



Submission by CARE to the Merits Committee

The Marriages and Civil Partnership (Approved Premises) (Amendment) Regulations 2011

The Government has repeatedly stated that it intends that the above regulations could not be used to compel a place of worship to host civil partnerships.

- It made this point in the original consultation in March see e.g. paras 3.18 and 3.35¹
- It made the point again in its analysis of the consultation responses on Nov 2nd. e.g. para 2.68²

The Regulations as drafted, however, fail to realise this intention with any kind of confidence and are, to this crucial extent, not fit for purpose.

Great store has been placed on the facts that:

First, Section 202 of the Equality Act states:

'For the avoidance of doubt, nothing in this Act [that is the Civil Partnerships Act] places an obligation on religious organisations to host civil partnerships if they do not wish to do so.'

Second, the new regulations state:

Religious premises: no obligation to make an application for approval

2B. Nothing in these Regulations places an obligation on a proprietor or trustee of religious premises to make an application for approval of those premises as a place at which two people may register as civil partners of each other in pursuance of section 6(3A)(a) of the 2004 Act.

These provisions, however, are of no value to the extent that the legislation that would be used to take a place of worship to court would be the Equality Act - not the Civil Partnerships Act or these Regulations - and especially its provisions relating to goods and services provision. This has been recognised by at least two sources:

1. The Scottish Government

The Scottish Government recognised this as an issue in its consultation on religious ceremonies and civil partnerships and gay marriage:

*'Para 2.35 Ensuring religious bodies and religious celebrants do not have to carry out civil partnerships against their will may require an amendment of the Equality Act 2010, which is generally reserved, to ensure that religious bodies and religious celebrants are not at risk of contravening the 2010 Act. In addition, the Scottish Government will have regard to the European Convention on Human Rights.'*³

¹ <http://www.parliament.uk/deposits/depositedpapers/2011/DEP2011-0584.pdf>

² <http://www.homeoffice.gov.uk/publications/equalities/lgbt-equality-publications/civilpartnership-response?view=Binary>

³ <http://www.scotland.gov.uk/Publications/2011/09/05153328/0>

This statement has been in the public domain since September.

There are two potential counter responses that must be addressed:

First, the two services are not identical. For our purposes, however, these differences are not material. The point is simply that churches in England and Wales, like those in Scotland, will have the option to provide new services in relation to civil partnerships (be they hosting services or officiating services) and that if a church wishes to continue to conduct heterosexual marriages but, for reasons of religious conscience, cannot provide the new service in relation to civil partnerships, it is likely to be subject to litigation on the basis of goods and services equality legislation.

Second, the UK Government can say that their legal advice is different. Again that is not really relevant in the sense that this does not negate the Scottish Government's advice. To the extent that we have two governments with two different sets of legal advice, we have legislation that lacks clarity in relation to a key intended commitment. As such, the law is not fit for purpose and must be made clearer before being passed.

2. The Mark Hill Legal Opinion Nov 8th

The legal opinion by Mark Hill QC on the actual draft regulations of November 8th makes the same point but, much more importantly, spells out the issues in detail.

a. Provision of a Public Function

1. Section 29 of the Equality Act 2010 states:

A person (a 'service-provider') concerned with the provision of a service to the public or a section of the public (for payment or not) must not discriminate against a person requiring the service by not providing the person with the service.

2. Section 29(6) extends this to those providing a public function, which can include a cleric marrying a couple see: Lord Rodger of Earlsferry in *Parochial Church Council of Aston Cantlow & Wilmcote with Billesley, Warwickshire v Wallbank* [2003] UKHL 37 at paragraph 170. This can be extrapolated, Hill argues, to other churches providing marriage services.

Hill concludes:

'Thus a finding of discrimination on the ground of sexual orientation is likely to result against a faith group, individual church proprietor/trustee or its minister who refuse to permit their premises to be used for the registration of civil partnerships in cases where they are prepared to host marriage ceremonies.'

This Hill notes is compounded by the Court of Appeal in *Ladele v London Borough of Islington* [2009] EWCA Civ 1357.

The first stage is an assertion that a refusal to perform civil partnerships, on the part of someone who is quite prepared to perform marriages, amounts to discrimination as defined in Regulation 3(1) and (3), as the requirements of paragraphs (3)(a) to (d) are satisfied, and it cannot be said, in the light of Regulation 3(4), that marriage and civil partnership are "materially different". The second stage involves the contention

that officiating at marriages and civil partnerships involves "the provision to the public or a section of the public of ... services" within paragraph 4(1), and, if that is not applicable in the light of regulation 4(3), then regulation 8(1) and (2) apply, as Islington and Ms Ladele are both "public authorit[ies]" (para 68)

The operation of the regulations in the context of Section 29 is quite likely to result in legal judgements the effect of which is to require any place of worship conducting heterosexual marriages to also host civil partnerships. This would have very far reaching unintended consequences, far removed from the Government's intended purposes.

b. Public Sector Duty

The opinion also highlights the interaction of the new Public Sector Duty, see section 149 of the Equality Act:

(1) A public authority must, in the exercise of its functions, have due regard to the need to—

- (a) eliminate discrimination, harassment, victimisation and any other conduct that is prohibited by or under this Act;
- (b) advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it;
- (c) foster good relations between persons who share a relevant protected characteristic and persons who do not share it.

(2) A person who is not a public authority but who exercises public functions must, in the exercise of those functions, have due regard to the matters mentioned in subsection (1).

An obvious way in which a local authority could rise to the above challenge would be to only license people to provide marriages if they are also happy to host civil partnerships.

Section 149 could result in local authorities discharging their duties:

- (a) the registration of religious premises for the solemnisation of marriages pursuant to section 41 of the Marriage Act 1949; and
- (b) the approval of applications to permit the registration of civil partnerships on religious premises pursuant to the Civil Partnerships (Approved Premises) Regulations 2005.

...such that they will only register religious premises for the solemnisation of marriage that are also registered to host civil partnerships.

Again, and completely contrary to the stated intentions of the Government, these Regulations, operating in the context of the wider Equality Act 2010, are likely to result in churches wishing to conduct heterosexual marriages but not host civil partnerships, being prevented from doing either.

Conclusion

For all the above reasons the Regulations laid before Parliament do not achieved the stated purpose of advancing religious liberty by enabling places of worship that do wish to host civil partnerships to do so, whilst not obliging any place of worship that does not wish to host civil partnerships to do so. The fact that regulations with such far reaching, controversial implications should have been laid via negative assent procedure is completely inappropriate.

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