

IN THE MATTER OF:-

RE:-

THE GENDER RECOGNITION BILL:

THE EUROPEAN CONVENTION ON HUMAN RIGHTS:

The Impact on Religious Liberty:

OPINION
Annex - Answers to Questions

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INTRODUCTION:

1. I have been asked to consider the potential ‘conflict of rights’ between religious organisations and individuals whose gender has been changed pursuant to the Gender Recognition Bill.
2. I have prepared a full Opinion for my instructing solicitors dealing with the principles of religious liberty and areas of potential conflict with the Gender Recognition Bill 2003. If Members of Parliament require sight of the full Opinion, this can be provided upon request.
3. The ‘answers’ to the ‘questions’ below are in summary form only and are given by reference to the full Opinion.

ANSWERS TO QUESTIONS:

Question 1:

4. What cases are you aware of under existing law where transsexual people have:
 - a) Threatened litigation against a church or religious body
 - b) Commenced litigation against a church or religious body

Answer:

5. There have been a number of cases of threatened litigation in this area. The primary case is *Parry v Vine Christian Centre*¹. This case is illustrative of *militancy* in litigation, in that Parry could have decided to attend another more accommodating Church. I am aware of another current potential case at this juncture. This case is discussed at paragraphs 48 to 59 of the Opinion.

Question 2:

6. What scope does the Government have for protecting religious liberties in its drafting of this Bill, having particular regard to Article 9 of the European Convention on Human Rights and to any obligations that arise as a result of the judgement in the cases of *Goodwin & I v the UK*?

Answer:

7. The duty of the Crown under Article 9 of the Convention is to ‘accommodate’ religious practice. The decision of *Goodwin v United Kingdom* held that the inability of a trans-sexual to marry was contrary to Article 12 of the Convention. However, compliance with Article 12 requires no more than a ‘civil’ ceremony and the definition of ‘marriage’ by the European Court was *secular* focusing on the material and emotional benefits of marriage and not its religious significance. Nonetheless, it is possible that a trans-sexual may seek to extend the principle in the UK courts to require churches to perform trans-sexual weddings. The UK courts are not restricted by the ‘margin of appreciation’ and may go further than the European Court. Although a church is not a ‘core’ public authority, certain of its functions are public in nature and

likely to be subject to litigation in respect of Convention rights. The House of Lords has already held that conducting a marriage is a ‘governmental function’.² The ‘Principles of Religious Freedom’ are considered at paragraphs 15 to 47 of the Opinion.

Question 3:

8. Is it open to the Government to permit ministers of religion to be officially notified of the birth sex of a person who comes to them:
- a) To be married
 - b) To receive the administration of a sacrament such as communion
 - c) Seeking membership of their church
 - d) Seeking employment in their church?

Answer:

9. Yes. This is necessary to prevent a ‘conscience violation’ and breach of Article 9 First Sentence. This is discussed at paragraphs 60 to 73 of the Opinion

Question 4:

10. Could the Bill encourage litigation against a non-Anglican church, or its minister, for refusing to conduct a marriage involving a transsexual?

Answer:

11. Yes. There is uncertainty in this area as a non-Anglican Church does not have parish duties. It depends on the terms (if any) of membership. The case of *Parry v Vine Christian Centre* was against a Baptist Church. This is discussed at paragraphs 48 to 59 of the Opinion.

Question 5:

¹ Cardiff County Court of 15th February 2002.

12. Having regard to paragraph 3 of Schedule 4 of the Bill, how would the answer to question 4 above differ if the church was part of the Church of England or the Church in Wales?

Answer:

13. The situation of the Anglican Church is more problematic due to parish responsibilities. The provision provides a degree of ‘protection’ in a single area of Anglican Church parish duty. It is of limited assistance, but the provision is inadequate as it is difficult to comply with. This is discussed at paragraphs 60 to 66 of the Opinion.

Question 6:

14. What new obligations arise from the Bill in relation to employment of a transsexual in a religious body? What would be the legal position if a person with a gender recognition certificate applied for a job in a church as a:

- a) Secretary to the Minister
- b) Youth worker
- c) Pastoral worker
- d) Verger
- e) Mother and toddlers group supervisor
- f) Director of Women’s Ministries

Answer:

15. This is a very serious area of potential conflict and consequential litigation. The Gender Recognition Bill grants no exemptions to religious organisations. Clause 9 of the Bill states that the acquired gender is *for all purposes*. Thus, the potential employee will have the benefit of the Sex Discrimination Act 1975. This will apply to teaching posts in faith schools. The meaning of the

² Parochial Church Council of the Parish of Ashton Cantlow and Wilmcote with Billesley, Warwickshire v Wallbank and another, [2003] UKHL 37, per Lord Nichols at paragraph 13.

exemptions in these provisions will require judicial resolution. This is discussed at paragraphs 80 to 83 of the Opinion.

Question 7:

16. How would the answers to question 6 differ if the person was a transsexual but did not have a gender recognition certificate?

Answer:

17. Without a Gender Recognition Certificate, the situation would remain unchanged.

Question 8:

18. A minister may be asked for a job reference from a Christian organisation in relation to a former member of his congregation whom he knows to have had a 'sex change'. What are the implications for the minister if he tells the truth that the person concerned has 'changed sex'?

Answer:

19. The minister in question would breach the law. The term in clause 21(3) and use of the term 'voluntary organisations' is designed to encompass all non-State actors. It must be anticipated that courts will apply this provision to religious organisations.

Question 9:

20. What litigation could arise as a result of a refusal by a church to allow a male-to-female transsexual access to facilities reserved for females such as:

- a) Women's lavatories
- b) A ladies prayer group
- c) A Christian support group for sexually abused women?

Answer:

21. There would a clear argument of sex discrimination within the meaning of the Sex Discrimination Act 1975 and Article 8 (in conjunction with Article 14) of the Convention. This is discussed at paragraphs 48 to 59 of the Opinion.

Question 10:

22. What is the new potential for litigation against a Church of England church if it refuses to allow a transsexual to:

- a) Be a godparent in a ceremony of infant baptism.
- b) Be baptised as an adult
- c) Be confirmed

Answer:

23. There is potential for litigation. There is no exemption for such activities in the Gender Recognition Bill and there would be a clear case of discrimination in relation to parish functions.

Question 11:

24. What about a non-Anglican church that refuses to baptise a transsexual?

Answer:

25. The situation is complex, but the scope for litigation remains. There would *no right* to baptism in such circumstances, but there would be clear case of sex discrimination. It would be ‘hoped’ that the principles of religious freedom, as discussed in the Opinion, would be respected by the Courts. An exemption for religious organizations should be included in the Gender Recognition Bill.

Question 12:

26. What potential does the Bill create for litigation against a church or other religious body which refuses to allow a transsexual to be a member, to receive the administration of sacraments, or to attend services of worship? Please refer in particular to the following scenarios:

- a) A transsexual man in women’s clothes attends worship in a small church. Many members of the congregation complain to the minister that they feel unable to worship. They believe the man is denying the image of God in himself by dressing as a woman and that his attendance at worship dressed that way constitutes blasphemy. What new potential does the Bill create for litigation against the church if it prohibits the man from attending?
- b) I Corinthians 5:11 commands Christians not to keep company with anyone who claims to be a Christian but is engaged in gross immorality. What are the potential legal implications if a minister reminds his congregation of this duty in relation to:
 1. transsexuals in general
 2. a particular transsexual who has been attending the church
- c) The elders of a church (or the Vicar and church wardens of an Anglican church) meet with a transsexual man and advise him that he is committing gross sin by seeking to assume the identity of a woman.

He refuses to repent so they tell him he will be denied communion. The minister then announces the ban and the basic reasons for it to the congregation.

Answer:

- a) This was the very nature of the litigation in *Parry v Vine Christian Centre*. It is to be expected that the Gender Recognition Bill will increase the potential for litigation as Parry could *not* claim to be a woman at the time of the litigation. This is discussed at paragraphs 48 to 59 of the Opinion.
- b) This question is whether preaching against sexual minorities is a form of ‘hate speech’. On 9th November 2003, the Bishop of Chester was investigated by the Police over an article on homosexuality; in *Hammond v DPP* (The Times of 28th January), the Divisional Court held that the Public Order Act 1986 can be used to limit non-violent religious speech that sexual minorities object to.. In this case, a 69-year preacher was attacked by a group of 40 pro-homosexual supporters when he displayed a placard reading “Stop Homosexuality”. He was arrested and convicted. In both cases the speech was made in a public forum, but there is a clear threat to freedom of ‘religious’ expression. Any ‘disclosure’ by a church minister of a transgendered individual would breach Clause 21 of the Bill, even if such disclosure was made in pursuance of religious doctrine.
- c) In the current militant climate, such litigation should (even on the issue of communion) be anticipated. There will be a potential for litigation in relation to the parish duties of the Anglican Church and in relationship to terms of membership.

Question 13:

27. If a transsexual possesses a birth certificate declaring his chosen sex, this clearly provides scope for deceiving ministers of religion as to their birth sex. What is the new situation under the Bill if:

- a) A church admits a woman to membership but then discovers that she is really male. They write a letter rescinding the person's membership.
- b) A church publicly baptises a woman, who later turns out to be a man. The minister announces to the congregation that the baptism is no longer recognised by the church.
- c) A minister suspects that a person applying for membership has been through a 'sex change' and, even though he has no proof, refuses the application.

Answer:

- a) There will be potential for litigation as the law distinguishes between a right of access to membership of an organization, and for exclusion from a organization for breaching the terms of membership. In *Smith & Grady v United Kingdom*³, homosexuals were granted Article 8 Rights on dismissal from the Armed Services, despite joining in the knowledge of the prohibition on homosexuality. This is discussed at paragraphs 52 to 59 of the Opinion.
- b) The answer is uncertain and the legal principle is that 'fraud unravels all'
- c) The answer depends on whether the Church is Anglican or not. It is doubtful that an Anglican Church could violate parish duties on a 'suspicion'.

CONCLUSION:

28. If I can be of any further assistance, please do not hesitate to contact me.



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³ (2000) 29 EHRR 493.

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