

# STATES OF JERSEY



## **DRAFT MARRIAGE AND CIVIL STATUS (AMENDMENT No. 4) (JERSEY) LAW 201- (P.91/2017): SECOND AMENDMENT (P.91/2017 Amd.(2)) – COMMENTS**

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**Presented to the States on 30th January 2018  
by H.M. Attorney General**

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**STATES GREFFE**

COMMENTS

**Law Officers' Department  
Memorandum**

Morier House St. Helier JERSEY JE1 1DD



**To:** Senator Ian Gorst  
Chief Minister's Department

**From:** H.M. Attorney General

Deputy John Le Fondre  
Chairman, CS Scrutiny Panel

**Cc:** Senator Andrew Green  
Minister for Health and Social  
Services

**Date:** 25 January 2018

Ruth Johnson  
Director  
Chief Minister's Department

Simon Spottiswoode  
Scrutiny Officer

Tom Leveridge  
Scrutiny Officer

**Your Ref:** n/a

**Our Ref:** 201-12-01.20150002

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**Marriage and Civil Status (Amendment No.4) (Jersey)  
Law 201-  
(the "Amendment Law")**

**Introduction**

1. I have been asked by the Chief Minister and the Corporate Services Scrutiny Panel (the "Panel") to advise on the compatibility with the European Convention on Human Rights (the "ECHR") of the inclusion of a 'conscience' provision in the Amendment Law.
2. For the purposes of this advice, I have reviewed the Panel's amendments that have been lodged as the second amendment to P91/2017. The Panel has subsequently proposed amendments that, if accepted, would substantially narrow the proposed conscience provision so that the Assembly can, if it is minded to, adopt a provision of a more limited extent.

I understand that the Chief Minister also proposes to propose amendments for this purpose.

3. In any event, I understand that the amendments would provide that the 'conscience' provision would be set out in a new Article 7A of the Marriage and Civil Status (Jersey) Law 2001 (the "**2001 Law**"), with a corresponding provision included as an amendment to the Discrimination (Jersey) Law 2013 (the "**2013 Law**").
4. For the purposes of this advice I have focussed on the content of the Panel's second amendment to P91/2017 on the assumption that, if that amendment is ECHR compliant, then that is likely to remain the case if the Assembly decides that a narrower formulation should be adopted instead.

### **Advice**

5. New Article 7A would, in essence, relieve any compulsion on a person to participate in a same sex marriage or an acquired gender marriage. It would apply to religious organizations, owners of approved locations (or "locations" if Scrutiny's second amendment to its second amendment is accepted), clergymen, authorized religious officials and any other person who objects, on the ground of religious conviction to same sex marriage or acquired gender marriage (Article 7A(2)(a) to (e)).
6. Participating in any marriage is defined as including, but is not limited to, providing any goods or services for or in relation to a marriage, and any social event or function directly associated with and subsequent to a marriage ceremony.
7. Article 7A(2)(e) provides the ability for a person to object to participation in a marriage on grounds of religious conviction. It is this aspect of Article 7A that is perhaps the most extensive and contentious and that might be removed if one of the Panel's amendments to its amendment is adopted. Accordingly, it is that provision that this ECHR analysis focusses on. In considering that provision, I have noted that Article 7A(4)(a) provides that Article 7A(2)(e) does not apply to a person required under the 2001 Law to undertake any act or perform any duty in relation to a civil marriage.
8. The following provisions of the ECHR are considered to be relevant to the consideration of the compatibility of a 'conscience' provision. References to 'same sex marriages' can be read as including a marriage involving a person of an acquired gender.

#### *Article 9 ECHR – right to freedom of thought, conscience and religion*

9. Article 9(1) ECHR provides that everyone has the right to freedom of thought, conscience and religion. Article 9(2) ECHR provides that 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.

10. The effect of the introduction of a conscience provision would be, in essence, to provide a degree of legal protection for the provider who refuses to provide goods or services for or in relation to same sex marriages. The compulsion for that provider to participate might otherwise arise from the contractual obligations of the provider or the 2013 Law, which among other things makes direct discrimination in the provision of goods and service on the ground of a person's sexual orientation unlawful.
11. The inclusion of a conscience provision in the 2001 Law does not, in itself, engage Article 9 ECHR. An Article 9 ECHR challenge might arise, however, where the conscience provision has been drafted in such a way, intentionally or otherwise, so as to exclude a person from relying on it. The challenge on Article 9 ECHR grounds would be that the State had failed to provide adequate protection for that person's conscientious belief.
12. This is illustrated, in particular, by the *Ladele*<sup>1</sup> case, where a civil registrar claimed an infringement of the Article 9 ECHR right when disciplined for refusing to register a civil partnership on religious grounds. The Court determined in that case that there was no infringement of Article 9 ECHR, because a policy of requiring civil officials to offer services to all, irrespective of sexual orientation, was a legitimate restriction on the right in Article 9 ECHR. I understand that the provision Scrutiny has proposed would not assist a civil celebrant or public servant who had a conscientious objection to carrying out one of their tasks that would facilitate a same sex marriage. Following the reasoning in *Ladele* I think that this will amount to a legitimate restriction on the Article 9 ECHR rights of those persons. Further, while there is little or no specific authority on the point, I do not consider that the other limits on the conscience provision are inherently incompatible with the Article 9 ECHR rights of those excluded from its scope.

#### *Article 12 ECHR – right to marry*

13. Article 12 ECHR protects the right to marry, but is not relevant to the question of the introduction of a conscience provision which is designed not to compel a person to provide goods or services for the purposes of a wedding. The right to marry is confined to marriage "*according to the national laws governing the exercise of this right*", so while Article 12 ECHR is quite relevant to the extension of the legal right to marry to same sex couples, it is of no relevance in itself in the present matter. A same sex

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<sup>1</sup> *Eweida and Others v United Kingdom* (2013) 57 EHRR 8.

couple could not, therefore, claim a breach of Article 12 ECHR where, for example, a person invokes a conscience provision to refuse to make available a particular location or provide a service associated with the celebration of marriage.

*Article 14 ECHR –discrimination against same sex couples*

14. Article 14 ECHR provides for a right not to be discriminated against only in respect of the other rights laid down in the ECHR. It does not therefore provide a general or free-standing prohibition on discrimination by private individuals against one another and does not apply unless the facts at issue fall within the 'ambit' of the way that another ECHR right is afforded protection by the State concerned.
15. In addition to coming within the ambit of another right, there must be a difference in treatment as respects the way that right is accorded by the State between the complainant on the one hand and other person put forward for comparison on the other; and the difference in treatment must be based on some identifiable 'status' for it to fall within the scope of Article 14 ECHR.
16. On the assumption that the conscience provision proposed would not permit a provider of public services to discriminate in the way those services are provided to same sex couples, it is unlikely that permitting discrimination falling within the scope of the draft conscience provision, ie in the provision of services by one private individual to another, would infringe Article 14 of the ECHR, since it would not fall within the ambit of another convention right (being a purely private matter).
17. If it were to be established that Article 14 is engaged then it is important to highlight that there is little in the way of directly comparable legislation providing a conscience provision that has been tested in ECHR terms. Neither is there immediately discernible case law that is directly relevant to the question of whether the provision of protection for conscientious objection by one section of society, but not another, would amount to unlawful discrimination by the State in Article 14 ECHR terms.

*Article 14 ECHR –discrimination as between persons who may or may not be compelled to participate*

18. From an Article 14 ECHR perspective, a separate argument might be made that unlawful discrimination arises from 7A because the conscience provision protects the religious convictions of the providers of services in the private sphere, but not:

- a. the employees of those private sector service providers; or
- b. States of Jersey employees in the performance of their functions.

19. It might be claimed that discrimination arises in respect of the right to freedom of conscience under Article 9 ECHR (whether or not there is an infringement of that Article itself), and that the identifiable 'status' is one of work or professional status<sup>2</sup>. It is difficult, however, to see a persuasive argument that would recognise the providers of services in the private sphere (eg a photographer, a baker) and the provider of a service in the public sphere (eg a civil registrar, civil marriage celebrant) as being in an 'analogous position'. Therefore they would not satisfy the requirement for a relevant comparator<sup>3</sup>.

20. If a case in these terms came before the Court, it would be for the Court to determine if the difference in treatment between the relevant comparators was justified, and in Article 14 ECHR terms, differences in treatment will require particularly strong justification. In my view it would be possible to argue, convincingly that where the State has agreed to enable same sex couples to marry, those who are then responsible in their statutory functions to facilitate that marriage should not be permitted to object to performing those functions on grounds of religious or conscientious conviction. To do so would be in direct contradiction of government policy and the underlying aim of tackling discrimination and inequality (which was acknowledged in *Ladele* as being a particularly important social issue) in marriage and marriage registration. It would seem to me, therefore, that any difference in treatment arising from not extending conscientious objection to civil officials would be justifiable.

21. Similarly, while the point is perhaps more subtle, an employee in the private sector would not be in an analogous position to their employer or a sole trader. The positions of employer and employee are inherently different because an employer can usually require the employee to carry out lawful instructions, even if those instructions are not in accordance with the employee's conscience. An employee is already recognised to be in a different position from their employer or a sole trade by the 2013 Law. To explain, Article 22, 30 and 32 of the 2013 Law, which provide respectively that:

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<sup>2</sup> *Van der Musselle v Belgium*, App NO. 8919/80 (1983); and other cases. There is some divergence in case law as to whether 'status' must be an innate and immutable personal characteristic (e.g. race, sex) or can include an identifiable status that may change with time (e.g. domicile). The leading ECtHR judgment suggests the latter.

<sup>3</sup> Different types of occupation cannot, for Article 14 ECHR purposes, be compared (see *Van der Musselle v Belgium*, App No.8919/80 (1983)).

- a) a person who provides the goods or services (whether a natural or legal person) is prevented from engaging in unlawful discrimination;
- b) that an employer should not instruct their employee to carry out an act of unlawful discrimination; and,
- c) that an employer will be liable if his employee carries out an act of unlawful discrimination in most circumstances.

22. The effect of these provisions of the 2013 Law is to place the compliance obligation for not discriminating on the employer and not, in most cases, the employee. The effect of the Panel's draft Article 7A of the 2001 Law and new Article 24A of the 2013 Law is to remove the compulsion on the provider of the service not to discriminate. Having removed that compulsion on the service provider, the provider can lawfully instruct their employee to provide or not provide a service that would amount to participating in a same sex marriage if the service provider has a sufficient religious conviction. In any event, the employee's obligation to comply with the lawful instructions of their employer is unaffected. Although the context was different, the European Court of Human Rights has recognised in *X v United Kingdom*<sup>4</sup>, that self-employed persons and employed were not in an analogous position.

23. For these reasons, a challenge on Article 14 ECHR grounds, read in conjunction with Article 9 ECHR, is unlikely to be successful.

24. In view of this, any question as to whether an employer should make adjustments to their practices to accommodate the views of his employees who object to participating in same sex marriages would need to be resolved between the employer and employee. If the Panel's proposed conscience provision is adopted then further consideration might be given to making more specific provision about the rights of the employer and employee in due course, but this is not essential.

25. For the reasons set out above, my view is that the Panel's proposed conscience clause, taken at its broadest, is compatible with the ECHR.

**H.M. Attorney General**  
**25th January 2018**

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<sup>4</sup> App. No. 9793/82.

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**Statement under Standing Order 37A [Presentation of comment relating to a proposition]**

These comments were submitted to the States Greffe later than the noon deadline on Friday 26th January 2018, as specified in Standing Order 37A.

Advice as to the compatibility with the European Convention on Human Rights of the 'conscience clause' element of the Corporate Services Scrutiny Panel's second amendment to the Draft Marriage and Civil Status (Amendment No. 4) (Jersey) Law 201- was prepared for the Panel and the Chief Minister during the development of the Panel's amendment to the draft Law. In light of the expected focus on the human rights implications of the Panel's amendment during the upcoming debate, the Attorney General considered that it would be of assistance to all States Members if the advice was published as a comment to the Panel's second amendment so that all States Members have the same advice in advance of the debate.

The comment has been presented after the applicable presentation deadline owing to the fact that the Panel's proposed amendments had themselves only been in the week before the debate, and the Attorney General required time to consider and advise on the matter. Albeit that the comment has been presented beyond the relevant deadline, the Attorney General hopes that the comment will be accepted and that it will be of benefit to States Members.