Human Rights Implications of the Marriage (Same Sex Couples) Bill: Advice to the Catholic Bishops' Conference of England and Wales

I. Introduction

1. I am instructed by the Catholic Bishops' Conference of England and Wales ('CBCEW'[1]) to advise on human rights issues that arise under the Marriage (Same Sex Couples) Bill ('the Bill'), in the form reported to the House of Commons by the Bill Committee, and to suggest appropriate amendments to meet any human rights concerns. I am asked, in particular, to provide written advice concerning the effect of the Bill on the religious freedoms of the Catholic Church, Church-related institutions and bodies, and individuals, as well as issues of religious discrimination that may arise. To avoid unnecessary repetition, I refer to the Catholic Church in what follows simply as 'the Church.'

2. I am instructed that the aim of the CBCEW in requesting this advice is to enable the CBCEW to contribute constructively and in an informed manner to the public debates on the human rights compatibility of the proposed legislation so that Parliament may take its views into account when debating the legislation at Report and Third Reading in the House of Commons, and subsequently in the House of Lords. I have been instructed that the CBCEW may choose, therefore, to make this advice public.

3. I am instructed to review the Bill's compatibility in these respects not only with the European Convention but also with other relevant UK international and EU human rights obligations. I have been asked to advise on whether the legislative provisions present a risk of incompatibility with these human rights provisions, or, if no risk is present, whether they nevertheless raise human rights concerns. In what follows, therefore, I am not primarily concerned to identify breaches that I consider *certain* to occur. I am concerned to identify, rather, whether there are sufficiently *credible*

[1] The Catholic Bishops' Conference of England and Wales is the permanent assembly of Catholic Bishops and Personal Ordinaries in the two member countries. The membership of the Conference comprises the Archbishops, Bishops and Auxiliary Bishops of the 22 Dioceses within England and Wales, the Bishop of the Forces (Military Ordinariate), the Apostolic Exarch of the Ukrainian Church in Great Britain, the Ordinary of the Personal Ordinariate of Our Lady of Walsingham, and the Apostolic Prefect of the Falkland Islands.

risks resulting from the passage of the Bill in its current form for Parliament to be asked to address them.

4. This advice takes into account the letter that the Secretary of State sent to Archbishop Smith, dated 1st February 2013, the Bill Committee debates, in particular the assurances given by the Ministers responsible for the Bill in Committee, and the DCMS's 'Marriage (Same Sex Couples) Bill: Note for the Joint Committee on Human Rights (February 2013)' ('the Note for the JCHR').

5. Whilst the opposition of the Church to the principle of the Bill (that the definition of 'marriage' in civil law should be extended to include 'same-sex marriage') is well known, the House of Commons has, by a majority, now accepted this principle. I have, therefore, been instructed to suggest amendments that are good faith efforts to address concerns over the human rights implications of the Bill as it is currently drafted, rather than to suggest amendments that would question the principle of the Bill.

II. Summary

6. The specific human rights concerns identified subsequently fall, broadly, into four categories:

(1) Religious freedom not to solemnize same-sex marriages

This issue raises questions under Article 9 ECHR (freedom of religion), and Article 14 ECHR (freedom from religious discrimination) read with Article 9. My advice is that the protection from '*compulsion*' in Clause 2(1) and 2(2) is unclear. Without further explanation on the face of the Bill, religious organisations will be at risk of unfavourable treatment by public authorities, and other legal action (such as judicial review) if they decide not to opt-in to providing same sex marriages. This risk is particularly acute given that (as will often be the case) marriages conducted in Catholic Churches also constitute valid marriages for legal purposes.

(2) Religious freedom in education

This raises issues under Article 9 ECHR and Article 2 of Protocol 1 (right to education in accordance with the religious preferences of parents). My advice is that unless protections for religious schools are built into the Bill, religious schools may be required to promote or endorse same sex marriage by reason of current and/or future guidance from the Secretary of State. This issue arises because the change in the definition of marriage will effectively amend the Secretary of State's powers in this respect.

(3) Registrars and conscientious objection

This raises issues under Article 14 ECHR, and (separately) EU Directive 2000/78 EC, read with the EU Charter of Fundamental Rights. My advice is that registrars who have a conscientious objection, based on a genuine religious or other belief, that only opposite sex couples can marry, should be able to remain as registrars without being required to conduct same sex marriages to which they object, provided this protection only operates as long as there are enough registrars in the area to cope with the demand for same sex marriage, thus providing a balanced way of protecting both the rights and freedoms of registrars and those of same sex couples.

(4) Freedom of expression of those who oppose same sex marriage

This raises issues under Articles 10 ECHR (freedom of expression) by itself, and read with Article 14, and Article 9. My advice is that individuals should be protected, on grounds of freedom of expression, from actions for unlawful discrimination under the Equality Act 2010, and from the threat of criminal sanctions under the Public Order Act when discussing or criticizing same sex marriage in a reasonable and proportionate way.

III. Meaning and implications of 'freedom of religion and belief'

7. Each of these issues raises detailed and complex questions of law and legal practice. These differ from issue to issue; in particular, each raises questions concerning the drafting of different parts of the Bill and their interaction with domestic and

European Convention and (in one respect) EU human rights law. Despite these differences, there is a common underlying issue of legal principle that binds these issues together: how far should those who oppose same sex marriage on the grounds of religious or other beliefs be effectively removed from taking part in, or be silenced when engaging in, activities in the public sphere?

8. Since many of the detailed concerns, as set out above, involve issues of freedom of religion and belief, and since public discussion surrounding the Bill indicates, I am instructed, that there are differing understandings of what freedom of religion requires, it will be helpful if I clarify initially what I understand freedom of religion means, understood legally, and what it requires from the state. This understanding of the idea of freedom of religion is informed by, but not limited to, judicial interpretations of Article 9 of the European Convention on Human Rights ('ECHR'). The European Court of Human Rights (ECtHR) is one of several sources of legal requirements regarding freedom of religion, but there is also a growing corpus of judgments from the CJEU.

9. There are three aspects of the legal concept of freedom of religion and its relationship to the public sphere. First, religion is as an aspect of an *individual's* identity and belief system. Freedom of religion and belief, in this sense, is conceived to be an individual human right; the primary legal issue is how far the choices that an individual makes, based on this set of religious beliefs, are protected or constrained by law. Freedom of religion and belief, in this sense, encompasses two elements: the freedom to believe or not to believe what a religion teaches, and the freedom to manifest or not to manifest that belief in certain actions.

10. Religious freedom also has a second associational (or 'institutional') dimension. Freedom of religion and belief in this sense involves the freedom of individuals to come together in formal or informal ways, to practice their religion in common with each other, and to manifest their beliefs collectively. This relationship might (or might not) be formalized by the formation of a church. Seen in human rights terms, the issue becomes one of what rights the religious community or association or church has, when it acts in a way that impinges on, or operates in, the public domain.

11. There is also a third aspect of freedom of religion and belief: 'freedom *from* religion and belief', or at least freedom from a set of religious *and other beliefs* imposed as an

exercise of state authority. Churches should not seek to impose their religious views on others through the exercise of state authority; theocratic states are widely considered to be contrary to contemporary understandings of freedom of religion. Equally, the state should not seek to impose its beliefs on those who hold contrary beliefs, or on individuals who dissent from the state's policies, unless there are strong reasons (such as harm to others) justifying this imposition.

12. None of these features of freedom of religion and belief is absolute. This is true in two senses. First, other aspects of the public good will play a legitimate role in limiting freedom of religion in particular respects. Second, the three aspects of freedom of religion identified may, on occasion, conflict with each other, and compromises will therefore be necessary.

13. Broadly, two different models of accommodation are possible. Under the first approach, religion is present in the public as well as private spheres of activity, and is even to some extent encouraged in the public domain, not least because religious belief is seen as making an important contribution to public debate and public discourse, but there is a broad tolerance accorded to other viewpoints. The first approach is pluralistic, and based on tolerance of dissenting views.

14. The second approach views the purpose of freedom of religion and belief as essentially only there to protect private choices operating in the private sphere, and views the participation in the public sphere of religions, and those who are religious, with suspicion, particularly where they seek to manifest beliefs that are contrary to a dominant (or emerging) social consensus.

15. The European Court of Human Rights ('ECtHR') has made clear that, under the ECHR, the first, 'pluralistic,' approach is the basic approach that States should aim to achieve. In its foundational Article 9 case, *Kokkinakis v Greece* (1994) 17 EHRR 397, at para 31, the Court framed freedom of religion as follows:

> *'freedom of thought, conscience and religion is one of the foundations of a "democratic society" within the meaning of the Convention. It is, in its religious dimension, one of the most vital elements that go to make up the identity of believers and their conception of life, but it is also a precious asset for atheists, agnostics, sceptics and the unconcerned. The pluralism indissociable from a democratic society, which has been dearly won over the centuries, depends on it.'*

This adoption of pluralism as the guiding standard has important implications for the

role of the State. The Grand Chamber stated in *Sahin v Turkey* (2007) 44 EHRR 5, at para 107:

> '*the Court has frequently emphasised the State's role as the neutral and impartial organizer of the exercise of various religions, faiths and beliefs, and stated that this role is conducive to public order, religious harmony and tolerance in a democratic society … [T]he role of the authorities … is not to remove the cause of tension by eliminating pluralism, but to ensure that the competing groups tolerate each other*' (emphasis added).

Public authorities, therefore, should not "*remove the cause of the tension by eliminating pluralism*" simply preferring one belief rather than another where they clash.

16. There is a final important aspect of both Article 9 and Article 14 read with Article 9 that has important implications for human rights assessments of the Bill. Both Article 9 and Article 14 involve two broad sets of obligations on the state: a *negative* obligation that the state should not itself abridge these rights (this would include where, for example, the courts are the source of the breach by imposing obligations on religious organisations that are contrary to Article 9), and (by analogy with the positive obligation on the state under Article 10, *Platform 'Ärzte für das Leben',* (1991) 13 EHRR 204 and Article 14, *Belgian Linguistics Case,* (1979-80) 1 EHRR 251), a *positive* obligation on the state to ensure that others (including private parties) do not abridge these rights. States have a positive obligation to ensure that others do not abridge the rights of religious organisations, and to take practical measures of protection required by the situation to protect such organisations.

17. The underlying approach that should be adopted in any human rights scrutiny of the Bill concerned with the right to freedom of religion, in the senses identified above, is how far the Bill advances or retards the '*pluralism*' of values in the British public sphere. My advice is that in the four respects identified in paragraph 6 above, the state will not meet its positive obligation to secure religious pluralism in the public sphere due to the way in which the Bill is drafted, thus raising important human rights concerns which should be brought to Parliament's attention.

IV. The European Convention of Human Rights and the Bill

18. The European Convention on Human Rights plays two different roles in the context of discussions on the Bill. First, it establishes the principle that freedom of religion is an important human rights concern that States should take seriously, and further

establishes that States' obligations regarding freedom of religion should be seen as centrally concerned with ensuring pluralism and tolerance in the public sphere for protected beliefs: the Convention sets the standard that States should aim to achieve.

19. The Convention plays an important additional role in the discussion of the Bill: providing a set of detailed rules (mostly derived from interpretations of the ECtHR) which are available to be used in litigation. These rules are relevant in two different ways: in the context of litigation against the United Kingdom before the Court in Strasbourg, and in the context of litigation in United Kingdom courts under the Human Rights Act, where the ECtHR's jurisprudence is highly persuasive, if not determinative.

20. In both ECtHR and domestic judicial contexts, the relevance of the Convention rules to the Bill is twofold. On the one hand, the Convention (particularly Article 9) may be seen as establishing a shield, providing protections for freedom of religion and belief that complement the protections inserted in the Bill (such as the 'quadruple locks'). On the other hand, the Convention, particularly Articles 8 and 12, taken alone and/or in combination with Article 14, may be used as a sword to attack protections for freedom of religion that the Bill seeks to incorporate because they have gone 'too far'. I address both these issues below when dealing with specific issues, but here I seek to explain the general approach to these issues taken by the ECtHR.

21. Turning to the role of Article 9 in providing necessary protection for freedom of religion, the Secretary of State has consistently argued that Article 9 of the ECHR will serve as a strong protection of the Church's and individual's freedoms of religion and belief. I disagree. The problem in deciding between these different views is that, as the "Note to the JCHR" itself admits, at para 35, '*the ECtHR did not consider (and indeed has never done so) the issue of religious marriage ceremonies for same sex couples*.' In other words, in assessing possible risks, there is often a dearth of legal rules deriving from the Court's jurisprudence on which to rely. *In practice*, Article 9 has proven to provide very weak protection in analogous contexts, both when applied by the ECtHR, and (as a consequence) when being applied by British courts under the Human Rights Act. There is an important gap, therefore, between the *standards* identified by the Court (such as the importance of pluralism) and the

extent to which the Court is willing to impose those standards on States through the development of specific *rules*.

22. The weakness of Article 9, in practice, lies in: (a) the narrow approach that the ECtHR has taken to the interpretation of what a protected '*manifestation'* of religion covers; (b) the uncertainty over what views are to be regarded as acceptable in a democratic society and consistent with human dignity; and (c) the extent to which freedom of religion and belief is often ranked as significantly less weighty than other rights when it comes into apparent conflict with them.[2] When claims are made, therefore, that Article 9 provides strong practical protections (as opposed to important principles), my advice is that these claims should be taken with a large pinch of salt, unless 'freedom of religion' is interpreted very narrowly indeed, effectively protecting religion (and religious institutions and individuals) only when they have been relegated to the private sphere of activity.

23. The European Convention on Human Rights provides, therefore, an important standard with which the United Kingdom must comply, but the detailed ways in which that standard is to be achieved are frequently uncertain. Parliament clearly has a responsibility to comply with the rules that the Convention requires, but it also has a responsibility to consider whether British law should go further in certain respects than the Court in Strasbourg may require in order to meet the required standard. The ECtHR has consistently stated that clear and proportional choices as to how to secure the pluralistic principle of freedom of religion should be made at the national level, which may then be subject to scrutiny by the Court. The more that states, such as the United Kingdom, suggest that the '*margin of appreciation'* should apply, the greater the obligation that hard choices are confronted initially at the national level, rather than left to Strasbourg, where the protection in practice is weak.

24. I turn now to the issue of whether the Convention can be used to attack the protections incorporated in the Bill for religious freedom. The area of human rights law has been one of the most dynamic and fluid areas of legal development in Britain, and in Europe generally, not least over the past fifteen years. This is because both the British and European courts consider human rights law to be a '*living tree'*,

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[2] *See, e.g.* Lewis, ICLQ (2007) 56(2) 395 at 398*: 'the margin granted to States when restricting … consensual homosexual conduct in private (under Article 8) has been much narrower (and hence the intensity of scrutiny and level of protection afforded by the Court has been higher) than in cases involving religious manifestation and expression (under both Articles 9 and 10).*'

the interpretation of which develops over time to accommodate changing mores. What may appear, therefore, to be '*inconceivable*'[3] interpretations of human rights and equality law are unlikely to remain so for long, as mores change. Parliament must legislate taking this fact into account, rather than presuming that currently '*inconceivable*' interpretations will continue to be '*inconceivable*'.[4]

25. In its responses in Parliament, the Government has consistently sought to minimize the dynamic nature of Article 14 of the Convention prohibiting discrimination, particularly in the context of claims of discrimination on grounds of sexual orientation. For example, at para 67 of its 'Note for the JCHR', the Government states: '*The ECtHR has consistently held that Article 14 complements the other substantive provisions of the Convention and its Protocols and it has no independent existence*,' seeking to make an argument that Article 14 would not be interpreted to limit the rights of religious organisations. This is misleading: provided the claim is within the '*ambit*' of another Article (such as Article 12, or Article 8), then the claim under Article 14 is, indeed, independent. The Government's interpretation would effectively deprive the Article 14 prohibition of discrimination of any autonomous significance.

26. In short, the Government has sought to play up the strength of protections available under Article 9, and to play down the extent to which the ECtHR has developed Article 14's protections regarding discrimination on the basis of sexual orientation, whilst the reverse would be a more accurate description of the actual practice of the Court.

V. Religious freedom not to solemnize same-sex marriages

27. I am instructed that one of the principal concerns of the CBCEW is that there may be sustained attempts using human rights and equality law to limit the institutional freedom of religion of the Church with respect to its opposition to carrying out same-sex marriages itself. This may occur either directly by challenging any decision by the Church not to opt-in, or indirectly through penalising the Church or Church-related bodies because of the Church's position. This issue raises concerns under

[3] Letter to the Editor, *The Times*, 4 February 2013 (by Baroness Kennedy QC, Lord Lester QC, and Lord Pannick QC). This letter is considered further below.

[4] One example must suffice: in the space of just six years the European Court of Human Rights has moved from considering prohibitions on adoption by an unmarried, homosexual individual not to be a violation of the Convention in *Fretté* v. *France* (26 Feb. 2002) to accepting that it was a violation in *E.B.* v. *France* (22 Jan. 2008).

Article 9 ECHR (freedom of religion), and Article 14 ECHR (freedom from religious discrimination) read with Article 9.

28. The Government has sought to reassure religious organisations that they will not be required under any circumstances to conduct same sex marriages if they object to them, and I am instructed that the CBCEW has welcomed the Government's intention to protect religious organisations.

29. The Secretary of State's commitment to the Church's religious freedom in this context is set out in the *Impact Assessment* that the Government published to accompany the Bill. This states: '*There will be no requirement for any religious body to marry same-sex couples if they do not wish to, nor will there be any requirement for a religious organisation to permit the marriage of same-sex couples on their religious premises, if they do not wish to allow this*.'

30. The statement continues: *'[T]o meet [this] objective …, no religious body will be required to marry or permit the marriage of same-sex couples on its premises if it does not wish to ….*' The *Impact Assessment* goes on to commit the Government to '*ensure that protections are in place for religious bodies who do not want to perform same-sex marriages, not just from successful legal claims, but from the threat of litigation*.'[5]

31. Ministers have provided assurances that these fears are groundless because sufficient protections have been provided in the Bill as drafted to address these concerns. For the reasons that follow, my advice is that the assurances provided by the Secretary of State and by the responsible Ministers in Committee are not yet sufficiently credible for the Church to be assured that these commitments have been met, and that there is therefore a significant issue regarding the adequacy of the protection for freedom of religion.

Protections for religious organisations against 'compulsion'

32. Clause 2 of the Bill sets out one of the main ways in which the Government has sought to protect religious organisations, by providing that religious organisations may not be '*compelled*' to opt-in, and by providing that religious organisations may not be '*compelled*' to conduct same sex marriages. Protection from '*compulsion'* is central to the protection provided for religious individuals and organisations in the

[5] *Impact Assessment, Marriage (Same Sex Couples) Bill, 17 January 2013*, page 5 (emphasis added).

Bill – it constitutes one of the quadruple locks that the Government has so widely publicised.

33. Clause 2, subsections (1) and (2) provide as follows:

> *(1) A person may not be compelled to—*
> *(a) undertake an opt-in activity, or*
> *(b) refrain from undertaking an opt-out activity.*
>
> *(2) A person may not be compelled—*
> *(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.*

34. My advice is that these provisions do not adequately address the problem of how best to protect freedom of religion, because it is unclear what the protection from being '*compelled*' means in these circumstances. There is no definition of '*compelled*' in the Bill. This creates uncertainty and potentially limits the scope of protection that is afforded by the clause. If, as seems likely to have been the case, consideration was given to drafting a definition of '*compel'* but this was rejected because it would be too difficult to capture the full meaning of the term, this would imply that clarifying the uncertainty of the term is left to future litigation. Given the centrality of the concept to the protections for religious freedom incorporated in the Bill, the CBCEW would be justified in concluding that this is an unsatisfactory approach for the Government to take, and provides insufficient protection. For the reasons stated below, it is, arguably, quite limited in the scope of its protection. Clause 2(1), the protection from '*compulsion'* to '*opt-in*', may not, in particular, provide the robust protection promised.

35. The problem in determining the meaning of '*compulsion'* in this Bill is increased by confusion as to whether the term '*compel'* derives from any previous legislation, and if so, which. If it were clear which statutory precedent was used, then that might provide a basis for understanding the meaning of '*compulsion'* in the context of this Bill. Apart from the Civil Partnership Act (in which '*compel'* is used, but with a narrower scope than in this Bill, apparently) the obvious possible source of the word is the Matrimonial Causes Act 1965, section 8(2), in which the word '*compel'* is

used in a somewhat similar context to that in the Bill,[6] with antecedents stretching back several hundreds of years.[7] In Committee, however, the responsible Minister explicitly denied that this was the source from which '*compel*' derived,[8] thus introducing further confusion as to what '*compel*' means. Does it mean the same as in the Matrimonial Causes Act or not?

36. Some members of the Bill Committee appeared to be puzzled why the Catholic Church is dissatisfied with the protections in Clause 2 when the Church of England regards them as satisfactory. It is important to bear in mind that there is a critical difference between the position of the Church of England and all other Churches under the Bill as it now stands. As its Note to the JCHR stated, at para 44, the Church of England '*expressly requested that the Bill should not enable them to opt in*', and for that reason, at para 40, the Bill '*treats the Church of England differently to other religious organisations, which are permitted to opt in to a process for solemnizing marriage for same sex couples*.' The Catholic Church is therefore intensely concerned with the adequacy of the protections provided in Clause 2(1); the Church of England is not, because it is not given any discretion to opt-in in the first place.

37. There are several problems with the protections provided in Clause 2. The limited case law that is available, in which a protection from '*compulsion*' in other contexts has been judicially interpreted, seems to indicate that a protection from '*compulsion*' could be very narrow in scope, essentially only providing protection from the imposition of *criminal* punishment,[9] and this is how the term is primarily used in the Civil Partnership Act 2004 (for example, section 130(2)). The responsible Minister has provided assurances in Committee that the Government intends the Bill to provide greater protection than this. Mr Robertson said this: '*The word "compelled" … not only prevents criminal penalties, but has the effect of preventing any type of conduct that would have the effect of forcing a person to do something protected under that clause.*'[10]

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[6] '*No clergyman of the Church of England or the Church in Wales shall be compelled - (a) to solemnise the marriage of any person whose former marriage has been dissolved and whose former spouse is still living; or (b) to permit the marriage of such a person to be solemnised in the church or chapel of which he is the minister*.'

[7] Lord Hardwicke's Marriage Act 1753 (26 Geo. II. c. 33), section 13: '*No suit shall be in the Ecclesiastical Court to compel a marriage, by reason of any contract.*'

[8] Mr Robertson: '*we have absolutely not borrowed from the Matrimonial Causes Act*', Bill Committee, Seventh Sitting, 28th February 2013.

[9] See, e.g. *V v. C* [2002] CP Rep 8 (Court of Appeal, Civil Division), in which the meaning of compulsion was considered in the context of the privilege against self-incrimination.

[10] Mr Robertson: Bill Committee, Seventh Sitting, 28th February 2013.

38. The Government's intention to provide broader protection than simply protection against criminal punishment is indicated not only by the Minister's statement, but also by the fact that the exception to the Equality Act 2010 incorporated in the Bill, which provides that it is not contrary to section 29 of that Act to refuse to solemnize a same-sex marriage, is headed: '*no compulsion to solemnize etc*' (emphasis added), implying that the Government wishes to protect churches from discrimination complaints if they decide to refuse to solemnize same sex marriages, and that such a complaint would constitute '*compulsion'*. But, in introducing this specific and limited exception to section 29, which I examine further subsequently, the Government has introduced a further uncertainty into the meaning of '*compulsion'*. Simply put, the issue is why it is necessary to have both the exception to section 29, and Clause 2(2). On the one hand, if it is necessary to provide explicitly on the face of the Bill for an exception to section 29, then we have to assume that without such an explicit exception, the protection against compulsion in Clause 2 would not by itself have been enough to ensure protection against section 29. On the other hand, the Minister in Committee said explicitly that '*compel'* in Clause 2 includes the imposition of civil penalties, of the type that an unamended section 29 would give rise to.[11]

39. What the Government intends the protection against compulsion to cover is therefore left unclear. Does the protection against '*compulsion'* protect a religious organisation from being treated less favourably by a public body that objects to the religious organisation's decision not to opt-in? The assurance that the Minister provided on this point is less than clear. Mr Robertson assured the Committee: '*The imposition of any penalties on or subsequent unfavourable treatment of a religious organisation or individual in order to compel that organisation to opt in to same-sex marriage is already unlawful under the Bill as drafted ….'* The Minister also stated that Government intends the protection to have *"the effect of preventing any type of conduct that would have the effect of forcing a person to do something protected under that clause."*[12]

40. Even assuming that the courts accepted this interpretation (which is not certain), several questions arise. Does the protection from '*compulsion'* prohibits less favourable treatment being accorded not only '*in order to compel that organisation to opt-in,'* and not only where the effect is to '*force'* the Church to change its doctrine,

[11] Bill Committee, Seventh Sitting, 28th February 2013.
[12] Mr. Hugh Robertson: Bill Committee, Seventh Sitting, 28th February 2013.

but also where the action is taken simply to penalise that organisation for not opting in? In other words, if a public body did not intend to change the religious organisation's stance, but simply wanted to register its disapproval of that stance, would this be prohibited? An organisation penalised for not opting-in by being denied access to grants, for example, would not necessarily be being '*forced*' to do anything; it would simply be penalised for not opting-in. The Minister gave no assurance that this would be prohibited under Clause 2(1).

41. Does the protection against '*compulsion*' protect a religious organization from other legal action being taken against it in connection with its decision not to opt-in, for example exposure to judicial review of the decision not to opt-in? The Minister refused to give any assurances that it was the Government's intention that such litigation would breach the prohibition against '*compulsion*'. The Minister (Mr Robertson) said this: '*I understand the concerns that unnecessary and misconceived legal actions are unwelcome in any situation. I entirely understand that.*' However, '*no law can, of course … prevent an individual from filing an application with the court.*' Instead, all the Minister was prepared to say was that '*the protections provided to religious organisations and individuals under the Bill as drafted mean that any challenge against a religious organisation or governing body for not opting into conducting same-sex marriages would be bound to fail. (…) The question is whether such a case would succeed. In this case, we are absolutely confident that it would not. The Committee does not have to take our word for it, because that position was supported by both Lord Pannick and Baroness Kennedy.*'[13]

42. There are, however, at least four problems with the Minister's assurances reproduced in the previous paragraph. First, the Minister gives the wrong impression when he says that '*no law can … prevent an individual from filing an application with the court*'. Whilst perhaps technically the case, there are numerous statutory provisions explicitly preventing particular decisions being called into question in any court.[14]

43. Second, the Minister did not deny the likelihood that such litigation was likely; in failing to provide explicit protections against the dangers (which he accepts) of '*misconceived*' litigation, the Minister thereby fails to honour the commitment in the

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[13] Bill Committee, Seventh Sitting, 28th February 2013.

[14] For example, Falkland Islands Constitution Order 2008/2846, Schedule 1; Foreign Compensation Act 1969 c. 20, s. 3; Arms Control and Disarmament (Inspections) Act 1991 c. 41, s. 2; Chemical Weapons Act 1996 c. 6, s. 25; Landmines Act 1998 c. 33, s. 13; Nuclear Explosions (Prohibition and Inspections) Act 1998 c. 7, s. 6; Chemical Weapons (Overseas Territories) Order 2005/854, Schedule 1; Landmines Act 1998 (Overseas Territories) Order 2001/3499, Schedule 1.

Government's *Impact Assessment*, to '*ensure that protections are in place for religious bodies who do not want to perform same-sex marriages, not just from successful legal claims, but from the threat of litigation*.'[15] Instead, the Minister relied on the Court's power to strike out an application at an early stage: '*Should a claim be issued, an application for strike-out could be made at an early stage as there would be no cause for action.*'[16] An application may only be struck out, however, when '*the statement of case discloses no reasonable grounds for bringing … the claim'* (emphasis added).[17] Predicting ahead of time that '*no reasonable grounds'* could be identified on which to base an application seems somewhat over-confident of the Minister, given the speed with which this area of law is changing, as we shall see subsequently.

44. Third, although the Minister claims support for his position from Lord Pannick QC, Lord Pannick said nothing in his evidence to the Bill Committee about whether '*any challenge against a religious organisation or governing body for not opting into conducting same-sex marriages would be bound to fail*' (emphasis added).[18] Lord Pannick's position related to a somewhat narrower issue, and in any event he appeared to be operating under a misapprehension.

45. Lord Pannick addressed the issue of whether a '*complainant who is a member of the Catholic Church, and who says that they wish to enter into a same-sex marriage but are not able to do so under Catholic doctrine'* would succeed in challenging the Church's refusal to conduct such a marriage.[19] Lord Pannick's view was that the correct legal response to such a person (and one he suggested the courts would adopt) was '*that they are perfectly entitled under current English law to have a marriage. What they are not entitled to is a marriage under Catholic doctrine, but that is purely a religious matter*.' This appears to respond to the issue under Clause 2(2), but not the issue under Clause 2(1).

46. In any event, Lord Pannick appeared to be operating under a misapprehension, in that he appears to have failed to appreciate that at the moment many marriages conducted in Catholic Churches are not '*purely … religious'*. They are *also* civil marriages, recognised as such by the state. He also appeared to consider the

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[15] *Impact Assessment, Marriage (Same Sex Couples) Bill, 17 January 2013*, page 5 (emphasis added). Others have also accepted that such litigation is likely: Baroness Kennedy QC, in her oral evidence to the Bill Committee specifically denied that '*there will be no attempts to mount legal actions—I suspect there will*', she said, Bill Committee, First Sitting, 12th February 2013.
[16] Bill Committee, Seventh Sitting, 28th February 2013.
[17] CPR, rule 3.4(2).
[18] Bill Committee, First Sitting, 12th February 2013.
[19] Bill Committee, First Sitting, 12th February 2013.

Church's concern as relating specifically to the position of Church of England ministers, but as we have seen, the issue under Clause 2(1) does not apply to the Church of England. My advice is that Lord Pannick's evidence (which, of course, was not in the form of a detailed legal opinion prepared after due consideration of the opposing arguments, and on the basis of instructions) has been accorded excessive weight by the Government and should not be relied on.

47. Finally, the provisions of Clause 2(1) state that '[a] *person may not be compelled to … undertake an opt-in activity,'* but it is unclear what the mechanisms of enforcement are for this provision. First, who has the right to enforce this provision? It is not framed in terms of a '*person*' (which would include the Church) having a statutory *right* to enforce it. Could the Church seek an injunction against a local authority, based on only the provisions of Clause 2(1), if the local authority sought to withdraw contracts in order to penalise the Church for exercising its discretion not to opt-in? Assuming that it would be interpreted as establishing such a right (which is by no means certain) it is also unclear *against whom* the right is enforceable. Is it enforceable against public bodies only, or against everyone? What if a private firm was pressured into not accepting advertising from the Church in order to register the firm's disapproval? Would that refusal by the firm be actionable by the Church, and if so in what forum? Does Clause 2 create a private cause of action, a form of statutory tort? It is entirely unclear.

48. Instead of relying on the uncertain term '*compel*', and its uncertain status, it would be preferable for this blanket (if uncertain) protection to be supplemented by more targeted protections on the face of the Bill directed at preventing specific, credible risks of unacceptable pressure, in particular pressure to opt-in. An amendment should provide the necessary clarification and thus at least protect religious organisations (a) from all legal penalties – criminal and civil – for deciding not to opt-in; (b) from any other legal actions being taken against them (such as judicial review) for deciding not to opt-in; and (c) by making it clear that public authorities will be acting *ultra vires* if they penalise religious bodies for deciding not to opt-in. It should also provide greater clarity as to the mechanism of enforcement available to religious authorities.

Exception to Section 29 of the Equality Act 2010

49. We have seen that Clause 2(5) inserts an exception to section 29 of the Equality Act 2010 into that Act, and I have advised that in doing so it has introduced further confusion as to the meaning of '*compulsion*'.

50. That problem aside, there are other significant issues that arise from the proposed exception. Broadly speaking, section 29 does two, rather different, things. It prohibits discrimination by a '*service provider*', and it prohibits discrimination '*in the exercise of a public function*'. It is unclear which particular provisions of Section 29 are thought likely to give rise to successful litigation if an exception is not included.

51. It is not made clear on the face of the Bill whether the Government considers it necessary to provide an exception to section 29 because the solemnization of a marriage, etc is regarded as the provision of a '*service*', or because it is considered to involve the exercise of a '*public function*'. The Explanatory Notes do not provide any explanation.

52. The issue is important because the proposed exception to Section 29 of the Equality Act 2010 only applies to the range of activities listed in Clause 2(2), not those listed in Clause 2(1). As to whether an opt-in activity constitutes a service, Mr Robertson stated in Committee: '*a religious organisation's decision whether to opt into conducting same-sex marriages is [not] a service to the public or a section of the public …. For that reason, the decision is not within the scope of section 29 of the Equality Act …*' He continued: '*The fact that undertaking an opt-in activity would enable a religious organisation subsequently to offer services to the public does not make any prior conduct also a service*.'[20]

53. Even assuming that a religious organization would not be considered by the courts to be a '*service*' provider for the purpose of the activities referred to in Clause 2(1), the question arises whether these activities could nevertheless be considered to involve the exercise of a '*public function*.' If they do involve the exercise of a public function, then a religious organization deciding not to opt-in would be at risk of a successful discrimination claim, by virtue of section 29(6).

[20] Bill Committee, Ninth Sitting, 5th March 2013.

54. The Minister responded to this point as follows: '*a religious organisation's decision whether to opt into conducting same-sex marriages is neither a service to the public or a section of the public, nor a public function. For that reason, the decision is not within the scope of section 29 of the Equality Act …*' He continued: '*the fact that undertaking an opt-in activity would enable a religious organisation subsequently to conduct same-sex marriage, which has legal effect, does not make any prior conduct a public function.*'[21]

55. My advice is that this is by no means certain. As we shall see, the issue of whether decisions by religious authorities to opt-in are '*public functions'* arises not only in this context, but also in the context of the operation of the Human Rights Act 1998, and common law judicial review. I shall turn to this issue next. For the sake of convenience, it will be assumed that if a decision to opt-in involves the exercise of a public function under the Human Rights Act this will effectively also determine the similar issue arising in 'ordinary' judicial review and under section 29 of the Equality Act (as mentioned above), although even that assumption is not beyond doubt.

56. Given that I conclude that there is a significant risk that a decision not to opt-in could be considered to be a '*public function'* for the purposes of the Human Rights Act, my advice is that an amendment is necessary to the Equality Act 2010. There are two major alternatives: either to insert, on the face of the Bill, a specific exception in section 29 of the Equality Act 2010 for religious organisations when deciding not to opt-in, or to insert a clause that provides explicitly that religious organisations are not performing public functions or providing services when deciding not to opt in.

Decision whether to opt-in may constitute a 'public function'

57. Unlike the (limited) exceptions dealing with section 29 of the Equality Act, no exception is provided in the Bill regarding the provisions of the Human Rights Act 1998. We shall see that there is an issue regarding the liability of the Government under the European Convention on Human Rights in Strasbourg, but there is also (separately) the question of the (possible) liability of religious authorities under the Human Rights Act 1998 in the domestic courts. The issue I consider initially is whether a decision by a religious authority not to opt-in is reviewable under that Act in the domestic courts.

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[21] Bill Committee, Ninth Sitting, 5th March 2013.

58. It is important to stress that the primary concern I address here is *not* '*the risk of success of any challenge brought by a same sex couple under Article 9, in order to establish their right to marry according to religious rites in a particular church or other religious building*', which is the primary focus of the Government's Note to the JCHR. This Note spends several paragraphs reassuring churches that the risk of a successful challenge is negligible.

59. The Church's primary concern relates, I am instructed, to challenges to its statutory discretion whether to '*opt-in*' to the conduct of same-sex marriages. This issue is dealt with in a brief paragraph of the Note to the JCHR that manages to miss the point of the Church's concerns. At para 34, the Note states: '*The availability of an opt-in for most religious organisations … does not mean that States must compel organisations to provide marriage ceremonies for same sex couples. This would accord insufficient weight to the Article 9 rights of the religious organisation, its ministers and its members*.' The primary concern of the Church, I am instructed, is not that the State would '*compel organisations to provide marriage ceremonies for same sex couples*', but rather that the courts would be used to challenge the Church's decision not to opt-in, for example, by non-governmental organisations seeking a Declaration that the process by which the Church's decision not to opt-in was flawed, or that the considerations taken into account in making the decision not to opt-in were impermissible. It does not appear to me that such a Declaration could legitimately be regarded as '*compulsion*' (a Declaration does not 'force' any action to be taken) but it would nevertheless have significant legal and political consequences.

60. There are two key questions that arise under the Human Rights Act in this context. The first is whether there is an arguable case that the discretion accorded to religious authorities to opt-in involves the exercise of a *public function* for the purposes of the Act. The second is whether there is an arguable case that the discretion accorded to religious authorities exercising a public function to opt-in breaches the substantive provisions of the European Convention on Human Rights included in the Human Rights Act, given that the Bill permits religious authorities to discriminate on grounds of sexual orientation. I shall consider the '*public function*' issue first, and deal with the substantive issue subsequently.

61. It seems highly unlikely that, *in general*, the Church would be regarded as a '*public authority*' for the purposes of the Human Rights Act. However, bodies that are not, generally, public authorities may nevertheless become subject to the Human Rights

Act if they are regarded as '*hybrid*' bodies, that is, if they exercise some *public functions*. In such a case, the exercise of the *public function* is subject to the Human Rights Act, whilst the exercise by the body of its other (non-public) functions will not be covered by the Act.

62. The relevant question is whether, given that the Church frequently conducts marriages that are both religious *and civil,* this makes the Church a '*hybrid*' public authority in the sense that it is carrying out a public function, namely conducting 'civil' marriages. If this is the exercise of a public function, this could render the Church's decision not to opt-in to conduct same-sex marriages challengeable under the Human Rights Act. The gloss in Clause 11(1) (which provides that '*In the law of England and Wales, marriage has the same effect in relation to same sex couples as it has in relation to opposite sex couples*') may strengthen that argument.

63. The Secretary of State has responded to this concern as follows: '*In our view, the decision to opt-in or not is not a public function – it is not a function of a public nature. The fact that it would enable a religious organization subsequently to undertake a function that is arguably of a public nature (ie the legal solemnization of same sex marriages) does not make any conduct prior to that also a public function. So we do not think these decisions would be susceptible to a claim under the Human Rights Act*.'

64. In Committee, the responsible Minister stated that a decision whether to opt-in is not a '*public function*' under section 29 of the Equality Act. He also stated that, for the same reasons, such a decision would not constitute a decision of a public nature under the Human Rights Act either. He stated: '*a religious organisation's decision whether to opt into conducting same-sex marriages is neither a service to the public or a section of the public, nor a public function. For that reason, the decision is not … within the scope of the Human Rights Act.*' He continued: '*Such decisions are therefore not susceptible to claims under … the Human Rights Act*.'[22]

65. My advice is that the courts would not necessarily adopt the same position as that adopted by the Secretary of State and the responsible Minister. The Government acknowledges that the legal solemnization of same sex marriages is '*arguably of a public nature*.' It is also the case that the solemnization of opposite-sex marriages will

[22] Bill Committee, Ninth Sitting, 5th March 2013.

also be '*arguably of a public nature*', for the same reasons. Indeed, I suggest that it is clear and that there is very little doubt that these are, indeed, public functions.

66. I am strengthened in this regard by the speech in May 1998 of the Minister who was responsible for presenting the Human Rights Bill in the House of Commons, the Home Secretary (Mr Jack Straw):

> *Mr. Straw. (…) Before I speak on the amendments, it may be helpful if I say how the Government think that the Bill will operate in relation to the Churches. Much of what the Churches do is, in the legal context and in the context of the European convention on human rights, essentially private in nature, and would not be affected by the Bill even as originally drafted. For example, the regulation of divine worship, the administration of the sacrament, admission to Church membership or to the priesthood and decisions of parochial church councils about the running of the parish church are, in our judgment, all private matters.*
>
> *In such matters, Churches will not be public authorities; the requirement to comply with convention rights will not bite on them. We do not believe that, for example, the Church of England, the Church of Scotland or the Roman Catholic Church, as bodies, would be public authorities under the Bill. I was asked to clarify that by many people, not least the Cardinal Archbishop.*
>
> *On the occasions when Churches stand in place of the state, convention rights are relevant to what they do. The two most obvious examples relate to marriages and to the provision of education in Church schools. In both areas, the Churches are engaged, through the actions of the minister or of the governing body of a school, in an activity which is also carried out by the state, and which, if the Churches were not engaged in it, would be carried out directly by the state.*
>
> *We think it right in principle—there was no real argument about it on Second Reading—that people should be able to raise convention points in respect of the actions of the Churches in those areas on the same basis as they will be able to in respect of the actions of other public authorities, however rarely such occasions may arise.*
> *(…)*
>
> *Mr. Andrew Rowe (Faversham and Mid-Kent)*
>
> *The Church has the power to marry in a way that the state recognises, but the choice to get married in a church is entirely voluntary. Does that not alter the case?*
>
> *Mr. Straw*
>
> *The hon. Gentleman makes an interesting point. There was a time when one could get married only in church but, these days, marriage is a matter of civil law—it is the exercise of a public right. The Churches are standing in the stead of the state in arranging the ceremony of marriage, which is recognised not only in canon law,*

> *but in civil law. In that instance, the Church is performing a function not only for itself, but for civil society.*[23]

67. My advice is that it does not seem at all unlikely that the step that allows a religious organisation to move from the exercise of one public function (solemnizing opposite sex marriages) to the exercise of another public function (solemnizing same-sex marriages), would also be regarded as the exercise of a public function, particularly since that step (opting-in) is itself provided for in legislation.

68. The idea of what constitutes a '*public function*' in these circumstances is notoriously uncertain. The Joint Committee on Human Rights (correctly, in my view) stated the problem as follows:

> *'We are concerned that, as the law stands, the only guidance that can be given on the important issue of whether a body should be considered a functional public authority for the purposes of the HRA is to seek further "specialist legal advice". It is currently impossible for the Government, or any other body, to provide comprehensive and accessible advice on the application of the Human Rights Act. We consider that this represents a serious failure to achieve the aspiration of a human rights culture in which Convention rights are secured for individuals without the need for formal legal proceedings or the involvement of legal advisers'* (emphasis added).[24]

69. My advice, therefore, is that there remains at least a significant *risk* that religious organisations which conduct legally-recognised opposite sex marriages could be regarded as exercising a '*public function*' in deciding whether or not to opt-in, for the purposes of the Human Rights Act 1998 (and section 29 of the Equality Act, and 'ordinary' judicial review). This could result in a legal challenge to a decision not to '*opt in*'. An obvious solution would be to provide an explicit statement on the face of the Bill that 'opting-in' is not the exercise of a '*public function*'.

70. The Government argues that making a specific statement on the face of the Bill that religious authorities are not (for these purposes) exercising public functions would be unhelpfully confusing. The Secretary of State has written to the Church that: *'To make a specific statement of the sort you have requested* [that the Bill provide explicitly that a decision whether to opt-in is not a public function] *might … risk creating doubt about whether other decisions made by religious organisations are also public functions.'*

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[23] *Hansard*, House of Commons, 20 May 1998, at cols 1017-18, emphasis added.
[24] Joint Committee on Human Rights, *The Meaning of Public Authority under the Human Rights Act,* HL Paper 77; HC 410 (Session, 2006-7), at page 47.

This is an unconvincing response. As we have seen, there is already uncertainty as to what decisions are public functions; introducing a degree of clarity as to at least one area of activity can hardly be regarded as unhelpful; uncertainties will remain as regards other activities, it is true, but a clarification of the type suggested is unlikely to *increase* uncertainty as regards these other activities.

71. To conclude: a significant risk has been identified; even if litigation against the Church may ultimately be successfully resisted, it may only be after the Church has incurred significant costs, since I consider that a '*reasonable*' case may well be possible, such that the case might not be struck out immediately. The CBCEW may legitimately consider that religious organisations should not be exposed to such costs, particularly if they are not public bodies, and that more explicit protections are therefore needed. If so, an amendment on the face of the Bill is much the preferable course of action for Parliament to adopt. There is ample precedent, for example, for a provision to be inserted in the Bill providing that *'a decision by a person not to undertake an opt-in activity shall not be questioned in any legal proceedings whatsoever.'*[25]

Substantive issues under the HRA and the European Convention

72. Such an amendment is even more important given the uncertainty over the *substantive* legal risks under the Convention and the Human Rights Act (that is, leaving aside the question of '*public function*').

73. There are at least two substantive questions that arise. The first issue is whether there is an arguable case that a religious authority *exercising public functions* in a discriminatory manner (as described above) would itself be found to be acting unlawfully in *domestic* litigation under the Human Rights Act. My advice is that there is such a risk.

74. The second issue is whether, in instituting the system of '*protections*' in the Bill that explicitly permit religious authorities to discriminate in circumstances where the Church is recognised by the State as operating as a proxy for the State, the *United Kingdom* would itself be found to be acting unlawfully under the Convention in breach of its positive obligations by facilitating *discrimination* by a third party, even if

[25] See above, fn at para 42.

the activities of the religious authorities are not themselves regarded as involving the exercise of a public function. This issue may arise both under the Human Rights Act or directly in Strasbourg.

75. The Note to the JCHR assumes that the primary issue in this context is whether the *Church* would be forced *directly* by a judicial decision in *Strasbourg* to conduct same-sex marriages, whereas a primary concern of the Church is that, given its current delegated legal functions, the 'protections' provided may not withstand future scrutiny if a case were to be taken *against the United Kingdom*. What is feared, therefore, is that the Church would be forced to retreat from officiating at marriages that have a dual public and religious character. *This* issue is never addressed by the Note to the JCHR.

76. My Advice is that there is an arguable case, a significant *risk* at least, that the protections provided by the Bill may in time be regarded as incompatible with the Convention, under Article 8 alone, or (more likely) under Article 14 taken with Articles 8 and/or 12, on the ground that the Bill adopts a regime that discriminates on grounds of sexual orientation in the provision of a public service, namely the solemnization of marriages by religious authorities that also constitute civil marriages.

77. It is important to be clear what the legal issues are that I focus on in the following paragraphs. I do *not* suggest that the European Court of Human Rights '*would require a faith group to conduct same-sex marriages in breach of its own doctrine*' in the stark way in which the issue was framed in their Letter to *The Times* by Baroness Kennedy QC, Lord Lester QC, and Lord Pannick QC, and quoted to that effect by the Secretary of State in the House of Commons at Second Reading. Indeed, I agree with the thrust of that Letter, not least because a '*faith group'* as such would not be before the European Court, since the Court only decides cases directly against Member States, and therefore the Court could not itself require a faith group to do anything.

78. That technical point aside, I also agree more broadly that a challenge to a Member State's decision to allow churches to continue not to conduct same-sex marriages would probably not *at the moment* be a breach of a positive obligation under Article 12, because the Court has held in *Schalk and Kopf v Austria,* Application no.

30141/04, 24 June 2010, that there is no right to same sex marriage under Article 12, *as things stand today*.

79. However, the authors of the Letter to *The Times,* and the Secretary of State, give too much weight to the supposed finality of the European Court's decision in *Schalk and Kopf v Austria* to support their conclusion that such an event is '*inconceivable*'. Although the decision of the Court was that there was no right under Article 12 to same sex marriage, there are several reasons that call into question the claim that it is 'inconceivable' that in the future a right to same sex marriage may be developed by the Court, and that states could be required to ensure that state-recognised religious marriages are conducted without discrimination on grounds of sexual orientation.

80. First, marriage rights contained in Article 12 are *not* restricted to opposite-sex couples '*in all circumstances*' even now. The Court held in *Schalk and Kopf*:

> *'Regard being had to Article 9 of the [EU] Charter [of Fundamental Rights], therefore, the Court would no longer consider that the right to marry enshrined in Article 12 must in all circumstances be limited to marriage between two persons of the opposite sex. Consequently, it cannot be said that Article 12 is inapplicable ... However, as matters stand, the question whether or not to allow same-sex marriage is left to regulation by the national law of the Contracting State' (emphasis added).*[26]

81. The Government's Note to the JCHR recognises this uncertainty rather more forthrightly than does the Letter to *The Times*, stating (at para 58), that '*In Schalk and Kopf v Austria the ECtHR held open the possibility that it might extend its interpretation of Article 12 to include marriage of same sex couples, but currently the issue of whether to allow such marriages falls within States' margin of appreciation*' (emphasis added).

82. This is hardly a firm *guarantee* of future non-interference, as it appears to indicate (correctly) that if there is a significant change in the European consensus on the matter, the legal interpretation may well change, as it has in other areas in the past. It is also the case that this area of litigation is likely to expand considerably in the near future, giving increased opportunities for the Court to alter its position over time. There are already at least two cases before the Court at the moment, in

[26] At paragraph 61.

which the Court may develop the law further.[27] In addition, as the Note to the JCHR itself identifies, at para 60, four same sex couples involved in the Equal Love campaign have applied to the Court in February 2011 claiming breach of Article 12, alone or in conjunction with Article 14, because they cannot marry, and these applications are still pending.

83. Second, the Court now recognizes that same-sex couples can establish family life, under *Article 8* of the Convention. There is, therefore, the opportunity to argue that same sex marriages may come within the ambit of the right to family life, even if it does not come within the ambit of Article 12.

84. There is a third reason for an increased risk under Article 12 read with Article 14 as regards the United Kingdom specifically. This is because, by changing the domestic law on '*marriage*' as such, the Government opens up the prospect that a *discrimination* claim against the United Kingdom could succeed because the claimed discrimination would then come '*within the ambit*' of Article 12. Previous case law has involved the question *whether* Member States must introduce same sex marriage, not *how* it legislates for same sex marriage once it has decided to introduce same sex marriage. A similar issue arises in the context of abortion: the Court has never held that a Member State must introduce a law permitting abortion, but it has held in several cases that once a Member State introduces a law permitting abortion it must be applied in a fair way (see the jurisprudence discussed most recently in *P and S v Poland*, Application No. 57375/08, 30 October 2012).

85. Fourth, although the Government has argued that the chance of a successful challenge to the protections accorded in the Bill under the ECHR is low, on the basis that Article 9 (protecting freedom of religion) would protect the safeguards, there is simply no precedent from the Court of Human Rights on the acceptability under the Convention of balancing religious protections with sexual orientation equality in the context of a same sex marriage law that has been introduced by a Member State. The recent judgments by a Chamber of the Court of Human Rights illustrate, however, that Article 9 does not provide significant protection when there is a clash between it and equality on the basis of sexual orientation.[28]

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[27] *Chapin & Charpentier* v. *France* (No. 40183/07) (communicated), and *Fedotova* & *Shipitko* v. *Russia* (No. 40792/10).

[28] *Eweida and Others v United Kingdom* (*Application nos. 48420/10, 59842/10, 51671/10 and 36516/10*). A registrar (Ms. Ladele) was disciplined after she refused to carry out civil partnership ceremonies but she failed in her application to the ECtHR under Article 14 taken in conjunction with Article 9. Mr.

86. The Court often accords Article 9 rights relatively little weight, and accords a Member State a considerable margin of appreciation in deciding how to protect *that* right. Much greater weight is given to equality on the basis of sexual orientation, and the margin of appreciation is correspondingly significantly reduced. Differences in treatment based on sexual orientation can be justified only with very considerable difficulty, as indicated by the current case law of the Court. The Government cannot therefore argue convincingly that the Court would necessarily accept the safeguards put in place to protect the position of religious organisations.

87. In its Note to the JCHR, the Government accepts, at para 68, that the ECtHR has held '*that differences based on sexual orientation require particularly serious reasons by way of justification*' but argues that '*a wide margin is usually allowed to the State under the Convention when it comes to general measures of economic or social strategy*', citing *Stec v United Kingdom*, (2006) 43 EHRR 1017, and stating that the '*scope of the margin of appreciation will vary according to the circumstances*'. This statement is liable to mislead, however. The implications of *Stec* for the issue of same sex marriage are much less clear when it is understood that in *Stec* the Court applied the margin of appreciation not to the question of whether the United Kingdom had to move to equality in the future (it did), but only to the *speed* with which the United Kingdom was moving to equality. This is hardly reassuring to the Church.

88. There is a fifth reason for concern relating not to litigation in Strasbourg, but to litigation under the Human Rights Act. Setting out its analysis of the human rights implications of the Bill in its Note to the JCHR, the Government resorts to the '*margin of appreciation*' no fewer than 12 times in the course of a short document, without once pointing out that where challenges are made under the Human Rights Act in *domestic* courts, the margin of appreciation does not in any event apply in the context of justifications, and therefore the issue of proportionality is likely to be directly addressed by the domestic court, with the uncertainty that such an assessment almost inevitably introduces. The proposed '*protections*' may turn out not to be safeguards at all.

McFarlane (a counsellor) was dismissed after colleagues became concerned that he would not provide sexual therapy to same sex couples given his religious beliefs. Mr. McFarlane failed in his application both under Article 9 and Article 14 in conjunction with Article 9.

89. Seventh, in its Note to the JCHR, at para 80, the Government states that '*Article 9 is given particular weight under the Convention and this is reflected in the Human Rights Act 1998 (section 13)*'. This, too, is misleading. Section 13 was inserted during the passage of the Human Rights Bill when detailed proposed amendments to protect freedom of religion were withdrawn on the assurances of the then Secretary of State that what became section 13 of the Act was sufficient protection. As is now well known, section 13 has become a dead letter in practice. As Mark Hill QC, Russell Sandberg, and Norman Doe authoritatively state in their study, *Religion and Law in the United Kingdom*, at page 61: '*In practice, it seems that the section is a dead letter: section 13 hardly features in higher court judgments concerning freedom of religion*.' Section 13 does not provide the robust protection that is necessary.

90. The eighth reason for a degree of scepticism as to whether the protections provided to the Church's position are sufficiently robust to withstand attack under the Human Rights Act concern the issue of whether the Church's views on homosexuality are protected by Article 9. As the Note to the JCHR states, at para 69, it is arguable that a '*justification for interferences with rights [cannot] be derived purely from negative attitudes that a particular minority might arouse*.' This is a potentially important caveat to the Government's reassurances, because it appears to refer to a restriction on the right to freedom of religion that is now apparent in the British courts' interpretation of that right: the development of a threshold requirement as to what constitutes a '*religious belief*' that qualifies for protection. To be protected, beliefs must be '*worthy of respect in a democratic society and … not incompatible with human dignity*'. This is the test set out in *Campbell and Cosans v United Kingdom*.[29] On the basis of this test, where a belief is considered to be inconsistent with '*human dignity*', it does not come within the ambit of Article 9's protection.

91. The tests of what is '*worthy of respect*' and '*not incompatible with human dignity*' are highly controversial, and not fully tested. For example, when the ECtHR adopted this test in *Campbell and Cosans*, the Court developed the test in the context of interpreting the limits of philosophical '*convictions*' in Article 2, Protocol 1, under which the State shall respect the right of parents to ensure their children's education in conformity with the parents' own religions and philosophical convictions. Some British judges have also expressed concern with the *Campbell and*

[29] (1982) 4 EHRR 293, para 36.

Cosans threshold test. Rix LJ has said that *'[r]eligion is a controversial subject and there would be many who would argue that undoubted religious convictions are not worthy of respect or are not compatible with human dignity. It is in part to guard against such controversy that the Convention guarantees religious freedom*.'[30] Lord Walker has also said, and this more generally, that '*the requirement that an opinion should be "worthy of respect in a 'democratic society'*"' begs too many questions.[31]

92. Nevertheless, this threshold test has proven popular in the British courts when dealing with difficult freedom of religion cases. In particular, it was accepted and applied in *R (Williamson and others) v Secretary of State for Education and Employment*, on the issue of corporal punishment in some Christian schools, by Lord Nicholls,[32] who held that *'[t]he belief must be consistent with basic standards of human dignity or integrity'*. This was expressly also accepted by Lord Walker, despite the reservations expressed above,[33] and Baroness Hale,[34] who also made clear her view that the 'dignity' test did apply to religious beliefs and did not only apply to philosophical beliefs. Lord Nicholls applied this threshold in the context of Article 3, which forbids torture and inhuman or degrading treatment or punishment: '*Manifestation of a religious belief, for instance, which involved subjecting others to torture or inhuman punishment would not qualify for protection*.' Subsequently, however, the concept of dignity has been used as a threshold test well beyond the context of Article 3. In the Court of Appeal in *Ladele v Islington London Borough Council* Lord Neuberger MR regarded this dignity test as '*support[ing] the view that Mrs Ladele's proper and genuine desire to have her religious views relating to marriage respected should not be permitted to override Islington's concern to ensure that all its registrars manifest equal respect for the homosexual community as for the heterosexual community*'.[35]

93. My advice is that there is a risk, which the Government does not address, that the Church's position, refusing to countenance same-sex marriage, could be portrayed as being contrary to '*dignity*', with the courts being asked to view it as unacceptable prejudice against homosexuals, and thus not within the range of 'acceptable' religious views that would be protected by Article 9. By apparently adverting to this issue in para 69 of its Note, without exploring its implications, and without reassuring the

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[30] *Williamson and Others v The Secretary of State for Education and Employment* [2003] QB 1300 (CA), para 151.
[31] *Williamson and Others v The Secretary of State for Education and Employment* [2005] 2 AC 246, para 60.
[32] Ibid, para 23.
[33] Para 64.
[34] Para 76.
[35] [2009] EWCA Civ 1357, para 55.

Church that its views would not be held to be incompatible with '*dignity*', the Government has failed to address a key issue.

94. It is possible for Parliament to clarify that at least under the Human Rights Act religious authorities exercising the discretion not to opt-in are not exercising a public function, and that would at least minimize the likelihood of litigation directed against the Church under that Act. If it fails to do so, then my advice is that there is a significant risk of litigation directly against these religious authorities, which could involve significant expense for the Church.

Implications of the Public Sector Equality Duty

95. As is explained above, despite the Clause 2 protections, the Bill contains an explicit exception regarding section 29 of the Equality Act. There is no exception, however, as regards section 149 of the Equality Act 2010. Under section 149, most public authorities, such as local authorities, are under a duty to have *'due regard'* to the need to *'advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it.'* In particular, public authorities must have *'due regard'* to the need to *'remove or minimize disadvantages suffered by persons who share a relevant protected characteristic that are connected to that characteristic'*. John Bowers QC, in his advice to the Coalition for Marriage of the 1st February 2013, has emphasised how section 149 has important implications for school authorities as public authorities, and may well affect how such bodies are required to present material to pupils concerning same sex marriage.

96. My advice concerns another potential effect of section 149. The Bill appears to do nothing to prevent public authorities from penalising a decision by a religious organisation not to opt-in to same sex marriage, on the basis that section 149 authorises such treatment. It is not at all clear that Clause 2(1) protects religious organisations from such less favourable treatment. As we have seen, the Government considered that there is a need to insert an exception for section 29, even though Clause 2 prevents '*compulsion'*. If it is necessary to have an exception for section 29, why not for section 149?

97. In its response, the Government appears to have misunderstood the CBCEW's concern about the use of section 149 of the Equality Act 2010 as narrower than it is.

The Government states that the CBCEW's concern is that '*a public authority [should] not use a religious organisation's opposition to marriage of same sex couples as a reason for deciding not to enter an agreement or partnership with that organisation.'* Put more precisely, I am instructed that the CBCEW's concern is that the Bill does nothing to prevent religious organisations which do not opt-in to same sex marriage from being treated *less favourably* by public authorities, *for example* by refusing to award public contracts or grants to religious organisations, on the basis that the public authority is given discretion to do so under section 149.

98. The Secretary of State is undoubtedly correct that the public sector equality duty is, of course, a duty to have '*due regard*', that this '*would not make unlawful an otherwise wrong or oppressive act*'. She is also possibly, although not necessarily, correct that it '*applies to religion or belief in the same way as to sexual orientation*', and that the treatment that the Church is concerned that public authorities might engage in '*would be vulnerable to challenge by the religious groups on other judicial review grounds*.'

99. However, my advice is that since the enactment of the first public sector duty in 2001, there has been extensive litigation, which has significantly expanded the discretion of public authorities to which the duties apply. In particular, the courts have consistently interpreted the duty of '*due regard*' more robustly than the Government acknowledges by interpreting it as a duty to further *equality of opportunity*, and not just as a duty to avoid discrimination. Public authorities have, in practice, used this discretion to pursue broad equality aims, including by denying public contracts to organisations that the public authority regarded as unsuitable (on equality grounds) for the public authority to be associated with, and this appears to be entirely legal.

100. The fact that the public sector duty now imposes duties on multiple grounds (race, gender, sexual orientation, religion, etc), means that public authorities have a significant discretion how best to balance these grounds if they are perceived to clash; my advice is that it is not at all clear that the public authority's exercise of its discretion to make clear its opposition to the Church's decision not to opt in to conducting same sex marriage by refusing to enter into contracts with that body would be unreasonable or otherwise *ultra vires*.[36] The domestic courts have also

[36] The Government has argued before the European Court of Human Rights, as recently as last September, in the *Ladele* case, that the decision of Islington Borough Council to prefer to follow one

been reluctant to second guess the discretion of public authorities where allegations have been made that more weight should have been given to a particular ground of equality.[37]

101. The Secretary of State is careful not to state that a judicial review of a public authority that engaged in this less favourable treatment would be *successful*, only that the decision would be '*vulnerable to challenge*' (emphasis added). Contrast this with the statement of absolute certainty that challenges against religious authorities would be doomed to fail. The failure to reassure those concerned that the actions of the public authority would be clearly *ultra vires* is itself a legitimate reason for concern.

102. In addition, the Secretary of State asserts that, in the Government's view, *'similar reasoning would apply in such a case as arose in Wheeler v Leicester City Council'*. This is not in any way reassuring. The *Wheeler* case was decided *in 1985* before any of the modern public sector duties at issue were enacted; the first of the modern duties was not enacted in Britain until after the Stephen Lawrence Report *in 2001*. The *Wheeler* case was not, therefore, an interpretation that squarely addresses the problem raised in its modern statutory context.

103. In Committee, the responsible Minister sought to provide further reassurance. He stated: '*as the law stands, a public authority would in fact be acting unlawfully … if it attempted to treat a religious organisation adversely simply because that organisation refused, as is explicitly allowed in the Bill, to conduct same-sex marriages. If, for example, a local authority withdrew meeting facilities from a Church only because it did not offer same-sex marriage, that would be likely to be unlawful direct religious or belief discrimination.*'[38] In providing this reassurance, the Minister appears to be acting under a misapprehension. It is not at all clear that if a local authority withdrew meeting facilities from a Church because it did not offer same-sex marriage, that would amount to unlawful direct religious or belief discrimination. At most, it is likely to amount only to *prima facie* unlawful indirect discrimination, which would then be subject to a justification defence. Given the approach that the Court of

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aspect of its equal opportunities policy (on sexual orientation) even where this conflicted with another aspect of its equal opportunities policy (on religion) was nevertheless entirely legitimate.

[37] The Courts have made it crystal clear, as Aikens LJ said in *R (Brown) v Secretary of State for Work and Pensions* [2009] PTSR 1506 that: 'the weight to be given to the countervailing factors is a matter for the public authority concerned, rather then the court, unless the assessment by the public authority is unreasonable or irrational ... .' [at para 82]. See, most recently, *R (Coleman) v London Borough of Barnet Council and Another* [2012] EWHC 3725 (Admin) for a review of the authorities.

[38] Bill Committee, Ninth Sitting, 5th March 2013.

Appeal adopted in *Ladele*, according the local authority a very wide justification defence, my advice is that it is by no means certain that a court would necessarily find against the local authority.

104. Even if it were to be established that the actions of the public authority were *ultra vires*, such a clarification would only be as a result of a judicial review being taken by a Church-related body, which would be time-consuming and expensive. If the Government agrees that the less favourable treatment should be *ultra vires*, then the appropriate approach is to make this clear on the face of the Bill, thus avoiding unnecessary litigation. It is unclear why the Secretary of State *'[does] not think it would be helpful to make legislative changes to the public sector equality duty'*, when a narrowly tailored amendment is possible that would resolve the problem, without adverse consequences for the public sector equality duty more generally.

VI. Schools and the Secretary of State's guidance

105. The Secretary of State is under a statutory duty to issue guidance on *'the nature of marriage and its importance for family life and the bringing up of children'* under Section 403 of the Education Act 1996. Section 403 goes beyond an obligation on schools to teach children about the law of the land; it requires children to be taught about the *value* or *benefit* of the institution of marriage for family life and for the bringing up of children. It requires, in other words, schools to *promote* and *endorse* marriage, and not just tell pupils that marriage exists as a legal institution.

106. The statutory change in the definition of marriage may result in religious schools being compelled to teach a definition of marriage as *important* for family life and the bringing up of children that is contrary to their own understanding of that institution and thus impact on previously accepted and protected religious freedoms. This raises important issues under Article 9 regarding Church authorities responsible for running faith schools, and under Article 2 of Protocol 1, which provides that '*the State shall respect the right of parents to ensure such education and teaching in conformity with their religious and philosophical convictions*.'

107. The Secretary of State has responded to these concerns as follows: '… *there is no need to provide additional protection as the Bill will not in itself make any change to the way teachers teach. But we do recognize, of course, that when providing factual information about marriage to pupils, schools will need to reflect the fact that*

marriage in England and Wales is open to both opposite sex and same sex couples. And as now, as part of sex and relationship education, schools will continue to teach pupils about the nature and importance of marriage for family life and bringing up children.'

108. In Committee, Mr Robertson said this: '*The wording of section 403(1A) is clear. The Secretary of State issues guidance to ensure that pupils "learn"—it is worth paying attention to that word—"the nature of marriage and its importance for family life and the bringing up of children". The Secretary of State does not issue guidance to ensure that teachers promote or endorse any particular view of marriage. Guidance is already interpreted by schools with a religious character according to their ethos, and that is reflected in the sex and relationships education policies that they produce. Nothing in the legislation affects schools' rights to teach marriage according to their character, and the additional protections are therefore unnecessary*.'[39]

109. My advice is that neither response fully addresses the CBCEW concerns regarding the effect of the Bill on the Guidance that the Secretary of State issues, because it is unconvincing to imply that nothing has changed legally. This concern is reinforced by the possible effect of Clause 11(1) of the Bill, which provides that *'In the law of England and Wales'* which will include section 403 of the Education Act 1996, *'marriage has the same effect in relation to same sex couples as it has in relation to opposite sex couples.'* The '*nature of marriage'* in section 403 must, therefore, be read subject to this new provision, a view that John Bowers QC also adopts in his advice to the Coalition for Marriage. This interpretation is strengthened by the provisions of Clause 11(2) that '*The law of England and Wales (including all England and Wales legislation whenever passed or made) has effect in accordance with subsection (1)'.*

110. The reassurances provided fail to address the central point of concern, namely that the definition of '*marriage'* would be changed by the Bill. This means, therefore, that the duty on the Secretary of State to issue Guidance is effectively amended to require the Secretary of State to issue guidance on '*the nature of marriage <u>between opposite sex and same sex couples</u> and its importance for family life and the bringing up of children.'* Section 403, as amended, provides therefore, that the Guidance should not only ensure that schools describe the nature of marriage defined in this way, but also that schools should teach '*the importance* ….' of marriage *defined in this way*, for family life and the bringing up of children, which may

[39] Bill Committee, Eighth Sitting, 28th February 2013.

imply endorsement, or even promotion of *this* understanding of the meaning of marriage. The CBCEW would be justified in considering that this may well pose a problem for a Catholic school with a designated religious character as it involves promoting or endorsing same sex marriage, which would be contrary to its Catholic religious character.

111. If this is the case, my advice is that it would be important to address two different concerns on the face of the Bill, the first relating to the effects of the Bill on the *existing* Guidance, the second relating to *future* Guidance. It is important to ensure that the existing Guidance is not interpreted in the way feared. It would also be important to ensure that a *future* Secretary of State (perhaps in a new Government) who might see his or her responsibility when issuing Guidance differently from the policy of the present Secretary of State and attempt to lay down the content of the curriculum more prescriptively in the way feared.

112. To ensure against both eventualities, an amendment would be needed to ensure that schools with a designated religious character are not compelled to promote or endorse an understanding of marriage that runs contrary to its religious ethos under either current or future guidance. This would not affect guidance issued by the Secretary of State that requires schools to teach children about the legal status of marriage (i.e. that it is legally open to both opposite sex and same sex couples). However, if a Secretary of State issued guidance that dictated that all schools should teach the importance of same sex marriage this should not apply to schools if it would contrary to the designated religious character of the school.

VII. Right of conscientious objection by marriage registrars

113. There are two separate issues that arise under human rights law, broadly understood. The first issue is whether under the ECHR there is an obligation on the United Kingdom to permit this type of conscientious objection, and the Government argues in its Note to the JCHR at para 120, based on the *Ladele* case in the ECtHR, that there is no '*requirement under Article 14 read with Article 9 to allow for conscientious objection in the case of marriage registrars whose religious or philosophical beliefs mean that that they do not want to conduct same sex marriage ceremonies*.'

114. The *Ladele* judgment was delivered by the Fourth Section of the Court on the 15th January 2013 and is not yet final. The applicant has recently requested that

her case be referred to the Grand Chamber. However, my advice is that unless and until the ECtHR reconsiders *Ladele*, this Chamber decision stands as the relevant precedent and accords the United Kingdom a broad margin of appreciation under ECHR law in deciding how to balance '*the rights of those who believe, whether or not motivated by religion, that homosexual acts are morally wrong or that same sex relationships should not be promoted*.' It is therefore the case that, as things stand at the moment, there is no ECtHR authority that local authorities responsible for providing civil marriages must permit this type of conscientious objection to civil marriage registrars.

115. Leaving aside the questions that this issue raises under the ECHR, it raises an important (separate) question arises under *European Union* human rights law, one which the Government does not address. This is because a marriage commissioner who was refused permission by the local authority to be allowed to continue in post without carrying out same sex marriages would be able to claim that she had been discriminated against on grounds of religion in her employment contrary to EU Directive 2000/78 EC, implemented in Great Britain in the Equality Act 2010. The Court of Appeal in *Ladele* addressed the issue under domestic equality law and under the ECHR, but not under EU law. There has been no decision by the Court of Justice of the European Union on the issue. The issue is not *acte clair*, and would eventually require a reference to the CJEU by the domestic courts.

116. If such a reference were to be made, this would require important issues to be considered: the role of the general principle prohibiting religious discrimination in EU law contrary to the fundamental rights of the individual (Case 130-75 *Vivien Prais v Council of the European Communities* [1976] ECR 1589); and the role of Articles 10 (including in Article 10(2) '*the right to conscientious objection*'), 21 and 22 of the EU Charter of Fundamental Rights (O.J. (2010/C 83/02), 30.03.2010), which the Lisbon Treaty made legally binding on the United Kingdom when it is implementing EU law.

117. The combined effect of these general principles and the Charter suggest that the interpretation of EU Directive 2000/78 EC, and the Equality Act 2010, as a law of a Member States partly falling within the scope of EU law, will now be subject to closer judicial scrutiny and evaluation from an EU fundamental rights perspective, and that the CJEU could reach a different conclusion from that reached by the ECtHR in *Ladele*. It cannot simply be assumed that any decision by the CJEU would be the same as that by the ECtHR: the European Union is a very different entity

from the Council of Europe and, importantly, under EU law, the margin of appreciation developed by the ECtHR does not apply in the same way.

118. The recent decision of the CJEU in Joined Cases C-71/11 and C-99/11, *Y and Z v Germany*, 5 September 2012 (Grand Chamber) is relevant. The Grand Chamber interpreted an EU Directive providing for religious protections by drawing on the EU Charter of Fundamental Rights; it did not accord the Member State any significant margin of appreciation. More specifically, Advocate General Bot, at para 100 of his Opinion, stresses the importance of religious freedom in a way that is directly relevant to the position of marriage registrars under EU law:

> *'By requiring [a person] to conceal, amend or forgo the public demonstration of his faith, we are asking him to change what is a fundamental element of his identity, that is to say, in a certain sense to deny himself. However, no one has the right to require that'* (emphasis added).

119. As the Government's Note to the JCHR itself points out a second issue arises under the ECHR, one that the ECtHR did not consider in *Ladele*: whether local authorities should have the *discretion* whether or not to permit this type of conscientious objection, even though the local authority is not legally obliged to do so. The Civil Partnership Act 2004 does not have an explicit conscientious objection clause, but it grants local authorities discretion whether or not to require all registrars to be designated civil partnership registrars. The legislation simply requires registration authorities to ensure that there are a sufficient number of civil partnership registrars for the area to carry out that function. Across the United Kingdom, registrars' beliefs have been accommodated by some local authorities which have allowed registrars with sincerely held religious objections to the formation of civil partnerships not to be designated as civil partnership registrars. Under the Bill, this approach has not been adopted; instead, all existing marriage commissioners will automatically be required to conduct same-sex marriages.

120. The question that arises is whether, as the Government put it in its Note to the JCHR, '*it would be open to local authorities to arrange their services so that they can permit those marriage registrars with a conscientious objection to marriage of same sex couples to conduct only opposite sex marriage ceremonies*' (para 122). Based on the considered judgment of the Court of Appeal in *Ladele*, and after pointing out various possible difficulties with this interpretation, the Government concludes that it '*appears that it would be unlawful for a local authority to arrange its services so that*

marriage registrars who have a conscientious objection to marriage for same sex couples would not have to conduct such marriages' (para 125).

121. The Government reaches this conclusion on the basis that in *Ladele* '*the Court of Appeal held that it would constitute a breach of the Equality Act (Sexual Orientation) Regulations 200743 (now broadly replicated in the EA 2010) for Islington to arrange its services so as to permit Ms Ladele to refuse to register civil partnerships because of her views on same sex relations'* (para 123). There is considerable doubt whether this decision is correct as a matter of domestic law, but the Government correctly draws the conclusion that *'[i]f that reasoning is applied to marriage of same sex couples, it means that a marriage registrar whose role will encompass conducting same sex and opposite sex marriage ceremonies, because of the change of definition of marriage, cannot lawfully refuse to marry same sex couples while marrying opposite sex couples*.'

122. This issue raises questions under domestic law but it also raises issues under the ECHR and under EU law: whether provisions of domestic law that impose a blanket ban, preventing local authorities from permitting civil registrars from claiming conscientious objection in any such circumstances, would be contrary to ECHR and/or EU law. Even if it were the case that the ECHR and EU law did not require States to permit the type of conscientious objection involved in the *Ladele* case as a general right available to all marriage registrars, this separate question arises and may well be litigated.

123. A third question that arises under both ECHR and EU law is the discrimination in the Bill between those who are responsible for officiating at marriages conducted in registry offices, and those who are responsible for officiating at marriages conducted in churches. Clause 2(4) allows individuals connected to a religious organisation which has opted-in to same sex marriages to refuse to conduct or be present at a same sex marriage ceremony on grounds of conscience. Clause 2(4)(a) provides explicitly that these protections do not extend, however, to include '*a registrar, a superintendent registrar or the Registrar General*'. The government thus seeks to protect individuals from being '*compelled*' to conduct same sex marriages on grounds of conscience even if their religious organisations have opted-in; but it has failed to protect individuals in *other* circumstances, where the *state* is involved.

124. The responsible Minister sought, in the Committee debates, to distinguish the two sets of individuals. He argued that the reason why Registrars should not be able to exercise a conscientious objection is because '[r]*egistrars are public servants who perform statutory duties. (…) It is an important principle that public servants should perform their duties without discrimination*.' He stated: '*A registrar who marries a couple is conducting a civil marriage ceremony on behalf of the state, not performing a religious function*.'[40] These statements are intended, I understand, to distinguish Registrars from those conducting marriages in churches that have opted in.

125. However, the Government appears to be acting under a misapprehension regarding the position of those responsible for officiating at marriages conducted in churches. As I have stressed above, in many circumstances the person officiating at the ceremony in a Church building will, at the same time, also be exercising '*statutory duties*', and will also be '*conducting a civil marriage ceremony on behalf of the state*', as well as performing a religious function. Given that, my advice is that the discrimination between the two sets of individuals appears questionable on human rights grounds, raising issues under Article 14 taken together with Article 9.

126. Apart from the argument just considered, the responsible Minister relied on two further arguments to justify why civil registrars should not be able to exercise a right to conscientious objection. First, the '*Church of England made very, very clear in its evidence session that it was entirely happy with the protections and specifically asked us not to change them in any way*.'[41] Rather than assisting the Government, however, this argument appears to place the Government in further legal difficulty, since it appears to indicate that the Government accords more weight to the preferences of the Church of England in this matter than it does to those churches that have taken a contrary position in an area in which the Established position of the Church of England is not germane. This appears to amount to a clear example of a religious preference between religions that Article 9 and (particularly) Article 14 were designed to prevent.

127. The second argument that the Government relies on is that the '*representative body for registrars did not ask for a conscience objection*.'[42] Without knowing what consultative exercise, if any, was undertaken, and the extent to which

[40] Bill Committee, Sixth Sitting, 26th February 2013
[41] Bill Committee, Sixth Sitting, 26th February 2013
[42] Bill Committee, Sixth Sitting, 26th February 2013

those consulted were representative of the views of registrars, it is difficult to say whether those civil registrars who would wish to exercise a conscientious objection are a minority among civil registrars as a whole. In any event, it is contrary to the protection of freedom of religion in its individual form for the preferences of an organisation representing members of a profession to be relied on by Government to limit the fundamental rights of a minority of individual members of that profession. The ECtHR has made clear that the collective preferences of a trade union, for example, cannot justify the suppression of the human rights of individual workers, *Sørensen & Rasmussen v Denmark*, Applications nos. 52562/99 and 52620/99, 11 January 2006 (Grand Chamber).

128. To the extent that the CBCEW consider that civil registrars should be able to exercise a right of conscientious objection in these circumstances, my advice is that a narrowly tailored amendment should be introduced to meet the legal problems identified above. A conscientious objection clause, such as this, is not unprecedented. Section 4 of the Abortion Act 1967, for example, allows for individuals with a conscientious objection to abstain from participation in abortions.[43] The Government has provided no convincing reason for distinguishing between doctors in that context, and civil registrars in the same-sex marriage context.

129. A limited right to conscientious objection could be included that would apply to those who officiate at civil and religious marriages, and it would apply in respect of the actual solemnisation of the marriage and not to any other tasks undertaken that are associated with the solemnisation of marriage. As in the Abortion Act, the objection would have to be based on a sincerely held religious or other belief, placing the burden of proof on the person claiming to rely on it.

130. It is recommended, further, that the right to conscientious objection should be proportionate, also taking into account the rights of same sex couples, and only

[43] Apart from the Abortion Act 1965, there are the following provisions: the right of any person conscientiously to object to participation in work involving the treatment and development of human embryos (Human Fertilisation and Embryology Act 1990, section 38); the right of medical staff not to advise on or provide contraceptive services, subject to a duty to make a prompt referral to another provider who does not have such conscientious objections (National Health Service (General Medical Services Contracts) Regulations, SI 2004/291, Schedule 2, paragraph 3); the excusing of jurors from the important civic responsibility of jury service on grounds of conscientious objection (*Practice Direction (Jurors)* [1973] 1 WLR 134); the right of Sikhs not to wear motorcycle crash helmets (Motorcycle Crash Helmets (Religious Exemption) Act 1976) or safety hard hats in the workplace (section 11 of the Employment Act 1989).

permitting registrars to exercise their right to freedom of conscience where doing so would not prevent same sex couples from accessing civil ceremonies, or religious marriage ceremonies in churches that have opted-in. Individuals would not be permitted to exercise a conscientious objection if doing so would result in same sex couples being unable to access this service. If sufficient numbers of registrars were not available in any district, a registrar with a conscientious objection would come under a duty to conduct the same sex marriage. Therefore, no same sex couple would be prevented from marrying by reason of this amendment.

131. This addresses the Minister's concern that religious individuals might apply for positions as registrars just so they can conscientiously object to same sex marriage and prevent same sex couples from getting married: the registration authority should be able to compel such individuals to conduct the marriages if another registrar is unavailable to do so. Local registration authorities should also be able to take account of conscientious objections before employing individuals if employing an individual with a conscientious objection would affect its duty to ensure that there are enough registrars in the area to conduct same sex marriages.

VIII. Freedom of expression issues

132. The fourth substantive issue I have been asked to address concerns the implications of the Bill for freedom of speech. I am instructed that there is a concern that individuals, if they express an opinion against same sex marriage either inside or outside the workplace following the passage of this Bill, may be subjected to some form of detriment. This concern gives rise to issues under the rights to freedom of expression, and freedom of thought, conscience and religion. There have already been cases in which individuals have expressed opinions about same sex relationships, outside work, and have had disciplinary action taken against them as a result. One such case is *Smith v Stafford Housing Trust* [2012] EWHC 3221, in which Mr Smith posted a comment on *Facebook* critical of same sex marriage, after which his employer demoted him and reduced his pay. Even though he was ultimately successful in his legal action against his employer, the damages were minimal, he did not get his original job back, and his wages were not restored to the original amount.

133. It is difficult to be comprehensive about the circumstances that may give rise to a breach of (in particular) freedom of expression as a result of such detrimental

treatment, but I am instructed that two particular circumstances may be identified which are of particular concern: (1) where an individual (for example a teacher) is accused of 'discriminating' against a person because he or she has expressed a view against same sex marriage; and (2) where an individual is prosecuted for a criminal offence, such as incitement to hatred on grounds of sexual orientation because he or she has expressed a view against same sex marriage.

134. The human rights issue that both these circumstances give rise to is the application of Article 10. The approach that would be taken under the Convention and under the Human Rights Act is likely to be that adopted by the ECtHR in *Vejdeland v Sweden*, Application No. 1813/07, 9 February 2012. In deciding that the criminal conviction of those who had distributed what the authorities considered homophobic leaflets in a school was compatible with Article 10, the Court applied a proportionality test. The Court reiterated its consistent case law that:

> *'freedom of expression is applicable not only to "information" or "ideas" that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb. As set forth in Article 10, this freedom is subject to exceptions, which must, however, be construed strictly, and the need for any restrictions must be established convincingly.'*

'Discrimination'

135. The risk that teachers (or other employees) may be limited in their freedom of expression both inside and outside school as far as discussion of same sex marriage is concerned arises because criticism of same-sex marriage by teachers in the school context could be considered to be unlawful discrimination based on sexual orientation under the Equality Act 2010. A claim for '*harassment*' is excluded in the schools context, so far as sexual orientation is concerned, but claims for '*discrimination*' are not. By analogy with the judicial interpretation of '*discrimination on the grounds of sex*' as including some conduct that would also fall under '*harassment*',[44] the use of 'offensive' language may be held to amount to sexual orientation discrimination. Also, under EU anti-discrimination law, the Court of Justice has held that, in some circumstances, offensive statements may amount to discrimination.[45] John Bowers QC has raised similar issues in his advice to the Coalition for Marriage.

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[44] *Stewart v Cleveland Ltd* [1996] ICR 535, especially at page 542 at B-D.
[45] Case C-54/07, *Firma Feryn*.

136. The Secretary of State has responded to these concerns as follows: '*Our clear understanding is that discussion or criticism of same sex marriage would not be 'of itself' discrimination under the current law. This would only happen if the discussion or criticism took place in an inappropriate manner or context which resulted in discrimination against, or a detriment to, a particular pupil or group of pupils. The same is true of discussion or criticism of same sex relationships generally. We believe the existing provisions within the Equality Act are sufficient to protect teachers. Nothing in the Bill affects people's ability to hold and express their belief that marriage should be between a man and a woman. Teachers are perfectly entitled to give their own view, or that of their faith, in appropriate context and in a balanced and respectful way. We therefore do not think an amendment is necessary*.'

137. My advice is that the Secretary of State's assurances do not fully meet the concerns identified and therefore fail to protect freedom of expression sufficiently. In particular, the question that is likely to arise is whether the expression of particular views about the superiority of opposite sex marriage to same sex marriage may be regarded as itself resulting in a detriment to a particular group of pupils, namely those who are homosexual or those who are raised in families in which the parents are in a same sex marriage. This may create a chilling effect on teaching in particular contexts. One of the ways in which this can best be addressed is by putting the Secretary of State's reassurances on the face of the Bill, ensuring freedom of expression by protecting discussions of same sex marriages from being regarded as unlawful discrimination, or otherwise subject to dismissal or disciplinary proceedings.

138. As far as conformity with the freedom of expression under the ECHR is concerned, there is an additional potential problem. Were such speech to be regarded as directly discriminatory under domestic equality law, there is no opportunity for the court or tribunal to apply a proportionality test in the particular circumstances of the case. This is because, under the Equality Act 2010, unlawful *direct* religious discrimination is incapable of justification, and the court or tribunal is therefore unable to undertake the type of balancing that the ECtHR in *Vejdeland v Sweden* regarded as necessary in order to ensure that freedom of expression was appropriately protected.

Incitement to hatred

139. The possibility that an individual might be subject to criminal prosecution because of views he or she expresses in opposition to same sex marriage arises particularly because of legislation criminalizing incitement to hatred on grounds of sexual orientation. Section 29B of the Public Order Act 1986 outlaws the use of threatening words or behaviour with intent to stir up hatred on the grounds of sexual orientation.

140. I am instructed that the CBCEW sought to persuade the Secretary of State to introduce an '*avoidance of doubt*' provision to ensure that discussions related to same sex marriage would not in themselves constitute offences of incitement to hatred on grounds of sexual orientation. The Secretary of State responded as follows: '*We are currently discussing with the Home Office and Ministry of Justice the possibility of amendments to the protection of freedom of expression clauses in section 29J and/or 29JA of the Public Order Act 1986 which you raised with us. We were not able to complete these discussions before introduction of the Bill. (…) We will continue these inter-departmental discussions as the Bill progresses*.'

141. During Committee stage in the Commons, however, the responsible Minister resisted an equivalent amendment, on the ground that '*a simple expression of a view … is entirely legitimate. It could not in any way constitute an offence under that section*.' He continued: '*I am happy to put on record … that the criticism of marriage of same-sex couples could never in itself fall foul of the offence*.' Indeed, he told the Committee '*that we cannot put forward measures if they are deemed by the Government's Law Officers to be unnecessary. It simply cannot happen*.'[46] If that were the case, however, it seems unlikely that 'avoidance of doubt' provisions would ever be found on the statute book, but a recent search conducted of the Westlaw database discovered hundreds of such provisions currently in force.

IX. Threat of litigation

142. In the course of considering each of the four substantive concerns under the Bill identified in para 6 above, I have stressed that the danger to freedom of religion that the Bill poses is not necessarily that litigation against the Church or religious individuals would succeed, but that the threat of litigation may itself produce such a chilling effect as to endanger the pluralistic public space that the ECHR requires. The

[46] Bill Committee, Eighth Sitting, 28th February 2013.

Government itself recognises the potential for litigation to be brought that, though it may ultimately fail, would occasion considerable expense on the part of the Church or religious individuals. The Government has committed itself to '*ensure that protections are in place for religious bodies who do not want to perform same-sex marriages, not just from successful legal claims, but from the threat of litigation*' (emphasis added).

143. One particular type of litigation that would be a significant risk would be the use of judicial review proceedings against the Church or Church-related institutions. As the Government itself has itself recently recognized,[47] judicial review '*comes at a substantial cost'* to respondents, including the '*effort of defending the legal proceedings'*, and the potentially '*negative effect on decision makers*,' sometimes leading decision makers '*to be overly cautious in the way they make decisions, making them too concerned about minimising, or eliminating, the risk of a legal challeng*e'. If, as the Government acknowledges, the Church is not a public body, the exposure to such risk is even less justifiable. The Government is no doubt conscious that it has an obligation not just to refrain from itself abridging the Church's freedom of religion. As we have seen, it also has a positive obligation to protect the Church from others' attempts to abridge the Church's freedom of religion, and this includes through litigation.

144. One way of seeking to limit such litigation is by providing as much clarity as possible on the face of the Bill. This is particularly important given that the legislation is likely to provide the legal framework for marriage for many generations to come. It is a truism that whilst the Executive proposes, and the Queen-in-Parliament enacts legislation, it is the courts that are responsible for interpretation of that legislation. But Parliament is able, and has the responsibility, to influence this interpretation by clear and unambiguous drafting. My advice is that the Church cannot rely on the courts to give any weight to Ministerial assurances in the long term if the provisions of the Act itself are not crystal clear in reflecting those assurances.

145. My further advice is that the Church cannot rely on previous presumptions at common law that the courts will not intervene in the internal affairs of churches, or in the detailed relationship between religion and the public sphere. The Secretary of State has stated in her letter, in general terms, that: '*We consider that the right of a religious authority to act in accordance with its own teaching, especially when the law*

[47] Ministry of Justice, *Judicial Review: Proposals for Reform* (December 2012), at paragraphs 34-35.

specifically says that it can, is beyond any doubt' (emphasis added). My advice is that whilst those assurances may have been convincing in the past, such assurances are no longer as convincing, in light of judicial decisions over the past decade.[48]

146. To the extent that Parliament fails to adopt the amendments suggested above, there will, in my view, remain a significant degree of uncertainty on critical issues of concern to the Church, and this is likely to encourage litigation. I am not aware of how the Government plans to meet its commitment to ensure protections are put in place from '*the risk of litigation*' in these circumstances, but it is clearly important that it should do so. One possible approach, for example, would be to indemnify religious authorities in relation to any exposure to legal costs and expenses incurred in the course of legal proceedings brought against them in their capacity as religious authorities exercising the power to opt-in or opt-out of same sex marriage provision.

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15th April 2013

[48] In the *JFS* case [2009] UKSC 15 the Supreme Court held that a Jewish religious school could no longer admit pupils to the school on the basis of Orthodox Jewish religious principles (*halacha*) because these religious principles were held to be racially discriminatory, despite explicit exceptions in legislation protecting such schools from being found to be discriminating on religious grounds.

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