SOLEMNISATION OF SAME-SEX MARRIAGE AND RELIGIOUS FREEDOM

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ABSTRACT

Same-sex marriage is legal or likely to be legalised in many Western nations. One important safeguard invariably incorporated in the legislation providing for same-sex marriage has been an exemption for religious ministers who object to solemnising such marriages. Another category of potential objectors are marriage registrars, commissioners or celebrants employed or appointed by the state. By contrast, an accommodation grounded in the right of religious freedom and conscience for these governmental celebrants has not been granted. This article examines the introduction of same-sex marriage in three jurisdictions—England and Wales, New Zealand and Canada. It analyses the precise ambit of the exemption for religious celebrants, considers the vulnerability of such exemptions to future legal challenge and questions the validity of denying free exercise accommodation to state-appointed celebrants.

1 INTRODUCTION

Same-sex marriage (‘SSM’) has recently been legalised in several Western nations and is likely to become so in others.¹ A recurrent issue has been the rights of those who usually solemnise marriages to refuse to do so in the case of same-sex couples. Some religious ministers, clergy, marriage celebrants, commissioners and registrars may have a conscientious objection to conducting marriage ceremonies for people of the same sex. Their objection is usually grounded in sincere religious beliefs about the propriety of homosexual and lesbian relationships.

This article considers the attempts to craft an exemption for such marriage celebrants based on solicitude for their religious convictions. My starting point is that no one ought to be forced to marry a couple against that person’s religious beliefs or conscience. Where the

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celebrant refuses to do so, he or she should be permitted to do so by the state. Ideally, the law ought to make it clear there is no legal obligation on celebrants in such circumstances to conduct SSMs. Likewise, the relevant antidiscrimination laws that prohibit discrimination on the grounds of sexual orientation ought to explicitly exempt marriage celebrants from performing SSMs.

Yet carving out a suitable exemption has proved rather harder to achieve than one might expect. This, at least, has been the experience in New Zealand, Canada and England and Wales, the three jurisdictions that form the focus of this article.² I will not consider the case for exemption for those who have a conscientious objection to participating in SSM outside of the actual solemnisation ceremony itself. Thus, caterers, photographers, musicians, florists, those who hire out reception halls or rent bridal and honeymoon suites, and so on, remain a topic for further investigation.³

Part II examines the exemption provided for in New Zealand. The focus then turns, in Part III to Canada and a major case analysing the constitutionality of conscience exemptions for state marriage celebrants. In Part IV the path towards legalisation of SSM in England and Wales is then traced and the complex exemption mechanism is explained. I finish with some concluding thoughts in Part V.

II NEW ZEALAND

New Zealand became the thirteenth nation to legalise SSM when it passed the Marriage (Definition of Marriage) Act 2013 on 19 April 2013.⁴ Preserving religious freedom for those church ministers and other marriage celebrants who did not wish to conduct SSMs featured prominently in the public debate.⁵ The Bill’s promoter,⁶ Labour Party MP Louisa Wall, gave repeated assurances that religious liberty would be respected: ‘Because we have freedom of religion in New Zealand, no religious body is bound to marry a couple if that marriage is at odds with its religious belief.’⁷ The exemption in its final form reads:

⁴ Public Act 2013, No 20. The Act came into force on 19 August 2013: s 2. The Bill was passed by 77 votes to 44 by way of a free (conscience) vote.
⁵ See M Backhouse, ‘Wall: Gay Marriage Bill will allow choice’, New Zealand Herald, 10 March 2013.
⁶ This was a Private Member’s Bill not a Government Bill.
⁷ First Reading, 683 New Zealand Parliamentary Debates (‘NZPD’) 4914, 29 August 2012.
29. Licence authorises but not obliges marriage celebrant to solemnise marriage

(1) A marriage licence shall authorise but not oblige any marriage celebrant to solemnise the marriage to which it relates.

(2) Without limiting the generality of subsection (1), no celebrant who is a minister of religion recognised by a religious body enumerated in Schedule 1, and no celebrant who is a person nominated to solemnise marriages by an approved organisation, is obliged to solemnise a marriage if solemnising that marriage would contravene the religious beliefs of the religious body or the religious beliefs or philosophical or humanitarian convictions of the approved organisation.

Despite the Select Committee’s hope that this section would suffice to assuage those with religious liberty concerns, a flaw still remains: the exemption is simply not worded widely enough.8

First, marriage celebrants who are ‘independent’, that is, not members of any of the listed religious bodies,9 or any approved organisation,10 are not protected. Yet some 45 percent of marriages are conducted by these independent celebrants (with 23 percent by registrars at a state registry office and 32 percent conducted by a church or approved organisation marriage celebrant).11 Independent marriage celebrants are persons that ‘will conscientiously perform the duties of a marriage celebrant’ and ‘it is in the interests of the public generally, or of a particular community (whether defined by geography, interest, belief, or some other factor)’ that they be so appointed.12 Such persons may well have beliefs that generate a conscientious objection to SSM. It was erroneous then,13 for the Ministry of Justice to recommend that independent celebrants be excluded from the benefit of the conscientious objection exemption in s 29(2).14 The Ministry’s response was that, in contrast to ministers of religion, independent celebrants (and registrars) are appointed by the

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9 The designated religious bodies are listed in Schedule 1 of the Marriage Act 1955.
10 Marriage Act 1955, s 10(4).
government ‘to perform a public function, not to promote their own religious or personal beliefs’.  

(I shall respond to this reasoning in Part III)

Second, and perhaps even more importantly, ministers of religion of designated religious bodies may not be protected either. Ministers within tightly knit homogeneous denominations such as the Open Brethren, Seventh-Day Adventists or Elim (Pentecostal) Churches are not vulnerable. Rather, it is a religious minister whose more heterogeneous denomination is divided on gay marriage that may not be able to point to any authoritative ruling, precept, custom or teaching that states that only heterosexual marriage is acceptable. The mainstream Protestant denominations—Presbyterian, Methodist, and Anglican—have struggled to formulate a clear policy on this matter.  

The long-running battle over the ordination of gay clergy in the Presbyterian Church of Aotearoa New Zealand is a poignant reminder of how contentious matters of sexual practice and sexual orientation are.  

Presbyterians at their 2012 General Assembly passed a resolution affirming that the Church ‘upheld the historic Christian understanding of marriage as the loving, faithful union of a man and a woman.’ The Assembly narrowly declined, however, to adopt a proposal that would have prohibited ministers from administering marriage ceremonies between same-sex couples.  

Other denominations have yet to grasp the nettle. The Anglican Church announced that its ministers may not conduct same-sex weddings pending a report to its next General Synod in May 2014.  

Meanwhile, a conservative Anglican minister who declines to marry a gay couple is unable to point to any ruling of the regional or national diocese that states that marriage is only for opposite-sex couples. The blessing of the same-sex nuptials might contravene the religious beliefs of his own congregation or the sizeable conservative sector of New Zealand Anglicanism—but that is not the same thing. One MP commented that she would personally appear as a witness in support of any minister embroiled in litigation to state that that minister ‘had the right to deny a same-sex couple solemnisation of their marriage’.

15 Ibid at [50]
16 I Davison ‘Church groups at odds over their definitions of marriage’, NZ Herald, 15 November 2012.
19 Ibid.
wedding.' But such a well-intentioned gesture would be largely ineffectual and little solace for any minister of religion who had to defend his or her position.

Even if the New Zealand Anglican Church should eventually decide that solemnisation of SSM is allowed, particular Anglican clergy who dissent from that official line ought to be protected. The right of religious freedom protects all who practice that faith, not just those whose beliefs accord with the official teaching of that denomination or group.21 Those holding eccentric, idiosyncratic or even heretical religious beliefs—beliefs at odds with the majority of those of that faith, that are inconsistent with received church doctrine or contrary to the views of the church hierarchy (if any such hierarchy exists)—ought to be protected too. Religious freedom is not just for the ‘orthodox’ or those who happen to abide by the views of the majority of co-religionists or the pronouncements of the ecclesiastical or ruling elite. Appellate courts have acknowledged this. The Supreme Court of Canada stated that: ‘An “expert” or an authority on religious law is not a surrogate for an individual’s affirmation of what his or her religious beliefs are.’22 The House of Lords observed:

The court is concerned to ensure an assertion of religious belief is made in good faith: ‘neither fictitious, nor capricious, and that it is not an artifice’. . . But, emphatically, it is not for the court to embark on an inquiry into the asserted belief and judge its ‘validity’ by some objective standard such as the source material upon which the claimant founds his belief or the orthodox teaching of the religion in question or the extent to which the claimant’s belief conforms to or differs from the views of others professing the same religion. Freedom of religion protects the subjective belief of an individual. . . religious belief is intensely personal and can easily vary from one individual to another. Each individual is at liberty to hold his own religious beliefs, however irrational or inconsistent they may seem to some, however surprising.23

In light of this I proposed an amendment to s 29(2):

Without limiting the generality of subsection (1), no celebrant who is a minister of religion recognised by a religious body enumerated in Schedule 1, and no celebrant who is a person nominated to solemnise marriages by an approved organisation, is obliged to solemnise a marriage if solemnizing that marriage would contravene the religious beliefs of that celebrant.

20 Ruth Dyson (Labour), 688 NZPD 8528, 13 March 2013.
22 Syndicat Northcrest v Amselem, 2004 SCC 47 at para 54 per Iaccobucci J (for the majority).
23 R (on the application of Williamson) v Secretary of State for Education and Employment [2005] UKHL 15 at para 22 per Lord Nicholls.
But this change was not adopted. So, for now, the position of conservative church ministers within the mainstream Protestant denominations remains precarious.

III CANADA

In 2004 the Supreme Court of Canada was asked to hear a reference on the Federal Government’s proposed legislation to extend marriage to same-sex couples. One of the four questions in Reference Re Same-Sex Marriage was ‘if the Proposed Act were adopted, religious officials could be required to perform same-sex marriages contrary to their religious beliefs.’\(^{24}\) The Court was in no doubt:

> If a promulgated statute were to enact compulsion, we conclude that such compulsion would almost certainly run afoul of the *Charter* guarantee of freedom of religion, given the expansive protection afforded to religion by s. 2(a) of the *Charter*. . . . The performance of religious rites is a fundamental aspect of religious practice. It therefore seems clear that state compulsion on religious officials to perform same-sex marriages contrary to their religious beliefs would violate the guarantee of freedom of religion under s. 2(a) of the *Charter*. It also seems apparent that, absent exceptional circumstances which we cannot at present foresee, such a violation could not be justified under s. 1 of the *Charter*.\(^{25}\)

The Court also determined that the legalisation of SSM was consistent with the Canadian Charter of Rights and Freedoms 1982.\(^{26}\)

The bill to legalise SSM, Bill C-38, was introduced to the House of Commons on 1 February 2005 and was passed by that House on 28 June 2005, by 158 to 133 votes, with 32 MPs abstaining.\(^{27}\) The Senate passed the Bill by 47-21 votes on 19 July 2005, and it received the Royal Assent on 20 July 2005. The Civil Marriage Act 2005\(^{28}\) defines civil marriage as ‘the lawful union of two persons to the exclusion of all others.’\(^{29}\)

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\(^{24}\) 2004 SCC 79.

\(^{25}\) Ibid at paras 56-58.

\(^{26}\) Ibid at paras 5 and 43.


\(^{28}\) SC 2005, c 33.

\(^{29}\) Civil Marriage Act 2005, s 2.
Conservative Government to restore the traditional opposite-sex definition of marriage in December 2006 was defeated in the House of Commons.\textsuperscript{30}

Religious freedom for religious ministers featured prominently in the parliamentary debates on Bill C-38. The Prime Minister and Liberal Party leader, Paul Martin, addressed this concern in his second reading speech: ‘the government’s legislation affirms the charter guarantee: that religious officials are free to perform such ceremonies in accordance with the beliefs of their faith.’\textsuperscript{31} The Leader of the Opposition and Conservative party leader, Stephen Harper, was not convinced: ‘The so-called protection that the government has offered for even basic religious freedom is, frankly, laughably inadequate.’ The Bill provided ‘one meagre clause to protect religious freedom, a clause which states that religious officials will not be forced to solemnize marriages.’\textsuperscript{32} Yet, he continued, ‘the Supreme Court of Canada has already ruled that this clause is ultra vires. It falls within the provincial responsibility for the solemnization of marriage.’\textsuperscript{33} The Government’s proposal, in his view, fell well short of comprehensive protection. Harper proffered the following further protections to anticipate future challenges:

Parliament can ensure that no religious body will have its charitable status challenged because of its beliefs or practices regarding them. Parliament could ensure that beliefs and practices regarding marriage will not affect the eligibility of a church, synagogue, temple or religious organization to receive federal funds, for example, federal funds for seniors’ housing or for immigration projects run by a church. Parliament could ensure that the Canadian Human Rights Act or the Broadcasting Act are not interpreted in a way that would prevent the expression of religious beliefs regarding marriage.\textsuperscript{34}

In the end, none of these additional protections floated by the Opposition—bar one—were taken up. The one concession was a new clause in the Preamble (when the Bill returned from the Legislative Committee) to assuage concerns about freedom of expression: ‘Whereas it is not against the public interest to hold and publicly express diverse views on marriage.’ Even here, the

\textsuperscript{30} By 175 to 123 votes, December 7, 2006. The vote was a free vote.  
\textsuperscript{31} 38\textsuperscript{th} Parliament, 1\textsuperscript{st} Session, HC Deb, 1525, 16 February 2005.  
\textsuperscript{32} 38\textsuperscript{th} Parliament, 1\textsuperscript{st} Session, House of Commons Debates, 1605, 15 February 2005. The Supreme Court in Reference re Same-Sex Marriage, 2004 SCC 79 at para 39 held that, pursuant to s 92(12) of the Constitution Act 1867, only the Provincial legislatures, not the Federal Parliament, may legislate exemptions to solemnisation of marriage requirements.  
\textsuperscript{33} Ibid.  
\textsuperscript{34} Ibid.
wording is somewhat coy, preferring the term ‘diverse’ to ‘traditional’, ‘conservative’ or some other epithet indicating positive endorsement of heterosexual-only marriage.

The Civil Marriage Act, in its final form, states:

Preamble

WHEREAS nothing in this Act affects the guarantee of freedom of conscience and religion and, in particular, the freedom of members of religious groups to hold and declare their religious beliefs and the freedom of officials of religious groups to refuse to perform marriages that are not in accordance with their religious beliefs; . . .

3. It is recognized that officials of religious groups are free to refuse to perform marriages that are not in accordance with their religious beliefs.

3.1 For greater certainty, no person or organization shall be deprived of any benefit, or be subject to any obligation or sanction, under any law of the Parliament of Canada solely by reason of their exercise, in respect of marriage between persons of the same sex, of the freedom of conscience and religion guaranteed under the Canadian Charter of Rights and Freedoms in respect of marriage as the union of a man and woman to the exclusion of all others based on that guaranteed freedom.

Originally, the Bill just contained s 3, the ‘one meagre clause’ that Harper alluded to above.\(^{35}\) Section 3.1 was added after the Bill came back from the Legislative Committee.\(^{36}\)

Clearly, officials of religious bodies are protected. Are registrars or, as they are called in Canada, marriage commissioners, also protected?

The question was explored by the Saskatchewan Court of Appeal in Re Marriage Commissioners appointed under the Marriage Act 1955.\(^{37}\) The Saskatchewan Marriage Act provides that various listed religious clergy may solemnise marriages, as well as marriage commissioners appointed by the Minister. Following the legalisation of SSM, some marriage commissioners refused to solemnise SSM on the basis that they could not do so without violating their religious beliefs.\(^{38}\) Mr Orville Nichols was one.\(^{39}\) He lodged a human rights complaint against the Saskatchewan Government alleging religious discrimination under the

\(^{35}\) See quotation accompanying footnote 32.

\(^{36}\) As reported to the House of Commons on 16 June 2005.


\(^{38}\) Following SSM legalisation, eight commissioners resigned and three lodged human rights complaints against the Saskatchewan Government: ibid at paras 11 and 13.

\(^{39}\) Ibid at para 13.
province’s human rights law. In turn, a human rights complaint was filed against him, alleging that he had acted in a discriminatory manner by refusing to perform a SSM ceremony. The Human Rights Tribunal upheld the latter complaint and Nichols lost his appeal in the Court of Queen’s Bench.40

Given this litigation, the Province submitted two questions to the Court of Appeal. The first concerned a proposed statutory exemption for commissioners appointed before the change in the law occurred, the so-called ‘Grandfathering Option’. The second question concerned an exemption for all commissioners regardless of when they were appointed, the ‘Comprehensive Option’.41 The Grandfathering Option is below, whilst the Comprehensive Option is the provision below minus the words in bold:

28.1 (1) Notwithstanding The Saskatchewan Human Rights Code, a marriage commissioner who was appointed on or before November 5, 2004 is not required to solemnize a marriage if to do so would be contrary to the marriage commissioner’s religious beliefs.42

‘November 5, 2004’ is the date on which the Saskatchewan Queen’s Bench struck down the ban upon SSM in Saskatchewan.43 That Court held that a denial of a marriage licence to a same-sex couple would violate their equality rights provided in s 15(1) of the Charter. Henceforth, marriage commissioners were instructed that they must perform SSM ceremonies. The Grandfathering Option is clearly a more narrowly-tailored exemption designed to exempt those commissioners appointed before the date of the legalisation of SSM. But, Nichols’ hopes were to be dashed when the Court observed: ‘Commissioners who were appointed before the Queen’s Bench decision recognizing the legality of same-sex marriage in this jurisdiction are in no meaningfully different position than those appointed after the decision was rendered.’44

The Court first had to decide whether the exemptions infringed the Charter guarantee of equality.

40 Nichols v Saskatchewan (Human Rights Commission), 2009 SKQB 299.
41 Marriage Commissioners, 2011 SKCA 3 at para 18. The options are in the form of proposed amendments to the Marriage Act 1995, SS 1995, c M-4.1.
42 The Grandfathering Option also required that Commissioners who seek the benefit of the exemption file a written notice with the Director of the Marriage Unit within three months of the section coming into force: s 28.1(2)(3).
43 NW v Canada (Attorney General), 2004 SKQB 434.
44 Marriage Commissioners, 2011 SKCA 3 at para 23.
The purpose of the two options was to accommodate the religious beliefs of certain marriage commissioners and not deny same-sex couples the right to marry.\textsuperscript{45} Next, although facially neutral, did the options have the \textit{effect} of denying same-sex couples equal protection or the benefit of the new law? They did. Gay and lesbian individuals would be treated differently than other people and this negative differential treatment was due to their sexual orientation.\textsuperscript{46} Sexual orientation is not a ground mentioned in s 15 but has been recognised as a protected ground analogous to those enumerated in the section.\textsuperscript{47} It was argued that the infringement would be minimal as a same-sex couple turned away by a commissioner could easily find another one prepared to officiate.\textsuperscript{48} The Court was not persuaded. This argument downplayed the serious offence that such a refusal might have upon a gay or lesbian person seeking to be wed. Further, it was possible that the pool of non-objecting commissioners might not be large enough to ensure same-sex couples’ demands could be met, and this potential dearth of eligible commissioners would be exacerbated in remote rural areas.\textsuperscript{49} The different treatment would also create a disadvantage by perpetuating prejudice about the worthiness of same-sex unions and this ‘would clearly be a retrograde step’\textsuperscript{50}.

Rather optimistically it was contended that the Supreme Court in \textit{Reference Re Same-Sex Marriage} had \textit{already} determined that legislative initiatives of the sort at issue here passed constitutional muster. Did not the Court say that the state could not oblige officials \textit{of any sort} to solemnise same-sex marriages contrary to their personal religious beliefs?\textsuperscript{51} This was, replied the Saskatchewan Court of Appeal, a misreading of the decision, for it was plain that the Supreme Court’s approval of exemptions for ‘religious officials’ was referring to only ministers of religion holding formal positions in religious communities, and not marriage commissioners.\textsuperscript{52}

Turning to the second stage of the Charter analysis: was the curtailment of the equality rights of same sex couples justifiable in terms of s 1? The first requirement is that the objective of the impugned law must be of sufficient importance to warrant limiting a Charter

\textsuperscript{45} Ibid at para 36.
\textsuperscript{46} Ibid at paras 39 and 44.
\textsuperscript{48} \textit{Marriage Commissioners} at para 40.
\textsuperscript{49} Ibid at paras 42-43.
\textsuperscript{50} Ibid at para 45.
\textsuperscript{51} Ibid at para 48.
\textsuperscript{52} Ibid at para 49.
right. The broad and important goal of both options was the accommodation of the religious beliefs of the marriage commissioners. One could characterise the goal of the options as the denial of the rights of same-sex couples but that way of stating the objective was unhelpful.  

The second requirement is the proportionality analysis. This subdivides into three matters. First, was there a rational connection between the impugned law and its objective? Exempting commissioners was clearly rationally connected to the goal of accommodating such commissioners’ religious beliefs. Second, did the law impair rights and freedoms as little as possible in order to meet its goal? Here the exemptions foundered. The court raised the possibility of a ‘single entry point’ system. This corrals would-be married couples towards a bureaucratic official or some central office, rather than permitting them to directly contact a marriage commissioner.

What if the request for the services of a marriage commissioner involved completion of a form indicating, not just the time and place of the proposed ceremony, but also the genders of the two people planning to marry? . . . Assume too that the Director operated a simple internal system whereby a commissioner who did not want to perform same-sex marriage ceremonies because of his or her religious beliefs could make that fact known to the Director. In this sort of arrangement, the Director’s office could reply to a request for marriage services by privately taking into account the religious beliefs of commissioners and then providing, to the couple planning to marry, a list of commissioners in the relevant geographical area who would be available on the planned date of the wedding and who would be prepared to officiate.

Counsel for the marriage commissioners conceded that this kind of procedure did represent a less restrictive means of attaining the objectives the commissioners sought. It fell ‘within the range of reasonable alternatives’ and, in the Court’s view, did not appear to be ‘impractical, overly costly or administratively unworkable.’ The Court cautioned that its endorsement of a single entry point system was ‘not necessarily a determination that any such system would ultimately pass full constitutional muster.’ Rather, the concrete features of any particular system would still need to be evaluated to see if it met the Charter standard.

53 Ibid at para 77.
54 Ibid at para 82.
55 Ibid at para 85.
56 Ibid at para 86 (italics added).
57 Ibid at para 84.
58 Ibid at para 87.
59 Ibid at para 89 (emphasis added).
The third inquiry seeks to determine whether the benefits of the impugned law are proportionate to the negative effects of it upon citizens’ guaranteed rights. The salutary effect of the exemptions is that they permit marriage commissioners to avoid a violation of their consciences. But this was given modest weight, for reasons I will return to shortly. The deleterious effects upon same-sex couples, by contrast, loomed much larger. There was, again, the ‘perpetuat[ion of] a brand of discrimination which our national community has only recently begun to successfully overcome.’  

Second, the denial of marriage by certain commissioners was ‘devastating’ to the individuals concerned and had a more generalised ‘ripple’ effect upon the gay community as a whole. Third, the exemptions would ‘undercut the basic principle that governmental services must be provided on an impartial and non-discriminatory basis.’ Persons who ‘voluntarily chose to assume’ a public office, becoming part of ‘the apparatus of the state,” could not expect to shape that office to conform to their personal scruples. It was the other way around: ‘Marriage commissioners do not act as private citizens when they discharge their official duties. Rather, they serve as agents of the Province and act on its behalf and its behalf only.’

It was then ‘readily apparent’ that the positive effects of the exemptions did not outweigh their negative effects and thus, the third aspect (like the second) of the proportionality analysis had not been satisfied.

In the balancing exercise the Court gave rather short shrift to the benefits of respecting the commissioners’ religious liberty. The following paragraph is telling:

In considering the benefits of the Options, it is also important to note that the freedom of religion interests they accommodate do not lie at the heart of s. 2(a) of the Charter. In other words, the Options are concerned only with the ability of marriage commissioners to act on their beliefs in the world at large. They do not in any way concern the freedom of commissioners to hold the religious beliefs they choose or to worship as they wish. This reality means the benefits flowing from the Options are less significant than they might appear on the surface.

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60 Ibid at para 94.
61 Ibid at paras 95-96.
62 Ibid at para 98.
63 Ibid.
64 Ibid at para 98.
65 Ibid at para 99.
66 Ibid at para 93 (italics added).
For the Court, the commissioners’ interests ‘do not lie at the heart’ of this right. They are still entirely free ‘to worship as they wish’. This stance resonates with the tenuous ‘core’ versus ‘peripheral’ religious beliefs and practices distinction.67 According to this view, declining to do one’s everyday job because it offends one’s religious scruples is regrettable but fairly ‘small beer’ for the commissioners can still attend their church, pray, read their bible and go about their usual avowedly religious rituals. Restricting an aspect of one’s secular labour is insignificant compared with the circumscribing of the fundamental and patently ‘religious’ duties of one’s faith. According to this blinkered conception of religious free exercise, the former is a mere indirect curtailment of a secondary or peripheral religious matter whereas the latter represents a direct incursion upon a primary or central religious activity.

In the Court’s understanding, the right to hold religious beliefs is acknowledged and, indeed, inviolable, but acting upon them is another matter. Here the perennial ‘belief/action’ distinction rears its unsightly head once more.68 Acting upon one’s beliefs must be circumscribed in the interests of society and to protect the rights of others. But do not be alarmed, for one still can hold to that belief. This mindset, with its attenuated conception of religious exercise (protecting core but not peripheral religious matters, beliefs but not necessarily actions that manifest such beliefs), is made explicit in the concurring opinion of Smith JA: ‘Canadian constitutional jurisprudence has consistently distinguished between the right to hold certain beliefs and the right to act on those beliefs, particularly as one moves out of the fundamental area of religious rites and practices and when acting on a religious belief harms or infringes the rights of others.’69 From this narrow perspective, secular labour by a state-employed official is very far removed from rituals or liturgical conduct undertaken by a religious official. Smith JA emphasised that marriage commissioners were carefully devised by the legislature to be ‘non-religious, civil, as opposed to religious’70 celebrants. The legislation provided for a long list of religious celebrants whereas marriage commissioners conducting a civil, non-religious ceremony were there as a distinctly secular alternative to cater for those who did not wish to have their marriage conducted in a religious setting or with any religious connotations.71

67 See Ahdar and Leigh, Religious Freedom, at pp 173-75 for criticism of this dichotomy.
69 Marriage Commissioners, 2011 SKCA 3 at para 146 (Vancise JA concurring)(italics added).
70 Ibid at para 123.
71 Ibid at paras 123-124.
The notion that marriage commissioners are state employees and therefore must conform to the state’s juridical norms does not take the argument very far. For another norm, alongside state impartiality in the provision of public services, is government accommodation of its civil servants’ consciences. As Geoffrey Trotter puts it: ‘Rights-bearing citizens do not lose their human rights when they enter public employment.’\textsuperscript{72} To focus exclusively on the state’s obligation to same-sex couples is to neglect the position of the flesh-and-blood providers of the marriage services. Officiating is not (yet) done by ‘robots and computers’, and as long as the state acts through its citizens their rights must also be taken into consideration.\textsuperscript{73} As a good employer, the state must attempt to reasonably accommodate the sincere religious convictions of its employees. To ignore the duty of reasonable accommodation is to adopt a stark, take-it-or-leave-it stance: religious commissioners must refashion their beliefs to agree with the state, or take their beliefs with them and leave government employment.\textsuperscript{74} Rigid denial of an exemption for devout marriage commissioners would simply lead to the exclusion of religious persons from this branch of the public service, an outcome that seems at odds with the espoused political aim of tolerance and inclusion of all citizens.\textsuperscript{75}

The Court believed that exemptions for marriage commissioners would be ‘a step that would perpetuate disadvantage and involve stereotypes about the worthiness of same-sex unions.’\textsuperscript{76} Bruce MacDougall charged that to only allow refusals to conduct SSM (and not refusals to marry say opposite-race or divorced couples) demonstrates the state is not trying to accommodate religious consciences in general but rather it is ‘simply supportive of religious hostility to homosexuals, ie, homophobia.’\textsuperscript{77} But this criticism are misplaced, for it conflates the state with its myriad employees.\textsuperscript{78} The granting of an exemption for devout commissioners does not demonstrate that the state necessarily accepts the views of those commissioners. When the state allows doctors and nurses the right of conscientious objection from participation in abortion procedures, the state is not accepting or endorsing the stance of

\textsuperscript{72} ‘The Right to Decline Performance of Same-Sex Civil Marriages: The Duty to Accommodate Public Servants—A Response to Professor Bruce MacDougall’ (2007) 70 Sask L Rev 365 at p 385.
\textsuperscript{73} Ibid at p 385.
\textsuperscript{74} Ibid at pp 366-367 and p 392.
\textsuperscript{75} Ibid.
\textsuperscript{76} Marriage Commissioners, 2011 SKCA 3 at para 45.
\textsuperscript{77} ‘Refusing to Officiate at Same-Sex Civil Marriages’ (2006) 69 Sask L Rev 351 at p 358.
\textsuperscript{78} Trotter, ‘Right to Decline’ at p 374.

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those objectors on the merits of abortion.\textsuperscript{79} By permitting religious civil servants to opt out of conducting SSMs, the state does not, as MacDougall argued, in effect, accept the religious ‘version’ of the issue.\textsuperscript{80} Rather, an accommodation transmits the message that the state has solicitude for the consciences of its employees. If anything, the legislature has already decisively rejected the religious stance on the issue by legalising SSM. An exemption is a departure from the official ‘version’ that SSM is now accepted. As for the accusation of homophobia, a physician who withdraws from abortion is not (one would hope) motivated by animus against the woman seeking the procedure, but is simply unable in good conscience to provide the service herself or himself.\textsuperscript{81}

Smith JA was puzzled how conducting a marriage for a same-sex couple infringed a devout marriage commissioner’s religious freedom at all. He was unable to see how officiating at a civil ceremony carried any implication or connotation at all that the marriage commissioner who officiates necessarily approved of these types of union.\textsuperscript{82} By stark contrast, refusing to perform a SSM ‘without doubt expresses condemnation of same sex unions and practices as socially harmful and perverse.’\textsuperscript{83} Performing the ceremony when asked ‘might well be neutral [whereas] refusing to do so is an overtly discriminatory act’ that engenders psychological anguish and reinforces age-old prejudice.\textsuperscript{84}

As a matter of logic it is difficult to see how performing \textit{x} is neutral whilst refusing to perform \textit{x} is discriminatory and expresses condemnation of those seeking \textit{x}. Furthermore, this approach over-emphasises the external appearance of conduct at the expense of the internal attitude of the moral agent. For example, eating pork may well be a neutral act for most citizens but for certain people it violates deeply held religious beliefs. A central thrust of freedom of religion is protection of the individual’s conscience and (subjective) religious sensibilities. It may be hard to comprehend how undertaking a secular task can be freighted with religious meaning but much mundane activity is religiously significant for many religionists.\textsuperscript{85} So, to say that ‘[t]he performance of a civil marriage by a marriage commissioner. . . is not a religious rite or practice’ and that ‘[n]or does the requirement to do

\textsuperscript{79} Ibid
\textsuperscript{80} ‘Refusing to Officiate’ at p 365.
\textsuperscript{81} Trotter, ‘Right to Decline’ at p 371.
\textsuperscript{82} Ibid at para 142.
\textsuperscript{83} Ibid (italics in original).
\textsuperscript{84} Ibid.
so limit or restrict religious belief\textsuperscript{86} is to miss the point.

Even if, continued Smith JA, the performance of SSMs by devout marriage commissioners did restrict their religious freedom, it would do so ‘only in a secondary way’ and the curtailment would arguably be ‘trivial or insubstantial, in that it is interference that does not threaten actual religious beliefs or conduct.’\textsuperscript{87} And thus ‘to the extent that this is so, it does not even fall within the protection of s. 2(a) of the Charter.’\textsuperscript{88} This simply demonstrates that the judge has an attenuated understanding of just what constitutes the manifestation of one’s religion.

Although Saskatchewan rejected a statutory exemption for marriage commissioners, Prince Edward Island passed an exemption in 2005 permitting commissioners to refuse to solemnise SSMs.\textsuperscript{89}

\textbf{IV UNITED KINGDOM}

Following a public consultation on SSM which began in March 2012—that elicited 228,000 responses and 19 petitions, the largest response ever received to a Government consultation\textsuperscript{90}—the Minister for Women and Equalities, Maria Miller, introduced the bill to legalise SSM in England and Wales on 24 January 2013. The Bill was given the Royal Assent on 17 July 2013. The Marriage (Same Sex Couples) Act 2013 states with stark simplicity ‘marriage of same sex couples is lawful.’\textsuperscript{91}

Simplicity, however, is not a feature of the statutory provisions for clergy and other marriage celebrants who seek an exemption from conducting SSM on grounds of conscience. Churches expressed serious concerns at their right to refuse to marry same-sex couples. The Government’s response was the so-called ‘quadruple lock’, a fourfold bundle of provisions designed to make it clear that clergy and other religious officials would not be compelled to conduct SSMs.\textsuperscript{92} Part of the complexity is due to the special position of the Church of

\textsuperscript{86}Marriage Commissioners, 2011 SKCA 3 at para 147.
\textsuperscript{87}Ibid at para 148.
\textsuperscript{88}Ibid.
\textsuperscript{89}Marriage Act (Prince Edward Island), RSPEI 1988, c M-3, s 11.1 (added by An Act to Amend the Marriage Act, SPEI 2005, c 12, s 7. The section reads: ‘11.1 For greater certainty, a person who is authorized to solemnize marriage under this Act may refuse to solemnize a marriage that is not in accordance with that person’s religious beliefs.’
\textsuperscript{91}Section 1.
\textsuperscript{92}Equal Marriage, at paras 4.19-4.20.
England as the established church. This status means its canons form part of the law of the land. The Church can amend or repeal primary legislation through a Measure passed by its Synod, provided the Measure is later approved by parliament and receives the Royal Assent. Most pertinently, its clergy are under a common law duty to marry a parishioner in his or her parish church. The Church in Wales is still under a similar duty by virtue of it previously being established (it having been disestablished in 1920).

The Government’s report on the public consultation recommended that no religious organisation or its ministers be forced to conduct SSM ceremonies. This assurance was consistently reiterated throughout the entire parliamentary passage of the Bill. The sponsoring Minister stated

All religious organisations—whether they be Jewish, Muslim, Christian or any other—will be able to decide for themselves if they want to conduct same-sex marriages. The Bill provides for and promotes religious freedom through the Government’s quadruple lock. These protections are absolutely carved on the face of the Bill and are the foundation on which the legislation is built.

The Quadruple Lock

The first of the four provisions to protect the religious freedom of marriage celebrants is an express non-compulsion provision. Part 2 of the Act, headed ‘Religious protection’, opens with s 2:

2. Marriage according to religious rites: no compulsion to solemnize etc
   (1) A person may not be compelled by any means (including by the enforcement of a contract or a statutory or other legal requirement) to—
      (a) undertake an opt-in activity, or
      (b) refrain from undertaking an opt-out activity.
   (2) A person may not be compelled by any means (including by the enforcement of a contract or a statutory or other legal requirement)—
      (a) to conduct a relevant marriage,
      (b) to be present at, carry out, or otherwise participate in, a relevant marriage, or
      (c) to consent to a relevant marriage being conducted,
   where the reason for the person not doing that thing is that the relevant marriage concerns a same sex couple.

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93 See ibid at paras 1.4 and 4.21-4.23.
94 Ibid at paras 1.3 and 4.18-4.27.
95 Maria Miller, HC Deb, February 5, 2013, vol 558, col 129.
The right to decline to conduct a ‘relevant marriage’ in s 2(2) refers to ‘a marriage between same-sex couples.’

Second, the statute sets out an opt-in system so that religious organisations or individual ministers who wish to conduct marriages for same-sex couples will need to take positive steps before they can do so. It will be unlawful for religious bodies or their ministers to marry same-sex couples unless the requisite opt-in requirements have been complied with. An ‘opt in’ activity is further defined in a detailed table in s 2(3). If a religious organisation has decided not to opt-in, then none of its ministers will be able to conduct a SSM. If such an organisation has chosen to conduct SSM, its individual ministers are still under no compulsion to conduct one unless they decide to do so.

Third, there are two special provisions to safeguard the position of the established church. First the Church of England’s current stance on SSM (opposing it) might fall foul of centuries-old legislation, the Clergy Act 1533, that requires that church law be consistent with the law of the land. So when SSM was legalised the Church’s position might violate ordinary secular law and be subject to nullification on that basis. A special provision would, however, avert this clash and allow the inconsistency between the Church’s no-SSM-stance and the law’s affirmative policy in favour of SSM to continue. Thus, we have s 1(3):

1(3) No Canon of the Church of England is contrary to section 3 of the Submission of the Clergy Act 1533 (which provides that no Canons shall be contrary to the Royal Prerogative or the customs, laws or statutes of this realm) by virtue of its making provision about marriage being the union of one man with one woman.

Then, there is explicit recognition that it is illegal for the established church to marry same-sex couples:

1(4) Any duty of a member of the clergy to solemnize marriages (and any corresponding right of persons to have their marriages solemnized by members of the clergy) is not extended by this Act to marriages of same sex couples.

The term ‘a member of the clergy’ is a clerk in Holy Orders of the Church of England or the Church in Wales.

Fourthly, the Equality Act 2010 was amended to explicitly state that it is not unlawful

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96 Marriage (Same Sex Couples) Act 2013, s 2(4).
97 Maria Miller, HC Deb, 11 December 2012, vol 555, col 156.
98 Ibid.
99 Marriage (Same Sex Couples) Act 2013, s 1(5).
discrimination for a person to refuse to conduct a SSM.  

The Unpicking of the Locks?

Many MPs foresaw the potential for a disappointed same-sex couple to take a successful claim to the European Court of Human Rights.  

For instance, Sir Tony Baldry cautioned:

> there is an inevitable degree of risk in all this, given that it would ultimately be for the courts, and in particular the Strasbourg court, to decide whether provisions in the legislation are compatible with the European convention on human rights. There is absolutely no doubt that once marriage is redefined in this very fundamental way, a number of new legal questions will arise and no one can be sure what the eventual outcome will be. The Government believe that this is a risk worth taking. The Church of England does not.

‘It is abundantly plain to most Conservative Members,’ charged Sir Roger Gale in blunter fashion, ‘that the product of the Bill will end up before the European Court of Human Rights and that people of faith will find that faith trampled upon.’

The Bill was a veritable ‘Pandora’s box of endless litigation’, warned another. Labour MP Michael McCann, blasted:

> I am damn sure—as sure as the sun rises in the morning—that a same-sex couple will go to a church or synagogue and demand to be married, their demand will be refused and they will go to court; and we in turn will have to wait to see what new case law is created. By that time, it is possible that none of us will be serving in the House—we may have left politics altogether or indeed left this mortal coil—but in that set of circumstances people will look back and ask, ‘How did we get into this mess?’ They will look back in Hansard and say, ‘It’s because we made a bad law in 2013, and some politician said at the time that there was a quadruple lock, underpinned by case law.’

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100 Marriage (Same Sex Couples) Act 2013, s 2(5)(6). Section 110 provides that A does not contravene s 110 if A does not conduct a SSM. Schedule 3 to the Equality Act (services and public functions) now has a new Part 6A that contains the exemption for SSM, viz: 25A(1). A person does not contravene section 29 only because the person—(a) does not conduct a relevant marriage…’

101 See eg Robert Flello (Labour), HC Deb, 5 February 2013, vol 558, col 146; Jim Shannon (Democratic Unionist), HC Deb, 5 February 2013, vol 558, cols 166-6.

102 HC Deb, 5 February 2013, vol 558, cols 144-145 (italics mine).

103 HC Deb, 5 February 2013, vol 558, col 152.

104 Stewart Jackson (Con), HC Deb, 5 February 2013, vol 558, col 201.

105 HC Deb, 5 February 2013, vol 558, col 180.
The Bill’s supporters conceded that no one could totally rule out future litigation.\textsuperscript{106} Those who sought ‘a cast iron guarantee’\textsuperscript{107} were seeking the impossible.\textsuperscript{108} Yet, it was the Minister herself who had fuelled such an expectation when she confidently assured the House that ‘the system of locks will iron-clad the protection’\textsuperscript{109} religious bodies. Others were only a little less categorical and relied upon the advice of the Attorney-General to the effect that ‘case law in the European Court of Human Rights makes it infinitesimally unlikely that any such challenge would succeed.’\textsuperscript{110} Lord Pannick assured the Public Bill Committee by written memorandum that: ‘For the European Court of Human Rights to compel a religious body or its adherents to conduct a religious marriage of a same sex couple would require a legal miracle much greater than the parting of the Red Sea.’\textsuperscript{111} As the Minister explained, ‘the Government’s legal position has confirmed that, with appropriate legislative drafting, the chance of a successful legal challenge through domestic or European courts is negligible.’\textsuperscript{112} And again, ‘It is simply inconceivable that the Court would require a faith group to conduct same-sex marriages in breach of its own doctrines.’\textsuperscript{113} Lord Faulks did ‘not share the enthusiasm of some noble Lords for the Strasbourg jurisprudence’ and whilst some of his colleagues predicted that it was ‘inconceivable’ that there would be a challenge, he was ‘not as confident as they are—few lawyers are.’\textsuperscript{114} Lord Brennan agreed: ‘it would be naïve to assume that the problems that have been raised by other barristers will not encounter serious disputation in our courts and in Strasbourg.’\textsuperscript{115} Lords Faulks and Brennan were to be vindicated with alacrity. Within just one month of the Act’s passing, the homosexual couple chosen by the Government to promote the SSM legislation announced they were taking a case to Strasbourg to force the Church of England (to which they belonged) to marry them in their local parish of Danbury, Essex.\textsuperscript{116} It is

\begin{footnotes}
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\item[106] Hugh Robertson, HC Deb, 28 February 2013, vol 558, col 280.
\item[107] Such as Sir Gerald Kaufman (Lab), HC Deb, 5 February 2013, vol 558, col 125.
\item[108] As noted, eg, by Lord Alii, HL Deb, 19 June 2013, col 274.
\item[109] Maria Miller, HC Deb, 11 December 2012, vol 555, col 156.
\item[110] Margot James (Lab), HC Deb, 5 February 2013, vol 558, col 163.
\item[111] Quoted in the speech by Hugh Robertson, HC Deb, 28 February 2013, vol 558, col 280.
\item[112] Maria Miller, HC Deb, 11 December 2012, vol 555, col 156.
\item[113] Maria Miller, HC Deb, 5 February 2013, vol 558, col 131 (quoting ‘the eminent QCs Lord Pannick, Baroness Kennedy and Lord Lester’).
\item[114] HL Deb, 4 June 2013, col 1067.
\item[115] HL Deb, 4 June 2013, col 1070.
\item[116] J Bingham, ‘First couple consider legal challenge to Church’s gay marriage opt-out’, Daily Telegraph, 2 August 2013.
\end{enumerate}
\end{footnotes}
difficult to forecast how the European Court of Human Rights would rule to such UK applicants. Some members were never persuaded that the quadruple locks (‘Fort Knox locks’ as one member mocked\(^\text{117}\)) would not be ‘picked’ by the Strasbourg court.\(^\text{118}\)

In \textit{Schalk and Kapf v Austria}, the European Court of Human Rights held that SSM legalisation was a matter for each state.\(^\text{119}\) It also noted the sociological fact that ‘a rapid evolution of social attitudes towards same sex couples had taken place in many member states’ over the last decade.\(^\text{120}\) This might suggest a readiness to recognise a right for same-sex couples to be married by religious as well as civil bodies. But the right of religious group autonomy under Article 9 has also been consistently and forcefully affirmed.\(^\text{121}\) In the recent \textit{Good Shepherd} case, the Grand Chamber reaffirmed the right of a religious community to determine matters of internal governance,\(^\text{122}\) including the duties of members of its clergy.\(^\text{123}\)

For now at least, the locks do appear to be reasonably secure from Strasbourg attack. Unpicking from future UK Parliaments is a different matter. As Lord Naseby reminded: ‘Safeguards are not met by quadruple locks. Locks can be undone by any fiendishly good legislator anywhere in the world’.\(^\text{124}\) Including, one might gratuitously add, those that inhabit Westminster.

**Exemptions for Registrars?**

Conservative MP, David Burrows, moved an amendment to protect marriage registrars during the second reading in the House of Commons.\(^\text{125}\) The Bill (in clause 2 (4)(b)) expressly stated that those entitled to immunity from conducting SSMs ‘[did] not include a registrar’. Some MPs considered this was a serious flaw.

\[^{117}\text{Jim Shannon HC Deb, 28 February, 2013, col 292.}\]
\[^{118}\text{Eg Jim Shannon HC Deb, 5 February 2013, col 165; Graham Brady (Con), HC Deb, 5 February 2013, col 172.}\]
\[^{119}\text{[2010] ECHR 995 at paras 101-110.}\]
\[^{120}\text{Ibid at para 93.}\]
\[^{121}\text{Ahdar and Leigh,} \textit{Religious Freedom}, \text{ch 11, especially at pp 377-78 and pp 396-99.}\]
\[^{122}\text{Sindicatul ‘Pastorul Cel Bun’ v Romania, Appl no 2330/0 (ECtHR, 9 July 2013) at paras 162-168.}\]
\[^{123}\text{Ibid at para 4 per Wojtyczek J (concurring).}\]
\[^{124}\text{HL Deb, 3 June 2013, col 997.}\]
\[^{125}\text{The first version (Amendment 11) was moved and debated at length at the Public Bill Committee stage on February 26, 2013, col 220. The revised version was debated on 20 May 2013, col 926 et seq. There is a useful summary in the House of Lords Library Notes, Marriage (Same Sex Couples) Bill (HL Bill 29 of 2013-14), 30 May 2013, LLN 2013/011.}\]

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The well-known case of the Islington Borough Council Registrar, Lillian Ladele, whose claim went all the way to the European Court of Human Rights, was the prime example mentioned in the House. It will be recalled that Mrs Ladele, a Christian, had intimated that, due to her sincere religious convictions, she did not feel able to conduct a civil partnership ceremony for any same-sex couple seeking one. She had become a Registrar of Birth, Deaths and Marriages in 2002 and two years later the UK Parliament passed the Civil Partnership Act 2004, which came into effect in December 2005. The Council could have accommodated her conscientious position without interruption of service and without any offence to those seeking civil partnerships. There were more than sufficient registrars who did not share her views to cover these duties. Other UK councils had organised their roster of registrars to ensure that no objecting registrars would be forced to comply and that no client would face any embarrassing refusal. However, the Islington Council’s decision not to do so was found by both the Employment Appeal Tribunal and the Court of Appeal to be lawful since it was acting in pursuit of a self-made equality policy entitled (with no apparently intended irony) ‘Dignity for All’. The disciplinary proceedings instituted by the Council against Ladele for gross misconduct were upheld and her claim of religious discrimination was dismissed. The European Court of Human Rights upheld the Court of Appeal decision in January 2013 and so the Strasbourg judgment was fresh in the parliamentarians’ minds during the SSM debate.

To return to the Burrows amendment, it read:

New clause 2—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.

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126 Eweida v United Kingdom, Applications nos 48420/10, 59842/10, 51671/10 and 36516/10 (ECtHR, 15 January 2013).
The conscientious objection must be based on a sincerely-held religious or other belief.

In any legal proceedings the burden of proof of conscientious objection shall rest on the person claiming to rely on it.\textsuperscript{129}

There was also a similar amendment (new clause 3) to implement *transitional* protection to preserve the right of conscientious objection for registrars *already* employed.\textsuperscript{130} The Netherlands, noted several MPs, had such a transitional exemption provision.\textsuperscript{131}

The conscientious objection provision makes it clear that no client would be denied a civil marriage ceremony due to a want of suitable registrars and hence a registrar would be unable to claim protection if no one could cover for him or her in that particular locality. Objecting registrars would also have the onus of proving their refusal was grounded in sincere religious or other beliefs. Some members drew the analogy with surgeons who were allowed, under the conscientious objection provision in the abortion legislation, to abstain from participation in abortions.\textsuperscript{132}

Opponents of the new conscientious objection clause echoed the arguments from the Saskatchewan case, *Marriage Commissioners*, discussed earlier. Labour MP Kate Green, for instance, contended: ‘We are talking about someone who is performing a state function. They cannot pick and choose when acting as an agent of the state to what extent they are prepared to fulfil the function that they are required to perform.’\textsuperscript{133} The prospect that some registrars might be forced to choose between their beliefs and their livelihood was ‘regrettable’ but ‘one of the things that [went] with being a public servant is that one has to fulfil the requirements of the law of the land as it stands at the time.’\textsuperscript{134} The analogy between objecting registrars and surgeons refusing to do abortions was misplaced, countered one MP. The registrar's sole duty was to conduct marriage whereas a surgeon had many duties, among

\textsuperscript{129} HC Deb, 20 May 2013, vol 563, col 926.

\textsuperscript{130} HC Deb, 20 May 2013, vol 536, col 926.


\textsuperscript{133} HC Deb, 26 February 2013, col 225.

\textsuperscript{134} Kate Green, HC Deb, 26 February 2013, col 226,
which abortion was a ‘tiny part’ of what they might be called to undertake.  

Burrows did not press the permanent exemption (new clause 2) to a vote but did put up the transitional exemption provision (new clause 3). The amendment was lost by 340 to 150 votes.

V CONCLUSION

It is fitting that clergy and other religious ministers have been granted exemptions to permit them to refuse to solemnise SSMs in those countries that have legalised marriages by same-sex couples. This core facet of religious group autonomy has been guaranteed in the wake of considerable pressure from churches (and other religious communities) to have the right to solemnise marriages in accordance with the religious community’s beliefs and customs preserved. Whether future parliaments or courts will overturn this exemption is difficult to assess. Three, and even two, decades ago one would have been hard pressed to find many who would have confidently predicted that SSM itself would be legalised.

In New Zealand, the protection for religious ministers is weakened by the requirement that the religious body to which the minister belongs have an express and clear rule on the matter. This is a problem for conservative pastors and priests in those denominations that are still struggling to come to a clear resolution either in favour of or against the solemnisation of SSM.

The attempt to extend protection to civil marriage celebrants has been rejected in each country that has sought to do so. It was expressly considered and rejected in the Westminster parliament. Indeed, the attempt by Saskatchewan to introduce an exemption for civil celebrants was ruled to be unconstitutional by that province’s Court of Appeal. The case for protection for those who were already celebrants when SSM was legalised would seem to be stronger than those appointed after the law came in. But even in that situation, an exemption has been rejected. The operative reasoning has been that those who work for the state must abide by official public norms. There is no room for devout public servants to choose which citizens they will serve when it comes to solemnising marriage (or civil unions for that

135 Stephen Williams (Liberal Democrat), HC Deb, 20 May 2013, vol 563, col 934. This overlooks the fact that registrars also attend to the registration of birth and deaths, hence their full title.
matter). There is a strange amnesia at work here insofar as the obligation of state to accommodate the religious conscience of its employees is forgotten. It is a safe prediction that devout religious persons (who hold to ‘traditional’ sexual ethics) will withdraw from this area of the civil service.

But it might not come to this. The Saskatchewan Court of Appeal approved in principle a ‘single entry point’ system. Here, by way of a simple bureaucratic process, a sensible reconciliation of the competing rights can be attained: same-sex couples may obtain a state-sanctioned ceremony without enduring rejection or embarrassment and devout marriage commissioners can retain their jobs and avert a violation of their conscience. If the hard-won right of religious liberty is to be preserved in increasingly secular Western societies, creative solutions such as these will need to be found.