

Authorising Marriage Celebrants: Scotland's Rococo Legislation

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Church of Scotland to Solemnise Same sex Marriages

On 23rd May 2022 the General Assembly of the Church of Scotland voted in favour of allowing its ministers and deacons to solemnise marriages between same sex couples, made legal, of course, by the Marriage and Civil Partnership (Scotland) Act 2014. It did so by means of an "Overture" on the *Solemnisation of Same Sex Marriage* (see

https://www.churchofscotland.org.uk/_data/assets/pdf_file/0008/93356/committee-on-overtures-and-cases.pdf). In truth this is a not unexpected turnaround from the Kirk's position on homosexuality during the past twenty years, for it has been gradually moving towards this moment since shortly after the passing of the Civil Partnership Act 2004. Though the Kirk vigorously opposed that Act, notwithstanding Governmental efforts to emphasise the entirely secular nature of the new institution, once passed the issue of same sex relationships could not be ignored by the Kirk. While some Christian denominations remain brutal in their absolute rejection of homosexuality, Scotland's national church has never seen same sex marriage as undermining the Christian foundations of society (*pace* the response of, for example, the Free Church of Scotland to the consultation on the Marriage and Civil Partnership (Scotland) Bill: found at http://archive2021.parliament.scot/S4_EqualOpportunitiesCommittee/Free_Church_of_Scotland.pdf). The Kirk has always sought to accommodate Scotland's society as it is and not as religious zealots would have it be.

The softening of the Kirk's position on homosexuality became apparent in 2008, when an Aberdeen parish called the Rev. Scott Rennie to be its minister. The Rev. Rennie is openly gay (subsequently entering a relationship with a man who, later, became his husband). In 2009, the General Assembly refused to overturn his call to the parish, and in 2013 it formally authorised kirk sessions to call ministers who were lesbian or gay. Though it opposed the Bill that led to the Marriage and Civil Partnership (Scotland) Act 2014, it did so in noticeably muted terms, and it acknowledged that while its doctrines could not, at that point in time, accommodate same sex marriage its members may, at some point in the future, change its doctrines on marriage (something a membership-led organisation like the Kirk will always find less troublesome than hierarchical organisations with a permanent leadership). While the Church of England, preposterously, allows its clergy to enter civil partnerships so long as they refrain from sexual activity with their partners (House of Bishops *Pastoral Statement on Civil Partnerships* December 2019, paras 22-24), the Kirk's 2015 General Assembly formally allowed its ministers and deacons to be in civil partnerships without requiring them to remain celibate: *Ministers and Deacons in Civil Partnerships Act* (Act 1, 2015, Edinburgh 16 May 2015). This was extended in 2016 to include same sex marriages (Act 1, 2016, Edinburgh 21 May 2016).

Permitting ministers and deacons to be in a same sex marriage but not allowing them to solemnise such a marriage within their own denomination was obviously an unsustainable position, and in 2018 the General Assembly instructed its Legal Questions Committee to prepare legislation that would permit ministers and deacons to celebrate same sex marriages. That Committee was given two years to do its work and the plan was to consider any proposed Legislative Act at the 2020 General Assembly. The Covid pandemic postponed that consideration until 2021 but that year's General Assembly approved the draft Legislative Act and put it out for consideration by presbyteries. A majority of presbyteries (29 to 12) expressed support and the 2022 General Assembly voted 274 to 136 to allow ministers and deacons (who are willing to do so) to be nominated under s.9 of the Marriage (Scotland) Act 1977 to solemnise marriages between couples of the same sex. Scotland's national church has thereby put itself back on the right side of history.

Now, before the 2014 Act opened marriage to same sex couples, the Church of Scotland had no engagement with s.9 of 1977 Act. Uniquely, ministers and (after 2014) deacons of the Church of Scotland are automatically marriage celebrants by dint of their office and, reflecting the special position of the Kirk as Scotland's national church, they do not need any further official authorisation to perform the state function of changing people's legal status from single to married: their power to do so is enshrined in s.8(1)(a)(i) of the Marriage (Scotland) Act 1977. Officials of any other religious body who wish to conduct marriages (and, since 2014, civil partnerships) need to seek authorisation from the state. However, the automatic right of Kirk ministers and deacons to solemnise marriages applies only in respect of opposite sex marriages, and was not extended to same sex marriages when the institution was opened to gay and lesbian couples by the Marriage and Civil Partnership (Scotland) Act 2014. Instead, the Kirk was put in the same position as all other religious or belief organisations: ministers and deacons, like priests and imams, will need to seek authorisation from the state before acting as celebrants in the solemnisation of same sex marriages. The Kirk loses, thereby, a small part of its special position in our legal system.

There are two ways in which authorisation to solemnise same sex marriages may be obtained. First, under s.8(1B)(a)(i) of the Marriage (Scotland) Act 1977 (as inserted by s.12(2)(b) of the Marriage and Civil Partnership (Scotland) Act 2014) any religious or belief body (including the Church of Scotland) may itself request to be prescribed in Regulations made by the Scottish Ministers. Being so prescribed will allow any celebrant from the religious or belief body to solemnise same sex marriages. Secondly, under s.9(1A) of the 1977 Act (as inserted by s.13(2)(b) of the 2014 Act) any religious or belief body (again including the Church of Scotland) may nominate any of its members to the Registrar General as an individual authorised to solemnise marriages between persons of the same sex. The difference is that "the s.8 route" allows the body as a whole to be authorised, and "the s.9 route" allows nominated individuals within the body to be authorised. (There is also a "s.12 route" allowing for the temporary authorisation of individual celebrants by the Registrar General, which need not detain us here).

Authorising Marriage Celebrants: s.8 of the 1977 Act

Prior to 2014 there was only need for one list of bodies prescribed under s.8, and that list was then found in the Marriage (Prescription of Religious Bodies) (Scotland) Regulations 1977 (SI 1977/1670). But one of the major political imperatives in the 2014 Act was to ensure that no religious body that had previously provided marriage celebrants for opposite sex marriages would be forced, against their will, to provide celebrants for same sex marriages too. So it was considered necessary to create two lists for the purposes of s.8. The bodies that have sought prescription as willing to solemnise marriages for opposite sex couples are now listed in the schedule to the Marriage Between Persons of Different Sexes (Prescribed Bodies) (Scotland) Regulations 2014 (SSI 2014/304) (as amended with the addition of Humanist Society Scotland by the Civil Partnership, Marriage Between Persons of Different Sexes and Same Sex Marriage (Prescribed Bodies) (Scotland) Amendment Regulations 2016 (SSI 2016/427)). This list contains the following organisations:

- The Baptist Union of Scotland
- The Free Church of Scotland
- The Free Presbyterian Church of Scotland
- Humanist Society Scotland
- The Liberal Jewish Community in Scotland
- The Methodist Church
- The Orthodox Jewish Community in Scotland
- The Reform Jewish Community in Scotland
- The Religious Society of Friends (Quakers)
- The Roman Catholic Church
- The Salvation Army
- The Scottish Episcopal Church and other Churches of the Anglican Communion
- The Scottish Unitarian Association
- The Synod of Scotland of the United Reformed Church
- The United Free Church of Scotland

The list of bodies who have sought to be prescribed as desiring to solemnise same sex marriages is separately contained in the schedule to the Same Sex Marriage (Prescribed Bodies) (Scotland) Regulations 2014 (SSI 2014/305), as similarly amended by the 2016 regulations mentioned above, and this list is very much smaller:

- Humanist Society Scotland
- The Religious Society of Friends (Quakers)
- The Scottish Unitarian Association

It follows that, for all our claims to be an equal society that has no (legal) discrimination based on sexual orientation, the reality is that the choices available to an opposite sex couple wishing to marry in a religious ceremony are very much more extensive than the choices available to a same sex couple. This is the cost of allowing religious and belief bodies to choose which marriages they are willing to perform, and which they reject as contrary to their beliefs. (They can choose only

the gender mix and cannot refuse, for example, to perform mixed-race marriages. Sexual orientation is a less protected characteristic than race or gender in our equality legislation).

Authorising Marriage Celebrants: s.9 of the 1977 Act

But the list of prescribed organisations only tells part of the story. It is possible to be married to someone of the same sex by a celebrant belonging to a religious or belief body which is not on the prescribed list, if the body has followed the s.9 route and nominated to the Registrar General any of their members who are willing to solemnise same sex marriages. The Scottish Episcopal Church adopted this approach in 2017, when it became the first UK branch of Anglicanism to embrace same sex marriage. Likewise it is the s.9 route that has been mandated by the *Solemnisation of Same Sex Marriage Overture*, enacted into the Kirk's law by the 2022 General Assembly. The process by which a minister or deacon will be authorised to solemnise same sex marriage is set out in paras.5-7 of this Overture. The individual must make an application to the Principal Clerk of the General Assembly, and it is the Principal Clerk who will seek authorisation under s.9(1A) of the Marriage (Scotland) Act 1977 for the named individual to be registered by the Registrar General as being empowered to solemnise marriages between persons of the same sex. The authorisation lasts three years and the individual is responsible for initiating their own renewal of the status of celebrant of same sex marriages.

Authorising Civil Partnership Celebrants

And what of civil partnership? This statutory institution was created in 2004 as a means to give same sex couples access to virtually the same rights and responsibilities that opposite sex couples access through marriage. It was originally designed to be an entirely secular institution, which could be created only by district registrars: as a result there was no need for any provision governing the nomination of any other celebrant. But the secularity of this new institution was compromised when the Marriage and Civil Partnership (Scotland) Act 2014 allowed for civil partnerships to be created by celebrants from religious or belief organisations. The Civil Partnership Act 2004 was consequentially amended by s.24(13) of the 2014 Act with the insertion of a new s.94A (the equivalent of s.8 of the 1977 Act), which provides for the creation of a list of prescribed bodies who will offer celebrants for religious or belief civil partnerships (in addition to the district registrar who will continue to create civil civil (sic) partnerships). The list is contained in the schedule to the Civil Partnership (Prescribed Bodies) (Scotland) Regulations 2014 (SSI 2014/303). Originally only the Scottish Unitarian Association sought prescription, but in 2016 so too did Humanist Society Scotland (2016 Regulations mentioned above).

Civil partnership, originally limited to same sex couples, was of course opened to opposite sex couples by the Civil Partnership (Scotland) Act 2020 and, as with marriage when its gender-mix was extended, this required the insertion of a new s.94A(2A) into the 2004 Act (by s.7(2)(b) of the 2020 Act) establishing a second list

of religious or belief bodies that would be willing to provide celebrants for opposite sex civil partnerships. The need for a second list is based on the implausible belief that some bodies will be happy to celebrate same sex civil partnerships while having a conscientious objection to opposite sex civil partnerships. This second list is found in the schedule to the Civil Partnership Between Persons of Different Sexes (Prescribed Bodies) (Scotland) Regulations 2021 (SSI 2021/24), and it contains Humanist Society Scotland and the Scottish Unitarian Association – the same two bodies that are listed as providing celebrants for same sex civil partnerships.

Civil partnerships may also be created by a person registered with the Registrar General having been nominated by the religious or belief body to which they belong as being empowered to register civil partnerships, either for same sex couples (2004 Act, s.94B(1), as inserted by the Marriage and Civil Partnership (Scotland) Act 2014, s.24(13)) or opposite sex couples (2004 Act, s.94B(1A), as inserted by the Civil Partnership (Scotland) Act 2020, s.8(2)(b)). This is the equivalent to s.9 of the Marriage (Scotland) Act 1977.

The Church of Scotland's 2022 Overture says nothing about civil partnership, which is as it should be: the Kirk has no distinct interest in that secular institution and it loses nothing by not seeking to be a body that offers celebrants for its creation. The Religious Society of Friends (Quakers), who are on s.8 lists for both opposite sex and same sex marriage, is similarly absent from either list for civil partnerships.

Conclusion

All of this is terribly, and surely needlessly, complex. There are four different statutory lists of organisations whose celebrants are authorised for the creation of legally recognised relationships. Though these four relationships reflect different factual circumstances, *the legal consequences of each are the same*, whatever the relationship is called, whoever created it, and whatever its gender mix. The Church of Scotland does not need to be listed in respect of one of the four different circumstances but it is in the same position as all other religious or belief bodies for the other three circumstances. In addition, celebrants may be authorised on an individual basis, if nominated by their own religious or belief bodies. The law continues to distinguish between opposite sex marriage, same sex marriage, same sex civil partnership and opposite sex civil partnership, as well as between religious or belief marriages, civil marriages, religious or belief civil partnerships, or civil civil (sic) partnerships, but only in terms of how the relationship is legally formed. "Getting hitched" (if the informality may be forgiven) is governed by a far more rococo matrix of legislative provisions than "being hitched", though the latter is surely more important. A simpler system would be one in which all registered relationships (whatever the parties wished to call them) were created by the state alone (through the district registrar registering the existence of the relationship), leaving religious and belief bodies and individuals free to choose, if they wish to do so, to preside over the celebratory aspects (the party, in other words) of the relationship becoming legally recognised. Is it only my own profound irreligiosity that prevents me from seeing any loss at all to the legal system, or indeed Scottish society as a whole, in

simplifying the rules governing the authorisation of marriage and civil partnership celebrants in this manner?