Parliament. Please note that the drafting could change before the section 104 Order is laid at Westminster.

The draft amendments would protect the following from court actions claiming discrimination:

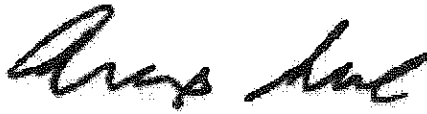
- An employee of a secular body (eg a chaplain at a university) who would normally carry out marriages for other employees but refuses to officiate at a same sex marriage or a civil partnership because the couple are same sex.
- A celebrant who refuses to register a civil partnership because the celebrant reasonably believes that one of the parties has changed gender. (There is existing provision in the 2010 Act ensuring that an approved celebrant does not have to carry out a marriage where he or she reasonably believes that one of the parties has changed gender).

¹ The statement agreed between the UK and Scottish Governments is at <http://www.scotland.gov.uk/Resource/0042/00426318.pdf>

- A celebrant who refuses to solemnise a same sex marriage or register a civil partnership because the marriage or civil partnership is between a same sex couple.
- Other people who refuse to participate in a religious or belief aspect of a marriage or civil partnership ceremony because the marriage or civil partnership is between a same sex couple.
- A religious or belief organisation and persons in the organisation who decide that premises they own or control should not be used for same sex marriages or the registration of civil partnerships because these are same sex relationships.

The Scottish Government is considering, with the UK Government, whether the amendments also need to cover cases where a denomination opts in, makes it clear that some of its celebrants will not take part and there is then a legal challenge against the denomination (rather than the celebrant) about some of its celebrants not taking part.

I am happy to answer any questions arising.

A handwritten signature in black ink, appearing to read 'Alex Neil', written in a cursive style.

ALEX NEIL

PART 1

MODIFICATIONS OF THE EQUALITY ACT 2010

1 Modifications of the Equality Act 2010

- (1) The Equality Act 2010 is amended as follows.
- (2) In section 110 (liability of employees and agents), after subsection (5B) insert—
 - “(5C) A does not contravene this section by refusing to solemnise a relevant Scottish marriage for the reason that the marriage is the marriage of two persons of the same sex.
 - (5D) A does not contravene this section by refusing to register a relevant Scottish civil partnership for the reason that the civil partnership is between two persons of the same sex.
 - (5E) Subsections (5C) and (5D) apply only if A is an approved celebrant.
 - (5F) Expressions used in subsections (5C) to (5E) have the same meaning as in paragraph 25B of Schedule 3.”
- (3) In Schedule 3 (services and public functions: exceptions)—
 - (a) before paragraph 25 insert—

“PART 6ZA

MARRIAGE AND CIVIL PARTNERSHIP: SCOTLAND”

- (b) in paragraph 25, after sub-paragraph (2) insert—
 - “(3) An approved celebrant (A) does not contravene section 29, so far as relating to gender reassignment discrimination, only by refusing to register the civil partnership of a person (B) if A reasonably believes that B’s gender has become the acquired gender under the Gender Recognition Act 2004.
 - (4) In sub-paragraph (3) “approved celebrant” has the meaning given in section 94A(4)(a) of the Civil Partnership Act 2004.”, and
- (c) after paragraph 25A insert—

“PART 6B

SAME SEX MARRIAGE AND CIVIL PARTNERSHIP: SCOTLAND

25B Same sex marriage and civil partnership: Scotland

- (1) An approved celebrant does not contravene section 29 only by refusing to solemnise a relevant Scottish marriage for the reason that the marriage is the marriage of two persons of the same sex.
- (2) An approved celebrant does not contravene section 29 only by refusing to register a relevant Scottish civil partnership for the reason that the civil partnership is between two persons of the same sex.
- (3) A person does not contravene section 29 only by refusing to participate in a religious or belief ceremony forming part of, or connected with, the solemnising of a relevant Scottish marriage for the reason that the marriage is the marriage of two persons of the same sex.

(4) A person does not contravene section 29 only by refusing to participate in a religious or belief ceremony forming part of, or connected with, the registration of a relevant Scottish civil partnership for the reason that the civil partnership is between two persons of the same sex.

(5) In this paragraph—

“approved celebrant”—

(a) in relation to solemnising a marriage, has the meaning given in section 8(2)(a) of the Marriage (Scotland) Act 1977,

(b) in relation to registering a civil partnership, has the meaning given in section 94A(4)(a) of the Civil Partnership Act 2004,

“relevant Scottish civil partnership” means a religious or belief civil partnership within the meaning of section 94A(4)(b) of the Civil Partnership Act 2004,

“relevant Scottish marriage” means a religious or belief marriage of two persons of the same sex within the meaning of section 8(2)(a) of the Marriage (Scotland) Act 1977.”

(4) In Schedule 23 (general exceptions), in paragraph 2, after sub-paragraph (9) insert—

“(9A) An organisation does not contravene Part 3, 4 or 7 only by refusing to allow premises owned or controlled by the organisation to be used—

(a) to solemnise a relevant Scottish marriage for the reason that the marriage is the marriage of two persons of the same sex,

(b) to register a relevant Scottish civil partnership for the reason that the civil partnership is between two persons of the same sex.

(9B) A person (or an association of persons) does not contravene Part 3, 4 or 7 only by refusing to allow premises owned or controlled by the person (or the association) for the purposes of an organisation to be used—

(a) to solemnise a relevant Scottish marriage for the reason that the marriage is the marriage of two persons of the same sex,

(b) to register a relevant Scottish civil partnership for the reason that the civil partnership is between two persons of the same sex.

(9C) In sub-paragraphs (9A) and (9B), “relevant Scottish marriage” and “relevant Scottish civil partnership” have the same meaning as in paragraph 25B of Schedule 3.”

EXPLANATORY NOTES TO THE PROPOSED MODIFICATIONS TO THE EQUALITY ACT 2010 DESIGNED TO PROTECT RELIGIOUS AND BELIEF BODIES, CELEBRANTS AND OTHERS

Introduction

1. These Explanatory Notes have been prepared by the Scottish Government to assist the reader of the draft modifications to the Equality Act 2010 ("the 2010 Act"). These draft modifications are designed to protect religious and belief bodies, celebrants and others who do not wish to take part in the solemnisation of a religious or belief marriage or the registration of a religious or belief civil partnership on the ground that it is of a same sex couple.

2. As the proposed modifications are reserved, the intention is that amendments to the 2010 Act will be included in an Order under section 104 of the Scotland Act 1998 ("the 1998 Act"). Section 104 of the 1998 Act gives UK Ministers the power to make consequential changes following an Act of the Scottish Parliament. The draft Order will be laid before the UK Parliament at Westminster.

3. The attached draft amendments to the 2010 Act follow the publication of a detailed statement agreed between the UK and Scottish Government on the intended approach¹.

The modifications

4. Article 1(2) inserts new subsections (5C) to (5F) into section 110 of the 2010 Act.

5. Section 110(1) of the 2010 Act makes an employee, or an agent for a principal, personally liable for unlawful acts they commit in the course of their employment, or under the authority of a principal, for which their employer or principal could also be held liable.

6. New subsections (5C) and (5D) provide that an individual cannot be held personally liable under the 2010 Act for a refusal to solemnise a same sex marriage or register a civil partnership where the reason is that the marriage or civil partnership is between two persons of the same sex.

7. New subsection (5E) provides that this protection only applies to an "approved celebrant". By virtue of new subsection (5F), the definition of "approved celebrant" in new paragraph 25B of Schedule 3 to the 2010 Act (new paragraph 25B forms part of these draft modifications) also applies to the amendments made to section 110 of the 2010 Act. The definition of "approved celebrant" covers religious and belief celebrants of marriages and of civil partnerships.

Example

A chaplain employed by a university is asked to solemnise the marriage of an employee of the university with a person of the same sex. Although his religious body has opted into marriage of same sex couples, he refuses because he does not wish to marry a same sex couple. This is lawful. The university makes alternative arrangements by finding an alternative chaplain to solemnise the marriage.

8. Article 1(3) adds provisions to Schedule 3 to the 2010 Act. Schedule 3 to the 2010 Act has a number of exceptions to the general requirements in the 2010 Act in relation to the provision of services and the exercise of public functions.

¹ This statement is at <http://www.scotland.gov.uk/Resource/0042/00426318.pdf>

9. Paragraph 25 in Schedule 3 already has an exception in respect of an approved celebrant not having to solemnise a marriage if the celebrant reasonably believes one of the parties to the proposed marriage has acquired a gender under the Gender Recognition Act 2004. The new paragraph 25(3) extends this protection to celebrants who register religious or belief civil partnerships, following their introduction. The new paragraph 25(4) defines approved celebrants to mean religious and belief celebrants.

10. The new paragraph 25B(1) and (2) provide that an approved celebrant does not contravene section 29 of the 2010 Act by refusing to solemnise a marriage or register a civil partnership because it is of a same sex couple. "Approved celebrant" is defined in new paragraph 25B(5) so as to mean a religious or belief celebrant. This provision protects religious and belief celebrants who do not wish to solemnise same sex marriage or register a civil partnership, even though their religious or belief body has opted in.

Example

A religious body opts into the solemnisation of marriage of same sex couples but makes it clear that it respects the views of those within the body who do not wish to take part. One of the body's ministers does not approve of same sex marriage and does not wish to solemnise such a marriage. This would be lawful. The religious body arranges for an alternative minister to conduct the marriage ceremony for the same sex couple.

11. The new paragraph 25B(3) and (4) provide that a person does not contravene section 29 only by refusing to participate in a religious or belief ceremony forming part of, or connected with, the solemnising of a marriage or the registration of a civil partnership because the ceremony is between two persons of the same sex. In this context, "religious or belief ceremony" refers to a religious or belief activity which forms part of the marriage solemnisation or the civil partnership registration.

Examples

An organist who usually plays hymns at wedding services at a church does not wish to play at a wedding service of a same sex couple. This would be lawful because he is carrying out a religious ceremony (i.e. activity) which forms part of the marriage service.

A commercial photographer is asked to photograph a wedding of a same sex couple. It would be unlawful sexual orientation discrimination for her to refuse because she does not approve of marriage of same sex couples. This is because she is not carrying out a religious or belief activity.

A volunteer flower arranger who usually decorates the place of worship for wedding services refuses to do so for a wedding of a same sex couple because she does not approve of such marriages. She is not carrying out a religious or belief activity but her refusal would nonetheless be lawful because she is not considered to be providing a service to the public or a section of the public, so it is not covered by the 2010 Act. If a commercial flower arranger asked by a same sex couple to decorate their wedding venue refused to do so because he does not approve of marriage of same sex couples, this would be unlawful sexual orientation discrimination. This is because he is not carrying out a religious or belief activity and the service he provides is to the public and so is covered by the 2010 Act.

12. New paragraph 25B(5) contains various definitions.

13. Article 1(4) adds provisions to Schedule 23 to the 2010 Act.

14. Sub-paragraph (9A) provides that a religious or belief organisation does not contravene Part 3 (services and public functions), Part 4 (premises) and Part 7 (associations) of the 2010 Act by refusing to allow premises it owns or controls to be used for same sex marriages or the registration of civil partnerships because these are same sex relationships.

Example

A religious or belief body which has opted in to same sex marriage and the registration of civil partnership decides a particular building should not be used for the solemnisation of same sex marriage or the registration of civil partnership because the local congregation disagrees with same sex relationships. This would be lawful.

15. Sub-paragraph (9B) provides that a person or association of persons does not contravene Parts 3, 4 or Part 7 of the 2010 Act in certain circumstances. These circumstances are a refusal to allow premises, which the person or association owns or controls for the purposes of an organisation, to be used for same sex marriages or the registration of civil partnerships because these are same sex relationships.

Example

A local church committee decides that its building should not be used for the solemnisation of same sex marriage or the registration of civil partnership, even though its religious body has opted in, because it disagrees with same sex relationships. This would be lawful. It is for the religious body to make its own arrangements on who decides how local premises should, or should not, be used.

16. Sub-paragraph (9C) provides definitions of "relevant Scottish marriage" and "relevant Scottish civil partnership". These relate, respectively, to a religious or belief same sex marriage and a religious or belief civil partnership.