

## GENDER RECOGNITION BILL

### ADVICE

1. I have been asked to advise in relation to concerns about religious freedoms raised in connection with the Gender Recognition Bill (as printed on 11<sup>th</sup> February 2004), 'the Bill'.
2. The Bill has been produced in part response to the decision of the European Court of Human Rights in Goodwin v The United Kingdom (11 July 2002). In that case it was held that a person who had been the subject of a sex change ought to have the right to seek recognition in the acquired gender. The absence of such a right violated the applicant's rights guaranteed by articles 8 and 12 of the European Convention on Human Rights, 'ECHR', namely the right to respect for private and family life and the right to marry.
3. The effect of the Bill is that if a gender recognition certificate is issued to a person (who has or has had gender dysphoria and who has lived in the acquired gender for a period of two years) 'the person's gender becomes for all purposes the acquired gender'. It becomes an offence, among other things, to disclose a person's historical gender if the information has been obtained 'in connections with the functions of ... a voluntary organisation'. It appears from published guidance that there are about some 5,000 persons affected in the United Kingdom.

4. I am instructed that the principal concerns about religious freedoms relate to:
  - 4.1 The criminalisation of persons for disclosing a person's original gender in circumstances where the person believes that it is necessary to do so to act consistently with their religious beliefs;
  - 4.2 That religious bodies might be the subject of litigation by transsexuals or trans persons (I have used the term 'trans person' in this Advice – reflecting the terminology in recent cases and articles) asserting a right to marry;
  - 4.3 That the Bill will increase the prospect of litigation against religious bodies.

#### THE RELIGIOUS BELIEF

5. There are religious organisations whose beliefs on transsexualism are summarised in the document 'Christian beliefs on transsexualism', Christian Institute, March 2004. In the document reference is made to passages from the bible and to the works of Christian theologians to support the propositions that: 'the body determines personhood, not just the mind'; and that 'Biblical Christians hold that 'sex change' surgery desecrates a body made in the image of God. And the Bible teaches that the State should validate what is right and not what is wrong'. For these reasons individual Churches wish to be free to decide such matters as who should join or lead ladies' prayer meetings, who should use ladies' lavatories and who should be entitled to receive Holy Communion.

## RIGHTS AND FREEDOMS

6. Article 9 of the European Convention on Human Rights, 'ECHR', scheduled to the Human Rights Act 1998, provides for an unqualified right to freedom of thought, conscience and religion and a further right to manifest religion, or belief, in worship, teaching, practice and observance. This further right is subject to the right of States to limit the right so long as the limitations are prescribed by law, and are necessary in a democratic society. Religious rights are also protected by article 10 (freedom of expression), article 11 (freedom of peaceful assembly) and article 2 of the first protocol (State to respect the rights of parents to ensure education in conformity with their own religious and philosophical convictions).
  
7. The European Court of Human Rights has considered religious rights in a number of decisions. In Kokkinakis v Greece 1993 17 EHRR 397 it was said (at paragraph 31) that '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 of their conception of life ... the pluralism indissociable from a democratic society, which has been dearly won over the centuries, depends on it. While religious freedom is primarily a matter of conscience, it also implies, inter alia, freedom to 'manifest [one's] religion'. Bearing witness in words and deeds is bound up with the existence of religious convictions'. In that case reference was made to the report in 1956 drawn up under the auspices of the World Council of Churches which recognised that bearing Christian witness was

`a responsibility of every Christian and every Church'. In Kokkinakis a law under which a Jehovah's Witness had been prosecuted for bearing witness (to the wife of a Greek Orthodox minister) was said in that case to have infringed the religious rights of the Jehovah's Witness.

8. In Otto-Preminger v Austria 1994 EHRR 34 in which the actions of the Austrian State in seizing a film satirising religious beliefs was upheld, the statements made in Kokkinakis were repeated. It was also said (at paragraph 47) `those who choose to exercise the freedom to manifest their religion, irrespective of whether they do so as members of a religious majority or a minority, cannot reasonably expect to be exempt from all criticism. They must tolerate and accept the denial by others of their religious beliefs and even the propagation by others of doctrines hostile to their faith. However, the manner in which religious beliefs and doctrines are opposed or denied is a matter which may engage the responsibility of the State, notably its responsibility to ensure the peaceful enjoyment of the right guarantee under article 9 to the holders of those beliefs and doctrines. Indeed, in extreme cases the effect of particular methods of opposing or denying religious beliefs can be such as to inhibit those who hold such beliefs from exercising their freedom to hold and express them'.
  
9. In Wingrove v United Kingdom 1996 24 EHRR 1, a case upholding a refusal to classify a film which infringed the laws of blasphemy, it was said by the Commission (at page 18, paragraph 52) that `the Court has emphasised the

primordial place in a democratic society of freedom of thought, conscience and religion, safeguarded by article 9 of the Convention’.

10. As part of religious freedom it has been held that religious organisations must be able to choose with whom to associate. As was pointed out in X v Denmark 1976 5 DR 157 ‘a Church is an organised religious community based on identical or at least substantially similar views. Through the rights granted to its members under article 9, the church itself is protected in its right to manifest its religion, to organise and carry out worship, teaching practice and observance, and it is free to act out and enforce uniformity in these matters’.

11. This approach was reaffirmed in Hasan v Bulgaria 2002 EHRR 1339. In that case the State had recognised one individual, but not another, as leader of the Muslim community. In that case the European Court of Human Rights (at paragraphs 60 to 62) stated ‘While religious freedom is primarily a matter of individual conscience, it also implies, inter alia, freedom to manifest one’s religion, alone and in private, or in community with others, in public and within the circle of those whose faith one shares .... The Court recalls that religious communities traditionally and universally exist in the form of organised structures. They abide by rules which are often seen by followers as being of a divine origin ... Where the organisation of the religious community is at issue, article 9 must be interpreted in the light of article 11 of the Convention which safeguards associative life against unjustified State interference. Seen in this

perspective, the believer's right to freedom of religion encompasses the expectation that the community will be allowed to function peacefully free from arbitrary State intervention. Indeed the autonomous existence of religious communities is indispensable for pluralism in a democratic society and is thus an issue at the very heart of the protection which article 9 affords.' The Court specifically rejected (at paragraph 81) a Government argument that nothing prevented the applicant and others from organising meetings stating 'it cannot seriously be maintained that any State action short of restricting the freedom of assembly could not amount to an interference with the rights protected by article 9 of the Convention even though it adversely affected the internal life of the religious community'.

12. Other jurisdictions have recognised that the State should not be entitled to force an organisation to accept persons whose lifestyle is inconsistent with the values which the organisation seeks to promote. In Boy Scouts of America v Dale 2000 8 BHR 535 the United States Supreme Court noted that the presence of a homosexual scout master in the scouts 'would, at the very least, force the organisation to send a message, both to the youth members and the world, that the Boy Scouts accepts homosexual conduct as a legitimate form of behaviour'. This was contrary to the message which the Boy Scouts wanted to promote. It was noted that the acceptance of homosexual behaviour had become more widespread and that the views of the Boy Scouts might be considered to be increasingly out of

step with the views of society as a whole. It was noted that this factor did not diminish the rights of the Boy Scouts to protection.

13. It is plain that the manifestation of religious beliefs in spheres beyond the religious organisations can cause all sorts of problems for society. This was a point made by Rix LJ in R (Williamson) v Secretary of State for Education and Employment 2003 QB 1300 at paragraph 95. The ECHR expressly permits limits to be imposed on such manifestations of religious beliefs. Areas of conflict have included refusals to work on certain days of the week, see Kottinnen v Finland 87-A DR 68 and Stedman v United Kingdom 1997 EHRR CD 168. The wearing of religious headscarves in secular universities has been said to be legitimately prevented, see Karaduman v Turkey 74 DR 93. An individual cannot refuse to pay that portion of tax which is used to support the armed forces despite religious objections, see C v UK 1983 37 DR 142. Indeed the right of secular authorities to collect taxes has been the subject of religious discussion over the centuries.

14. It is also clear that it is not for the State, or for Courts, to judge religious beliefs. The reason for this was explained in Dale at page 541. In that case a lower Court had examined the Scouts' literature and concluded that excluding homosexuals was inconsistent with its overarching objectives. The majority of the Court said 'our cases reject this sort of inquiry; it is not the role of the courts to reject a group's expressed values because they disagree with those values or find them internally inconsistent'. The majority also cited a case in which it was said

`religious beliefs need not be acceptable, logical, consistent, or comprehensible to others to merit First Amendment protection’.

15. In R v Chief Rabbi, ex parte Wachmann 1992 1 WLR 1036 Simon Brown J (now Lord Brown) noted `the Court is hardly in a position to regulate what is essentially a religious function – the determination whether someone is morally and religiously fit to carry out the spiritual and pastoral duties of his office. The Court must inevitably be wary of entering so self-evidently sensitive an area, straying across the well-recognised divide between Church and State’. In Williamson Arden LJ recorded (at paragraphs 251 and 252) the proper approach to the assertion of religious beliefs saying `In my judgment, it is a mixed question of fact and law whether a person has a religious belief for the purpose of article 9. Thus the first step is for the Judge to make findings on the evidence as to what are the actual beliefs of the complainant, so far as relevant ... the second step is for the judge to decide whether those beliefs constitute religious beliefs for the purposes of the Convention. The latter is principally a question of law ... Religious texts often form the basis from which adherents develop specific beliefs. It is not the Court’s function to judge whether those beliefs are fairly based on the passages said to support them. Its function at the fact-finding stage is to decide what the beliefs are and whether they are genuinely held by the complainant. The fact that the beliefs are based on religious texts may help the Court reach its decision on this factual issue’.

16. For similar reasons, when legislating in areas of religious beliefs, the legislature must not itself decide what religious views are, or are not, worthy of recognition. In his article 'A Reconstruction of Religious Freedom and Equality: Gay, Lesbian and De Facto Rights and the Religious Schools in Queensland' Reid Mortensen, senior lecturer in law at the University of Queensland, Australia noted when reporting on a debate about the proper ambit of discrimination laws (at page 11) 'a surprising number of Christians in the Government presented theologically informed reasons for the application of sexuality and marital status discrimination laws to employment decisions in religious schools. They appealed to the principles of tolerance taught by Christ, the place of free will in the biblical tradition, the moral insignificance of sexual conduct, the malleability of Christian morals, and the need for Churches to modernise. These may well be good and true principles, but if parliamentarians want their churches, or church schools, to exemplify them then they should take efforts to do so through the appropriate Synod, congregational meeting or school council. It is not proper for Christian parliamentarians, inactive or uninfluential in their own churches' forums, to exploit the privileged position they have in Parliament, and try to realise their religious beliefs by use of the coercive powers of government'.

17. In these circumstances it seems to me that it is possible to identify the following principles:

17.1 Religious rights have a 'primordial place' in a democratic society and the 'pluralism indissociable' from a democratic society depends on religious rights;

17.2 It is not the function of the Courts (or the legislature) to judge the acceptability of the religious views (even if the Judge or the members of Parliament are members of the same religion) if the religious views have attained a sufficient level of cogency. Indeed, as the views become less accepted by modern society as a whole, the greater becomes the burden on the Courts and legislature to protect them;

17.3 Religious rights which have been held to be of particular importance are the rights to bear witness and the rights 'to act and enforce uniformity' in the organisations. Any threatened interference with these rights by others will engage the responsibility of the State. Any threatened interference with these rights by the State is unlikely to be capable of justification.

#### RELIGIOUS BELIEF AND PROTECTION

18. It seems to me that the religious beliefs of those religious organisations who hold views summarised in the document 'Christian beliefs on transsexualism' have acquired sufficient cogency (whether or not they are considered to be right or wrong) to attract protection under article 9 of the ECHR. This view is part supported by sections 19(3) and (4) of the Sex Discrimination Act which permitted discrimination by an organised religion on the grounds that a person had not undergone any gender reassignment.

19. There are a variety of statutory provisions which provide some measures to protect religious freedoms. These include:

- 19.1 The Sex Discrimination Act 1975, as amended. Section 19 provides that for the purposes of an organised religion requirements that a person be of a certain sex, or has not undergone any gender reassignment, are permitted for the purposes of the doctrines of the religion;
- 19.2 the School Standards and Framework Act 1998 which provides, at sections 58 to 60, for discrimination in favour of those holding religious opinions in accordance with the tenets of the religion or religious denomination specified in relation to the school;
- 19.3 the Employment (Religion and Belief) Regulations 2003. These prevent discrimination against persons in relation to employment on the grounds of their religion or belief. It is permitted to discriminate on the grounds of religion and belief where the ethos of the organisation requires a person to be of a certain religion or belief;
- 19.4 the Employment Equality (Sexual Orientation) Regulations 2003. These prevent discrimination against persons in relation to employment on the grounds of sexual orientation but do provide exemptions for genuine occupational requirements (under regulation 7(2)) and for organised religions where a requirement has been applied to comply with the doctrines of religion or to avoid conflicting with strongly held religious convictions of a significant number of the religion's followers. These exemptions are the subject of a challenge brought on behalf of 7 trades unions. CARE, The Evangelical Alliance and the Christian Schools Trust have all intervened to make submissions in support of the exemptions on the basis that they are necessary to protect their religious rights

and freedoms. Counsel for the Secretary of State for Trade and Industry adopted the analysis of religious rights and freedoms advanced on behalf of the Interveners. Richards J reserved judgment on Friday 19 March 2004.

#### DISCLOSURE

20. In the draft Bill provision was made permitting disclosure 'in the course of official duties'. The Parliamentary Joint Committee on Human Rights, and the Department of Constitutional Affairs both considered that this was too uncertain to be an interference which was 'in accordance with law'. This is almost certainly right. However the provision was removed. No attempt was made to define the circumstances the provision might be properly used. It does not appear that the Joint Committee expressly considered the position of religious organisations.

21. A number of examples where if a disclosure was made it would be criminal have been set out in appendix 1 of the email sent to me on 15 March 2004. These include a Roman Catholic priest who is unable to disclose to his Bishop (both of whom hold the religious beliefs set out in paragraph 5 above) that a male candidate for ordination is a female to male trans person; a vicar who is about to perform a marriage by a female member of his congregation (who holds the religious beliefs set out in paragraph 5 above) to a person who he knows (from his work) to be a female to male trans person; a curate who discovers (from his work) that a marriage candidate is a trans person and that the vicar (who holds the religious beliefs set out in paragraph 5 above) is about to perform the marriage;

one elder of a Church (which has collectively declared itself to hold the religious beliefs set out in paragraph 5 above) discovers that a member of the congregation is a trans person and wants to discuss the appropriate response with fellow elders.

22. It seems to me that criminalising disclosures made in these circumstances would infringe the rights and freedoms of the individuals concerned. The religious organisations would lose the right to act and enforce uniformity. Their ability to project their message about beliefs in relation to transsexualism would be effectively removed. It is obviously necessary to protect the private lives of trans persons. However it is also necessary to protect the rights of religious organisations. It seems to me that, in circumstances where the Bill criminalises disclosures made by members of voluntary organisations, the Bill must (in order to protect the religious rights engaged) permit disclosures necessary to allow the religious organisations to regulate themselves in accordance with their beliefs. There does not appear to be any pressing reason why such limited disclosures ought not to be made. I note that where money is concerned (in the form of pension schemes) disclosure is permitted, see section 22(4)(h). The protection of money (and property rights in general) is less important in a democratic society than the protection of religious freedoms, see generally Grape Bay v Attorney General of Bermuda 2000 1 WLR 574.

23. Although a defence pursuant to Human Rights Act 1998 would be available in any criminal proceedings brought against persons making disclosures it is

obviously desirable to avoid unnecessary litigation. Any such litigation would be unlikely to foster the main aims of the Bill.

## MARRIAGE

24. The Bill provides, at section 11 and schedule 4, for amendments to the Marriage Act 1949. Section 5B will provide that 'A clergyman is not obliged to solemnise the marriage of a person if the clergyman reasonably believes that the person's gender has become the acquired gender under the Gender Recognition Act 2004. A clerk in Holy Orders of the Church in Wales is not obliged to permit the marriage of a person to be solemnised in the church or chapel of which the clerk is minister if the clerk reasonably believes that the person's gender has become the acquired gender under that Act'.
25. This provision will mean that ministers of the Church of England and Church of Wales will not be required to solemnise the marriage of trans persons (again this supports the analysis that the religious beliefs in this area are entitled to protection). Ministers in the Church of Wales do not have to permit their Church or chapel to be used for such a service. There is some legal controversy about whether or not a person residing in a parish can insist on having a marriage celebrated in the parish Church, see Michael Smith at 5 Ecclesiastical Law Journal 34.

26. The provision permitting a Minister from refusing to allow the Church of which he is a minister to be used does not extend to the Church of England. It appears that this is because the Church of England has not asked for this provision to apply. Although the absence of such a provision may well infringe the religious views of a Minister of the Church of England (and their respective congregations) it does seem to me that the legislature is entitled to rely on the views expressed by the leaders of the Church of England in this respect. Part of the right to organise themselves as a religion means that ministers of a Church have to accept the rulings from the governing authorities of the Church (see paragraph 17.3 above). It does not seem to me that it is for the legislature to determine whether or not the leaders of the Church of England have authority to agree to such a provision. Assuming that the leaders of the Church of England have not asked for such a provision it does not seem to me that individual Ministers of the Church of England will be able to assert any claim under the Human Rights Act if such a marriage does take place in the Church of which they are Minister. This would still leave open the issue about whether or not a person residing in a parish can insist on having a marriage celebrated referred to in paragraph 25 above.

27. It does not seem to me that a trans person could insist on having a marriage service carried out in a non-established Church pursuant to the Human Rights Act 1998. This is because such a Church would not be a public authority for such purposes, see Hautaniemi v Sweden Appl No. 24019/94 and Aston Cantlow v Wallbank 2003 3 WLR 283. Further it seems to me that, even if the Church was

considered to be a public authority within the meaning of the Human Rights Act 1998, it does not seem to me that the trans persons' demands to respect for their private lives and rights to marry would trump the rights of the Minister to religious freedom.

## LITIGATION

28. However there are other arguments which could be relied on by the trans person in litigation against Churches. In particular the Sex Discrimination Act 1975 might provide a means for such litigation. In P v S and Cornwall County Council 1996 ECR 1-2143 the European Court of Justice stated that 'sex discrimination cannot be confined to discrimination based on the fact that a person is of one or other sex, but that it includes discrimination which arises as a result of the gender reassignment of the person concerned'. In KB v NHS Pensions Agency Case C-117/01 the European Court of Justice noted the 'unshakeable belief of transsexuals that they must obtain recognition'. In this respect it is to be noted that some Members of Parliament when discussing the Gender Recognition Bill in the House of Commons Standing Committee A (pt 3) have expressed the view that the Sex Discrimination Act will extend into these situations. The inter-relationship of the wording of section 19 of the Sex Discrimination Act (referred to in paragraph 19.1 above) and section 9 of the Bill ('the person's gender becomes for all purposes the acquired gender') seems to me to permit of argument. It is possible to submit that if a person's gender has become for all purposes the acquired gender it cannot be said that the person has 'undergone

gender reassignment'. This does not seem to me to be the intention of those drafting the Bill, see the letter dated 8 February 2004 from Lord Filkin. However it does raise the prospect of divisive and costly litigation.

29. Further possibilities exist for challenge. Ministers of the Church of England, when performing baptisms or confirmations, might be carrying out a public function within the meaning of the Human Rights Act 1998. The possibility of litigation between the trans persons and the Churches then becomes more likely. In Parry v Vine Christian Centre Cardiff County Court 15 February 2002 proceedings were brought against the Vine Christian Centre by a trans person in relation to a refusal to permit her to continue as a member of the Church and to use the female lavatory. The case was summarily dismissed but it illustrates, even before the enhanced protections available under the Gender Recognition Bill, that legal challenges were made.

30. It appears from reports of debates that the Government view is that such challenges should fail. Although, for the reasons given above, it seems to me that should be the result, the cases are likely to occupy considerable time and divert the resources of the Churches into litigation. A closely drawn exemption designed to preserve both the rights of trans persons and the religious rights engaged by this Bill seems to me the best way to avoid unnecessary, costly and divisive litigation.

## CONCLUSION

31. It seems to me that the religious beliefs relating to trans persons set out in the document 'Christian beliefs on transsexualism' are (whether one considers them to be right or wrong) entitled to protection pursuant to the provisions of the ECHR. Similarly it seems to me that individual Churches are entitled to organise themselves so that they can act in accordance with their religious beliefs in their dealings with trans persons.
32. The Bill contains provisions which would criminalise disclosures made for religious purposes which are likely to infringe the religious rights of individuals. Further the Bill, in its current form, gives scope for litigation against individual Churches seeking to act in accordance with their religious beliefs. Such litigation is likely to be divisive, costly and of benefit only to the lawyers.



JAMES DINGEMANS QC

3 Hare Court,

Temple, London EC4Y 7BJ

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