

Memorandum

From: Scot M. Peterson, J.D., D.Phil. (Oxon)

Date: 25 November 2011

Re: Equality Act 2010, section 202 (Civil Partnerships on Religious Premises)

I. Introduction and Executive Summary

- Mark Hill QC has written an opinion in connection with submissions by three conservative evangelical organizations to the House of Lords Select Committee on the Merits of Statutory Instruments. The opinion states that the organizations' members will be exposed to litigation for refusing to conduct civil partnerships unless the disputed Regulations are annulled.
- This Opinion is surprising in the light of statements on the face of the Equality Act, of the Regulations, and by the Minister responsible in the Lords debate on the relevant section of the Equality Act, that nobody will be required to conduct civil partnership ceremonies against their conscience, and that the right to conduct such ceremonies on religious premises will be available only to those faith communities which opt in.
- The Opinion relies on an incorrect interpretation of the leading *Aston Cantlow* case, whose main finding was exactly opposite to that highlighted in the opinion. Under *Aston Cantlow*, a Church of England parish is not a public authority. Therefore it does not have the duty of equal treatment of same-sex and opposite-sex partners.
- The Islington registrar case (*Ladele v. London Borough of Islington*) is therefore irrelevant, as Islington Council is a public authority.
- The Opinion's final paragraph contains two contradictory statements: that almost no faith communities so far wish to opt in, and that the objectors face extensive litigation. If there is almost no opting-in, there can be no grounds for extensive litigation.
- Baroness O'Cathain's motion would have the effect of annulling Section 202 of the Equality Act 2010, which was carried in the House of Lords by 95 votes to 21 and in the House of Commons without a division.
- The Act was enacted by the Labour government. The disputed Regulations have been issued by the Coalition Government. Section 202 has therefore been supported by all three of the largest parties in each House, and the regulations submitted to Parliament should go into effect.

II. The Equality Act

In 2010 Parliament passed the Equality Act (c. 15) (the Act), which (*inter alia*) modified certain provisions of the Civil Partnership Act 2004, removing the prohibition on registering civil partnerships in religious premises. The provisions relating to civil partnerships were introduced in proposed amendments to the Act by Lord Alli (Waheed Alli) in the House of Lords, and that body approved them on 2 March 2010. (HL Deb (2009–10) vol. 717, c 1425–1441) One modification made after the amendment was introduced added the following provision:

For the avoidance of doubt, nothing in this Act places an obligation on religious organizations to host civil partnerships if they do not wish to do so. (s. 202(4)(3A))

During the debate on the amendment on 2 March, despite the late hour, numerous prominent peers were present including Lord Tebbit (Norman Tebbit), the Earl of Shrewsbury, the Duke of Montrose, Lord Eames (Robin H.A. Eames) and the former Bishop of Bradford (David James), all of whom voted Not Content. Nevertheless, the amendment passed by a wide margin (95–21). Although the government minister, Baroness Royall of Blaisdon (Janet Royall), expressed reservations before that vote, when the amendment was approved on Third Reading, she was more sanguine:

I made it clear during the debate on Report that, while the Government were sympathetic to my noble friend's intentions, the amendment he had tabled did not entirely achieve what he had hoped for. The amendments we are considering here are welcome additions to the provision, addressing many of the concerns I raised. (HL Deb (2009–10) vol. 718, c 870 (23 March 2011))

The House of Commons accepted the amendments on 6 April 2010, and the bill received the Royal Assent on 8 April. When the bill was before the House of Commons, the Solicitor General in the then-Labour government (Vera Baird QC) said that despite earlier drafting questions, '[O]nce the other place had made it clear that it intended the amendment to be accepted, we assisted to make sure that it would be effective.' (HC Deb (2009–10) vol. 508, c 929)

Following the ensuing general election, which brought the Conservative-Liberal Democrat coalition into government, in March 2011 the Government Equalities Office (GEO) published a consultation document, which sought public advice concerning regulations that were to be promulgated under the Act. (Civil Partnerships on Religious Premises: A Consultation) Thus governments including all three of the major parties in the UK have recognized the value of promoting the policy behind the Alli amendment. The GEO received 1,617 responses to the consultation, 343 on the official *proforma*, of which 145 were from organizations as diverse as the Oxfordshire County Council Registration Office, the Trades Union Council, the North West Liberal Party; and religious groups from traditions and political positions as different as the Church of England; Anglican Mainstream; Changing Attitude; Paulsgrove, Salisbury and Waterlooville Baptist Churches; the British Humanist Association; the Reformed Church Caucus; Lesbian and Gay Christian Movement; and the Jewish Gay and Lesbian Group.

After considering the evidence carefully, the GEO has laid regulations before the House of Lords that protect religious freedom. Paragraph 1.09 of the Summary of Responses to the Consultation states,

The proposals were designed to put in place a regime that ... protects faith groups and individual ministers from the risk of successful legal challenge if they do not wish to host civil partnership registrations.

Paragraph 1.10 of the same document continues,

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 organization to seek approval for its religious premises to host civil partnership registrations.

Those regulations are to be debated 15 December 2011.

III. The Regulations

The proposed Marriages and Civil Partnerships (Approved Premises) (Amendment) Regulations 2011 (the Proposed Regulations), published by the GEO, amend the Marriages and Civil Partnerships (Approved Premises) Regulations 2005 (SI/2005/3168) (the 2005 Regulations) to insert the following regulation 2B after regulation 2:¹

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.

In order to obtain approval of religious premises to be used to register civil partnerships, the Proposed Regulations require that a religious organization must consent. (Proposed Regulation 3A(2)(c)) Some religious organizations potentially affected by the regulation have already designated the party that must consent: they are listed in Schedule A1 to the Proposed Regulations. For example, the Church of England has specified its General Synod, and the Roman Catholic Church has designated the General Secretary of the Catholic Bishops' Conference of England and Wales. An application made by a proprietor or trustee of religious premises must include the required consent, and if the building is subject to a sharing agreement, all parties must consent. (Proposed Regulation 2D) Proposed Regulation 3A(3) requires the applicant to 'provide the authority with such additional information as it may reasonably require in order to determine the application'. Regulation 4 of the 2005 Regulations is amended to require publication of applications, either in a newspaper of general circulation or on the authority's web site, along with the required consent. The published notice must state that 'any person may give notice in writing of the objection to the grant of approval, with reasons for the objection, within 21 days from the date on which the notice is published in the newspaper or on the authority's website'. (Proposed Regulation 4(b)(ii)(c))

¹ References to the Proposed Regulations are to the new regulations that will become a part of the 2005 Regulations upon the Proposed Regulations' coming into effect.

IV. Objections to the Regulations

The 43rd Report of the House of Lords' Merits of Statutory Instruments Committee (the Committee) has drawn the special attention of that body to objections to the Proposed Regulations. The report states that the Summary of Responses 'suggested that the principle of the [Proposed Regulations] is contentious'. The Committee received submissions from the Evangelical Alliance, The Christian Institute and CARE (Christian Action Research and Education). All three of these submissions either closely track or explicitly incorporate an opinion dated 8 November 2011, also submitted to the Committee, by Mark Hill, QC, Honorary Professor of Law, Centre for Law and Religion, Cardiff University (the Opinion). Those objecting to the Proposed Regulations will be referred to collectively as the Objectors.

The Objectors criticize the Proposed Regulations generally, claiming that they fail to protect the sensibilities of faith groups, fail adequately to protect the consciences of individual ministers, and fail to respect the different decision-making structures of denominations other than, for example, the Church of England and the Roman Catholic Church. Specifically, the Objectors argue:

- That the public sector equality duties will apply to churches and/or ministers, imposing a requirement that they, functioning as public authorities (or on their behalf), host civil partnerships despite their unwillingness to do so;
- That local authorities, in pursuance of their obligation to eliminate discrimination and promote equality, will refuse to license premises for marriages unless the premises are also licensed for civil partnerships;
- That individual trustees will license premises without the consent of the minister and/or congregation occupying them, and that trustees of a certain church may disagree amongst themselves concerning whether to register premises;
- That defects in the Proposed Regulations will lead to 'long and costly litigation for faith groups and individual resident or officiating ministers in circumstances where the number of religious organizations which have evinced an intention to avail themselves of this statutory instrument is miniscule'. (Opinion, para. 21)

For all of the following reasons, the Objectors' arguments are fundamentally misplaced.

V. Responses to the Objections

A. Religious Organizations Are Protected by the Equality Act 2010.

The public sector equality duties, which Objectors claim will require them to host civil partnerships, are set out in section 149 of the 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.

Religious organizations are protected by broad exceptions to the Act enumerated in paragraph 2, Schedule 23, which Objectors concede applies to them. Faith groups do not contravene Part 3 (the public sector equality duties) by restricting ‘the use or disposal of premises owned or controlled by the organization’. (Schedule 23, para. 2(3)) Moreover, a minister does not contravene these parts of the Act by restricting ‘the provision of goods, facilities or services in the course of activities carried on in the performance of the minister’s functions in connection with or in respect of the organization’. (Schedule 23, para. 2(5)(b)) These exemptions are available for restrictions based upon sexual orientation ‘to avoid conflict with strongly held convictions’ which are held by ‘a significant number of the religion’s followers’. (Schedule 23, para. 2(7)(b), 2(9)(a))

While Objectors further concede that the provision exempting the use or disposal of premises might apply to their refusal to host civil partnerships, they claim that once they are acting on behalf of a public authority the exemption no longer applies. (Opinion, para. 13) However, paragraph 10 of the Schedule disapples the exemption with respect to sexual orientation *only if* the organization acts on behalf of a public authority *and* ‘under the terms of a contract between the organisation and the public authority’. Nothing in the Proposed Regulations contemplates that any *contractual* relationship will exist between religious organizations that host civil partnerships and the public authority. Therefore, the Act exempts faith groups that meet its other requirements. Moreover, while the Objectors argue that the exemption does not apply to ministers (Opinion, para. 13), individual ministers enjoy the same personal exemption that religious organizations do under paragraph 2(5) of the Schedule, with regard to the provision of goods and services.² Finally, while the Opinion implies that the GEO has furtively narrowed the scope of protection from ‘faith groups and individual ministers’ to ‘religious organizations’ between issuance of the consultation document and the summary of responses (Opinion, para. 3, 18), both phrases appear in the summary of responses and are quoted above.

Exemptions of this kind are, as Mr Hill agrees, well known in English law. (Opinion, para. 19) In his definitive work on ecclesiastical law, he writes, ‘[A] priest is relieved of his duty to marry those who are entitled by law to be married in his church if one or both of the intended parties has been divorced and his or her partner is still living.’ (Mark Hill, *Ecclesiastical Law*, 8th ed. (Oxford University Press, 2001), para. 5.46). A footnote continues, citing the Matrimonial Causes Act 1965, s. 8(2)(a),

[The Act] creates a permissive right entitling him lawfully to decline if his conscience so dictates. He may also refuse to allow his church to be used for such a purpose [despite its being available for other

² Objectors assert, without arguing, ‘Marriage services do not constitute “activities undertaken” nor “services in the course of activities undertaken” by a church.’ (Opinion, para. 13) Marriages by ministers in non-established denominations (at least) cannot *prima facie* be excluded from these protected categories, as they are activities undertaken by the minister in the performance of the minister’s functions. Objectors (understandably) do *not* argue that the Act requires them to perform same-sex marriages, although that would be an implication of the narrow interpretation of Schedule 23, section 2 that they postulate.

marriages] ... A capricious refusal, not based upon a conscientious objection, might be actionable under the Human Rights Act 1998.

The relevant provision is far less clearly worded than the protections afforded by the Proposed Regulations, yet it has protected the consciences of Anglican churches for decades.

The Church of England has long been permitted to allow clergy to refuse to marry individuals who would otherwise have a right to be married and to refuse to allow their premises to be used for the same purpose; even more robust protection, afforded to all churches in England and Wales by the Proposed Regulations, offers sufficient, general protection for the consciences of ministers, members of their congregations, and members of their denominations as well.

B. Religious Organizations and Faith Groups Are Not Public Authorities: Neither Religious Groups Nor Ministers Can Be Required to Host Civil Partnerships.

The Objectors rely upon *obiter dicta* from a single judge in *Aston Cantlow & Wilmcote with Billesley Parochial Church Council v. Wallbank* [2003] UKHL 37 to support their claim that clergy may be performing a public function when performing a marriage, implying that similar duties may attach to hosting a civil partnership. (Opinion, para. 8) The holding of that case, however, is quite different: Church of England parochial church councils are not public authorities. (*Aston Cantlow*, para. 14–16) Admittedly, the leading opinion of Lord Nicholls of Birkenhead describes the function of the Church of England in performing marriages, as well as burials, as ‘functions which may qualify as governmental’. (*Id.* at para. 13, 16) However, first, the law respecting marriage in the Church of England is different from that respecting non-established churches. Assuming certain legal requirements are met, ‘it is generally understood that there is a right to be married in one’s parish church’. (Hill, *Ecclesiastical Law*, *supra*, para. 5.35; Jacqueline Humphreys, ‘The Right to Marry in the Parish Church: A Rehabilitation of *Argar v. Holdsworth*’ 7 *Eccl. L.J.* 405 (2004)) No such right exists with respect to non-established religious organizations; therefore, even the dictum is applicable only to the Church of England.

Second, and more importantly, the Proposed Regulations require a faith group to opt in, in order to be authorized to host civil partnerships. The fact that a faith group provides one such function (say, burials) does not imply that it should be required to provide others (such as solemnizing marriages or hosting civil partnerships). Objectors attempt to evade this conclusion by claiming that local authorities ‘could ... be constrained by [the] public sector equality duty from registering places for the solemnization of marriage unless and until the proprietors of that place had sought and obtained approval for the registration of civil partnerships’. (Opinion, para. 11, emphasis supplied) However, the hypothetical is strained. One of the most important bases for the court’s holding in *Aston Cantlow* that the parochial church council was not a core public authority within the meaning of section 6 of the Human Rights Act 1998 was the fact that a public authority ‘does not itself enjoy Convention rights’ under the European Convention on Human Rights. (*Aston Cantlow*, para. 8) Certainly, if anybody can claim rights under Article 9 of the ECHR, which provides, ‘Everyone has the right to freedom of thought, conscience and religion; this right includes ... freedom, either

alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance,' then religious organizations, ministers and congregations can do so. Indeed, protection of these rights is unquestionably the reason for the inclusion of Schedule 23, paragraph 2 in the Act in the first place. Doctrines concerning marriage, divorce and sexuality are core to many religions' doctrines and teachings: Objectors' arguments are squarely based upon this premise. Any effort by local authorities to link performing marriages with hosting civil partnerships would almost certainly be in derogation of the rights protected by Article 9.

Nor does *Ladele v. London Borough of Islington* [2009] EWCA Civ 1357 lead to a different conclusion. In *Ladele* the registrars, who were employed by a public authority, were required to officiate both at civil marriages and civil partnerships as a part of their jobs. Ms Ladele refused to officiate at civil partnerships, and she was subject to discipline. Religious premises subject to the Proposed Regulations may, but need not, be approved as premises for the conduct of marriages. (Proposed Regulation 2C; see also Julian Rivers, *The Law of Organized Religions: Between Establishment and Secularism* (Oxford University Press, 2010), pp. 186-187) As with the supposed risk that local authorities could require premises to be approved to host civil partnerships as a condition for being approved for marriages, the Objectors conflate two independent functions, performing marriages and hosting civil partnerships, in an effort to confuse two, independent duties. No religious organization is required, either by the Act or by the Proposed Regulations, to host civil partnerships unless it applies to do so. Only then do any duties under the Act attach: for example, a religious organization authorized to host civil partnerships would not be permitted to restrict that function to couples of one gender.³ (Act s. 29(1))

Finally, while the Objectors point to the Scottish Government's consultation document, 'The Registration of Civil Partnerships [and] Same Sex Marriage, A Consultation' (Opinion, para. 12; submission by CARE, section 1) and argue that it offers 'advice' that the Act must be amended to protect religious bodies and religious celebrants, statements in the Scottish consultation apply in Scotland, not in England. As the consultation document points out (para. 2.19), the jurisdictions have different approaches to authorizing marriages: in England, the focus is on approving the *premises* where the marriage is to take place; in Scotland, the focus is on the *officiant*.

Baroness Royall put the question succinctly during her speech on Third Reading in the House of Lords:

It is unlawful to conduct civil partnership registrations on premises that are not approved for that purpose. It is not possible to bring a claim for discrimination for failing to do something which is unlawful. There is no obligation on the controllers of religious premises to get them approved, and since seeking approval is neither the provision of a service nor a public function, for the purposes of the

³ Objectors rely upon an 'open' letter to the Prime Minister, which was published in the LGBT press to demonstrate the reality of this threat. ('Tory MP Calls for Churches to be Banned from Holding Marriages If They Refuse Gay Couples', *Pink News* (2 September 2011) (online 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/>) A single MP's proposal is not sufficient to raise a colourable claim that the law could require, or even permit, councils to impose such a burden on religious groups.

Equality Bill, there is no scope for a claim for discrimination being brought for failing to do so. (HL Deb (2009–10) vol. 718 c 871 (23 March 2011)).

C. The Law Need Not Offer Additional Protection for Multiple Trustees of Religious Premises Or For Other, Intra-denominational Disputes.

Objectors also argue that trustees of church property, including religious denominations, may seek authorization to host civil partnerships in the face of strong objections from the local congregation and minister. The scenarios imagined by the Objectors under this head take a number of forms. Under one scenario, the minister is ‘unwell [or] on sabbatical’, and he or she returns to find that authorization to host civil partnerships has been applied for and granted, and the only recourse is to seek judicial review of the local authority’s decision. (Opinion, para. 18) Under a second scenario, a single, rogue trustee applies for authorization without giving notice to the other trustees. (Opinion, para. 15) The third scenario involves battling trustees, whose dispute must be moderated by the local authority, embroiling the authority in an adjudication concerning religious doctrine.⁴ (Opinion, para. 15) None of these speculations is unresolved by the Proposed Regulations, at least insofar as is possible under English law.

As Objectors point out, ‘Faith groups do not have legal personality or juridic personality as such.’ (Opinion, para. 17) Instead, the long-standing approach to the legal status of these organizations has been to focus on the proprietors or trustees who hold legal title to church property. (Rivers, *The Law of Organized Religions*, *supra* c. 3) The Proposed Regulations offer the trustees constructive notice (Proposed Regulation 4(1)), and the local authority has the power to require an applicant to provide ‘such additional information as it may reasonably require in order to determine the application’. (Proposed Regulation 3A(3)) Thus, even if some trustees remain ignorant of an application, because no one has noticed its publication (along with the ‘required consent’ of the rogue trustee), the local authority should be sufficiently cautious, if the religious group is not one listed in Schedule A1, to require a copy of the trust deed under which the property is held. Failing that, the remaining trustees will certainly have a claim against the rogue trustee based upon his or her wrongful conduct.

Nevertheless, Objectors argue, the Proposed Regulation concerning consent ‘crucially omits from even this purported protection the resident or officiating minister’.⁵ (Opinion, para. 19) However, the objection misinterprets the law concerning marriage, which is carefully tracked by the Proposed Regulations. Since the time of the Marriage Act 1836, 6 & 7 Wm. 4 c. 85, the primary focus has been on *where* marriages were solemnized rather than on *who* solemnized them. (See also Marriage Act 1949, c. 76, s. 41) Just as with the registration of civil partnerships, ‘Any proprietor or trustee’ may apply for registration of a building for the solemnization of marriages. While the solemnization of marriages may not be as divisive as hosting civil partnerships for the religions and denominations involved, it would be discriminatory in the extreme for the

⁴ The Evangelical Alliance also raises concerns about premises that are jointly owned. That situation is addressed explicitly in Proposed Regulations 2D(8) and 3A(2)(c).

⁵ On this point see also the argument accompanying footnote 2, above.

Proposed Regulations to impose more stringent requirements on faith groups that wanted to register for the latter than are imposed on those who engage in the former.

This point leads to the crux of Objectors' arguments under this heading. They claim that either the trustees may be divided or that 'faith groups and individual or officiating ministers' may be involved in 'long and costly litigation'. (Opinion, para. 21; see also Submission by the Evangelical Alliance: 'It is highly likely that the Government's proposals would open up deep internal divisions in many denominations. A situation could easily come about where the secular courts end up adjudicating on the theological issues involved.') But it is not up to the government to avoid making rules that might cause internal dissension *within* a denomination. English law has a long history of dealing with such dissension,⁶ and the potential for one or another, or even several, religious organization to experience internal strife is no good cause to refrain from offering other religions or denominations the option of hosting civil partnerships, when doing so has broad political support, including the support of the three largest parties in the nation.

VI. Conclusion

The final paragraph of the Opinion contains the following statement, which is most revealing of Objectors' position:

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 organizations which have evinced an intention to avail themselves of this statutory amendment is miniscule.

If the first statement is true, and there is to be 'long and costly litigation', then who is to bring it, since no one cares about hosting civil partnerships? If the latter is true, then how could such a 'miniscule' number of religious organizations bring about the litigation that the Objectors fear?

From a more general point of view, the Objectors' position becomes clearer. Rather than objecting to the Proposed Regulations, which offer all the protection available to faith groups, denominations, individual ministers and congregations, which is available under the existing regime for licensing religious premises for conducting marriages, Objectors wish section 202 had never been passed in the first place. They want a second chance to defeat the principle of the Alli amendment. In order to accomplish this, they have used every effort to identify problems with the regulatory regime that cannot be solved without a complete overhaul of English marriage law, as well as the Equality Act itself. Rather than offering constructive suggestions for modifying the Proposed Regulations, which the GEO could incorporate into its regime, they have put the perfect (in their view) in the way of the possible.

Neither the GEO nor the legislature should cave in to these efforts. The regulatory scheme proposed and submitted to the legislature offers every protection to the Objectors which is available under English law and applicable human rights and equality laws. They should be permitted to go into force as planned.

⁶ See, e.g., *General Assembly of the Free Church of Scotland v. Lord Overtoun* [1904] AC 515, 1904 F (HL) 1; *Varsani v. Jesani* [1999] Ch 219; and see generally Julian Rivers, *The Law of Organized Religions*, *supra* c. 3.