IN THE MATTER OF THE MARRIAGES AND CIVIL PARTNERSHIPS (APPROVED PREMISES) (AMENDMENT) REGULATIONS 2011

OPINION

1. On 2 November 2011, the Government Equalities Office published its *Summary of Responses* to its earlier document *Civil Partnerships on Religious Premises: A Consultation*. Annexed to the Summary is a draft Statutory Instrument entitled The Marriages and Civil Partnership (Approved Premises) (Amendment) Regulations 2011. This marks the culmination of a so-called 'listening exercise' which began in February 2011, following the Government's decision to implement section 202 of the Equality Act 2010. The section, infelicitously drafted in the final days of the last administration,[1] removed the statutory prohibition which prevented civil partnerships being registered on religious premises but did not similarly remove the prohibition on the use of religious liturgies and texts. The resulting provision, in consequence, is somewhat unsatisfactory: it presents a profound difficulty for a significant number of faith groups who regard same-sex relations as inimical to their sincere beliefs, yet (probably more through oversight than design) it only partially satisfies the secularists (and those faith groups for who same-sex relationships are compatible with their beliefs), allowing a religious building to be used for what remains a wholly secular function. In recognition of the disparate doctrines of religious groups, section 202 is permissive, in that it allows (rather than requires) religious buildings to be used for the registration of civil partnerships.

2. Paragraph 1.6 of the *Summary of Responses* states that the draft Regulations will be laid before Parliament "shortly" to enable them to come into force by the end of 2011 (see paragraph 1.6). Central to a proper consideration of the terms of the draft Regulations in each House will be the extent to which they give effect to the Government's expressed intention of respecting the religious sensibilities of those who do not wish civil partnerships to be registered on their particular religious premises. As the *Summary of Responses* makes plain in paragraph 1.9,

[1] The shortcomings in the drafting were expressly noted by the Government Minister during Parliamentary debate e.g. Lords Hansard, 2 March 2010, cols. 1437-1440.

> The voluntary nature of section 202 was at the heart of the proposals outlined in the consultation document. The proposals were designed to put in place a regime that enables faith groups to opt in, respects the different decision-making structures of different faith groups, protects faith groups and individual ministers from the risk of successful legal challenge if they do not wish to host civil partnership registrations, and is straightforward for local authorities to operate.

3. Similarly, paragraph 1.10 of the *Summary of Responses* records the concern expressed by some faith groups about the legal protection available to those who do not wish to apply to host civil partnership registrations on their premises and continues,

> These concerns have been considered carefully in detail and the Government remains confident that there is protection from the risk of successful legal challenge. To avoid any doubts about the voluntary nature of the process they create, the regulations specifically reiterate the principle set out in section 202 that there is no obligation on a religious organisation to seek approval for its religious premises to host civil partnership registrations.

The original consultation spoke of protecting "faith groups and individual ministers" whereas the more recent *Summary of Responses* adopts the markedly more restrictive expression "religious organisations".

4. Regrettably, the proposed Regulations have not been drafted in such a way as to secure the delivery of these laudable aims, and in consequence the Government Equalities Office finds itself in the unfortunate position of not honouring its repeated assurance given to faith groups during the consultative process to the effect that a conscience clause would be included in the Regulations to protect those ministers and church bodies who earnestly and sincerely object to the registration of civil partnerships on the particular religious premise where they operate.

The flaws in the drafting of the proposed Regulations

5. There are a number of flaws which require to be addressed. Draft regulation 2(3) will introduce, *inter alia*, a new regulation 2B into the marriages and Civil Partnerships (Approved Premises) Regulations 2005 (SI 2005/3168) in the following terms:

> **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.

This proposed wording is inadequate for the following reasons.

"Nothing in these Regulations ..."

6. Whilst acknowledging the laudable assurance that no faith group is to be compelled to secure approval for the registration of civil partnerships on its religious premises, it is self-evident that the proposed regulation 2B does not (and cannot) deliver on that objective. Couching this 'conscience clause' in terms

solely of "these regulations" is limiting. It fails to recognise that the obligation to register is more likely to arise not from the Regulations themselves but from the very specific provisions of the Equality Act 2010 itself and the application of the pervasive public sector equality duty more generally.

7. Section 29 of the Equality Act 2010 provides:

> 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.

8. Section 29(6) extends this prohibition on discrimination to persons providing a public function, which may include not only a local authority but also a church or faith group in the performance of its function of solemnising marriage or registering civil partnership. A cleric of the Church of England, when conducting a marriage, may be exercising a public function: see the late Lord Rodger of Earlsferry in *Parochial Church Council of Aston Cantlow & Wilmcote with Billesley, Warwickshire v Wallbank* [2003] UKHL 37 at paragraph 170:

> For the most part, in performing his duties and conducting the prescribed services, the minister is simply carrying out part of the mission of the Church, not any governmental function of the state. On the other hand, when in the course of his pastoral duties the minister marries a couple in the parish church, he may be carrying out a governmental function in a broad sense and so may be regarded as a public authority for purposes of the 1998 Act ... from time to time, when performing one of his pastoral duties – conducting a marriage service in the church – the minister himself may act as a public authority.

9. By extrapolation, ministers of other denominations when registering marriages (or in the future permitting their premises to be used for the registration of civil partnerships) will be regarded as exercising a public function. Thus a finding of discrimination on the ground of sexual orientation is likely to result against a faith group, individual church proprieter/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. The proposed Regulation 2B is insufficient to deal with this. The Court of Appeal in *Ladele v London Borough of Islington* [2009] EWCA Civ 1357 rejected the claim of religious discrimination brought by a registrar of marriages who was an evangelical Christian. It held that her refusal to conduct civil partnerships was unlawful under the Equality Act (Sexual Orientation) Regulations 2007. The Court's finding was based on several bases:

> 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)

10. Reference must also be made to section 149 of the Equality Act 2010 which established the 'Public Sector Equality Duty' and provides as follows:

> (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).

11. Local authorities therefore are charged with two functions of direct relevance to the matters under consideration:

(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.

In fulfilling those functions, individually and cumulatively, each local authority must have due regard to the need to eliminate discrimination on the ground of sexual orientation. It follows that a local authority could legitimately be constrained by this public sector equality duty from registering places for the solemnisation of marriage unless and until the proprietors of that place had sought and obtained approval for the registration of civil partnerships. It is very likely that certain third parties will contend that anything else would fall well short of the elimination of discrimination under the Equality Act. See generally *Johns & Johns v Derby City Council* [2011] EWHC 375 (Admin), approving a local authority's approach of not approving as short-term foster parents a devout Christian couple who regarded homosexuality as inconsistent with biblical teaching. Given the decision of the House of Lords in *Aston Cantlow* (above) categorising the solemnisation of marriage (and *ex hypothesi* the registration of civil partnerships) as the exercise of a public function the same rigorous approach is likely to be adopted by the Courts.

12. It should be noted that the potential for conflict with the Equality Act 2010 has properly been recognised by the Scottish Government whose recent document, *The Registration of Civil Partnerships – Same Sex Marriage: A Consultation* (2011) states at paragraph 2.35 that, '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". The Scottish Government appears to recognise that adequate safeguarding of religious organisations from threat of proceedings for declining to register civil partnerships requires amendment of the Equality Act 2010. Despite being part of the 2010 Act, section 202 of itself is not sufficient to escape the reach of sections 29 and 149 since it only refers to obligations under the Civil Partnership Act 2004 and not to anti-discrimination provisions more generally.

13. The limited and tightly drawn exemptions to the anti-discrimination duty in section 29 of the Equality Act 2010 are to be found in paragraph 2 to Schedule 23 of the Equality Act 2010. However, they are not apt to provide appropriate provision for those churches which generically or specifically do not wish to opt into the scheme for the registration of civil partnerships. Marriage services do not constitute "activities undertaken" nor "services in the course of activities undertaken" by a church. And while the "use of premises" limb could apply to organisations (sub-paragraph 3(d)), it does not apply to ministers themselves (sub-paragraph 5). Furthermore, the link between approval for registration of civil partnerships and the services of the church would be broken by the fact that the law requires that civil partnerships hosted in religious buildings will remain exclusively secular events. In this, it is quite unlike a religious wedding, which is sacred in both form and content. There is also the obvious fact that, in any event, sub paragraph 10 disapplies the exemptions in relation to anything done on behalf of a public authority: religious organisations when registering civil partnerships or solemnising marriage, or when applying for approval for either status are deemed to be public authorities (see *Aston Cantlow*, above) and will be unable to rely upon the statutory exemption under paragraph 2 to Schedule 23.

14. The consequence of what might well be an oversight by the drafters of the proposed Regulations is manifold. It is a curtailment of religious freedom in that it will compel faith groups either to cease their registration of buildings for the solemnisation of marriage and therefore their ability to celebrate a sacred liturgical wedding which has civil effect; or it will compel them to secure approval for the registration of civil partnerships despite their doctrinal objection to same-sex relations. In consequence, faith groups are placed in the invidious position of being dependent upon the discretion of each and every local authority, whose decisions in any event will be reviewable in the Administrative Court at the behest of any lobbyist. It will be noted that in an open letter to the Prime Minister dated 21 August 2011, Mr Mike Weatherley MP called for religious groups who declined to register civil partnerships to lose the right to solemnise

matrimony, on the basis that such perceived inequality should be outlawed as had been the case with adoption agencies.[2]

"... a proprietor or trustee ..."

15. Subject to the foregoing point, this form of wording is also problematic for two reasons. First it fails to address the possibility (which is highly likely) that there may be more than one trustee or that the proprietor may comprise a multi-member entity. While the latter requires the proprietor entity to act as a composite applicant, the proposed Regulation expressly permits an individual trustee to make an application on his or her own. There is no requirement for notice to be given to the other trustees and, even if there were, it would place the local authority in the invidious position of having to adjudicate in a trust dispute involving the merits between the opposing doctrinal viewpoints of a divided body of trustees. There is a well established jurisprudential principle that English courts do not trespass into matters of doctrine which are properly regarded as 'non-justiciable'. See *Blake v Associated Newspapers Limited* (31 July 2003), per Gray J; *His Holiness Sant Baba Jeet Singh Ji Maharaj v Eastern Media Group Ltd and Hardeep Singh* [2010] EWHC 1294 (QB); and *Shergill v Purewal and PTI (Derby) Ltd* [2010] EWHC 3610 (QB). Officials within a small department of a local authority cannot be expected to perform an exercise which the High Court properly regards itself as incapable of undertaking. This system cannot possibly be classified as 'straightforward for local authorities to operate', which was one of the expressed objectives of the Government: see *Summary of Responses* at paragraph 1.9.

16. Of even greater significance, however, is the fact that the proposed Regulation asserts that neither the "proprietor" nor the "trustee" of religious premises shall be obliged to apply for the approval of those premises for the purpose of the registration of civil partnerships. However, this is predicated upon a fundamental misapprehension as to the nature of the organisational structure of many faith groups. The individuals who require the benefit of a conscience clause are not necessarily the proprietors or trustees of the premises but the minister, the congregation and the church council or equivalent.

17. Faith groups do not have legal personality or juridic status as such. They operate in certain instances as corporations sole, but more usually as unincorporated associations or through the operation of trusts. Freehold property (a church for example) is generally held by a trust which often has very little nexus with the worshipping community which meets there week by week. Likewise, the officiating minister may well have no contractual or other formal relationship

[2] The text of the letter may be found at: http://www.pinknews.co.uk/2011/09/02/tory-mp-calls-for-churches-to-be-banned-from-holding-marriages-if-they-refuse-gay-couples/

with the proprietor of the religious premises nor with the trust body which owns it.

18. Under the proposed Regulations, the 'proprietor or trustee' may apply to the local authority for approval and the minister, congregation or church council may know nothing of it.[3] Even if the minister does become aware that an application for approval has been made (and note all that the Government intends is for a notice to be displayed as 'best practice' not by way of statutory duty), he does not have the benefit of any conscience clause. The very best that he can hope for is that he spots the notice, puts in an objection,[4] that the objection is taken seriously by the local authority and that the minister's objection prevails over the views of those who have applied for approval. If the resident or officiating minister does not come to learn of the application (he may be unwell, on sabbatical, or 'best practice' may not be followed and no notice is displayed) or if the local authority nonetheless grants approval despite the minister's objection, his only remedy will be to seek judicial review of the local authority's decision, which will only succeed if the decision can be shown to be *Wednesbury* unreasonable. This does not amount to protection for the minister, and falls well short of the conscience clause which the GEO assured faith groups would be included in the proposed Regulations. As stated above, the original consultation spoke of protecting "faith groups and individual ministers" whereas the *Summary of Responses* says "religious organisations".

19. This proposed Regulation therefore, whilst it purports to afford a measure of limited protection to some (but not all) individuals and bodies connected with religious premises, it crucially omits from even this purported protection the resident or officiating minister. The legislator is not unfamiliar with 'conscience clauses', in relation to clergy and their inter-relationship with certain secular functions, notably marriage.[5] The earliest of note is to be found in the Matrimonial Causes Act 1965 and applies to clergy in the Church of England[6] who cannot be compelled to solemnise the marriage of any person whose former marriage has been dissolved and whose former spouse is still living.[7] This permits them not only to refuse to solemnise the marriage but also to prohibit

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[3] Paragraph 2.13 of the *Summary of Responses* states 'we will make clear in guidance and on the application form that best practice is for the proprietors or trustees of the premises to make their congregation aware that they have applied eg by publishing a copy of the application form on a notice board within the premises that is accessible for the congregation to see.'

[4] All that the minister can do would be to make representations to the local authority following public notice under regulation 4(1)(b).

[5] See generally M Hill, *Ecclesiastical Law* (3rd edition, Oxford University Press, 2007) at paragraph 5.35.

[6] It also applies to clergy of the Church in Wales.

[7] Matrimonial Causes Act 1965, s 8(2).

the use of the church or chapel of which they are minister for such a purpose.[8] The same model was adopted by the Marriage (Prohibited Degrees of Relationship) Act 1986, which permits the clergy to refuse to marry those related by affinity whose marriage would have been void but for that Act, and to prohibit the use of his church accordingly.[9] However, the more recent exception created by the Gender Recognition Act 2004 is more narrowly drawn.[10] A Church of England minister is not obliged to solemnise the marriage of a person if he reasonably believes the person's gender to be an acquired gender under the 2004 Act.[11] Section 22 of the Gender Recognition Act 2004 creates a general offence of unauthorised disclosure of information relating to a person's 'gender history'.[12] The Gender Recognition (Disclosure of Information) (England, Wales and Northern Ireland) (No 2) Order 2005[13] makes provision for exceptions for certain legal, medical, financial and religious purposes. In respect of the religious purposes, disclosure is permitted to enable any person to make a decision whether to officiate or permit the marriage of the person.[14]

20. In summary, therefore, whatever view one may have on the merits of the policy which these Regulations seek to bring into effect, their drafting is such that they do not achieve the Government's objective in terms of:
    (a) protecting the sensibilities of faith groups;
    (b) giving an effective conscience clause to individual resident or officiating ministers;
    (c) affording protection from the anti-discrimination duty under section 29 of the Equality Act 2010;
    (d) affording protection from the all-pervading public sector equality duty under section 149 of the Equality Act 2010;
    (e) providing a scheme which is straightforward for local authorities to operate;
    (f) respecting the "different decision-making structures of different faith groups".[15]

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[8] Ibid, s 8(2)(b).
[9] Marriage Act 1949, s 5A (amended by the Marriage (Prohibited Degrees of Relationship) Act 1986, s 3).
[10] And they differ as between the Church of England and the Church in Wales.
[11] Marriage Act 1949, s 5B (1) (amended by the Gender Recognition Act 2004, s 11, Sch 4). A clerk in holy orders of the Church in Wales is not obliged to permit the marriage to be solemnised in his church or chapel: Marriage Act 1949 s 5B (2) (as so amended).
[12] This is punishable by a fine of up to £5,000.
[13] Gender Recognition (Disclosure of Information) (England, Wales and Northern Ireland) (No 2) Order 2005, SI 2005/916.
[14] It also includes whether to appoint the person as a minister, office-holder or to any employment for the purposes of the religion, whether to admit them to any religious order or to membership, or to determine 'whether the subject is eligible to receive or take part in any religious sacrament, ordinance or rite, or take part in any act of worship or prayer, according to the practices of an organised religion': ibid art 4. If a decision other than one relating to marriage is being made, the person making the disclosure must reasonably consider that that person may need the information in order to make a decision which complies with the doctrines of the religion in question or avoids conflicting with the strongly held religious convictions of a significant number of the religion's followers.
[15] *Summary of Responses*, para. 1.9

21. These Regulations are bound to lead to long and costly litigation for faith groups and individual resident or officiating ministers in circumstances where the number of religious organisations which have evinced an intention to avail themselves of this statutory amendment is miniscule.[16] Under-resourced local authorities will be compelled to adjudicate on disputes between trustees of religious premises, and between ministers and church hierarchy, and to determine matters of religious doctrine which they are ill-equipped to do and which the secular courts consider to be non-justiciable. I do not consider them to be adequately drafted to meet the expressed intentions of the Government and to honour the assurances given to faith groups.

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8 November 2011

[16] See paragraphs 2.76 and 2.77 of the *Summary of Responses*.

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