

Our Ref: BR/CI

The Rt Hon Julian Smith  
Secretary of State for Northern Ireland  
Stormont House  
BELFAST  
BT4 3SH

14<sup>th</sup> November 2019

By post and email: [REDACTED]

Dear Secretary of State,

**Re: The Northern Ireland (Executive Formation etc) Act 2019  
Same-sex marriage regulations**

We are instructed to write to you in relation to the above matter on behalf of our client, The Christian Institute, a charity which exists for the furtherance of the Christian faith and the advancement of education. Our client's work in these areas involves defending religious freedom and promoting marriage as the lifelong union of one man and one woman to the exclusion of all others.

Our client wishes us to raise with you the question of your powers under section 8 of the Northern Ireland (Executive Formation etc) Act 2019 ("the 2019 Act"). Under that section, you are required to make regulations to enable the marriage of same-sex couples and the formation of opposite-sex civil partnerships in Northern Ireland ("NI"), to be in force on or before 13 January 2020. Under section 8(6) you also have power to make "any provision" in regulations that you consider appropriate "to protect the ability to act in accordance with religious or other belief or opinion in relation to marriage or civil partnership".

The same-sex marriage legislation in Great Britain ("GB") included extensive provision to protect religious freedom and free speech. This included the "quad locks" in England and Wales for religious bodies and celebrants, including that no discrimination claim can be brought against them *on any ground*. UK Government ministers also gave assurances during the passage of the Marriage (Same Sex Couples) Act 2013 that no teacher would be under any duty to promote or endorse same-sex marriage (Hugh Robertson MP, Hansard 20 May 2013 at col 963, and Michael Gove MP, Public Bill Committee Hansard, 12 February 2013 at col 6). Those assurances were reflected in guidance issued by the Department for Education in England & Wales (see *The Equality Act 2010 and schools Departmental advice*, May 2014 at paragraphs 3.28 –

3.32) and by the Equality and Human Rights Commission of England & Wales (see *The Marriage (Same Sex Couples) Act 2013: Provision of School Education*, 24 March 2014).

Our client expects same-sex marriage regulations in NI to include no less in the way of legal protections than is provided for in the rest of the UK. We also expect similar assurances to be given by ministers in relation to the impact on education, and for similar appropriate guidance to be issued to schools. Indeed, the importance of ensuring no person is compelled to endorse same-sex marriage has been put into focus by the Supreme Court in Lee v Ashers Baking Company Ltd (Northern Ireland) [2018] UKSC 49.

### **Assurances**

During the parliamentary passage of the 2019 Act, the Parliamentary Under Secretary of State, Lord Duncan of Springbank, gave assurances as to the importance of religious freedom and conscience. He said that the introduction of same-sex marriage in NI will not lead to faith-based groups being compelled to act against their faith:

“The noble Lord, Lord Morrow, raised the issue of religious protection and religious freedom. He is right to do so, because there needs to be an understanding among all faith-based groups in Northern Ireland that they *will not be compelled* to act against their faith, their religion or even their opinion...

Article 9 of the European Convention on Human Rights guarantees the right to freedom of religion and freedom of conscience. That is not in doubt, not debated and not disputed, and will not be in any way eroded by anything **we** do here today—full stop. It is important to remember that all the legislation will comply with that and ensure we move that forward. Absolutely at the heart of this must be a belief in Northern Ireland that faith-based groups will not experience some sort of prejudice because they express their faith in fashions which do not recognise the situation today.” [our italicised emphasis]

*(17 July 2019, Hansard, House of Lords, volume 799, columns 286 – 287)*

These comments were made in response to an amendment tabled by Lord Morrow. That amendment would have required you to make regulations to protect religious belief or opinion in relation to marriage or civil partnership and that such provision should be “equivalent or similar to that contained in or authorised by the Marriage (Same Sex Couples) Act 2013”. Although Lord Morrow’s amendment was not carried, it was the basis for the minister’s (Lord Duncan’s) welcome assurances in relation to churches. That said, our client would ask you to make clear that same-sex marriage protections for religious bodies in NI discrimination law will relate to all the protected characteristics, as in the rest of the UK (see below).

Furthermore, unlike in relation to England and Wales in 2013, we cannot track down any assurances having been given by any NI or UK ministers in relation to ensuring teachers and schools in the Province are not compelled to promote or endorse same-sex marriage. Again, our client would not expect the protections for conscience and freedom of expression in schools in NI to be inferior to other parts of the UK and indeed there would be no justifiable reasons for that. We therefore expect ministers to issue appropriate statements providing the required assurances and confirming that guidance will be issued to schools in NI.

### **Religious protections in Great Britain**

In relation to the solemnisation of marriage by religious bodies and celebrants, the legislation in GB makes clear that a religious marriage ceremony of a same-sex couple will only be possible if: the governing body of the religious organisation has opted in by giving explicit consent to marriages of same-sex couples; the individual minister is willing to conduct the marriage; and (in relation to England and Wales) if the ceremony takes place in a place of worship, those premises have been registered for marriages of same-sex couples.

Secondly, the law in England and Wales is clear that churches and other religious bodies cannot be compelled to conduct or participate in same-sex marriage. Under section 2 of the Marriage (Same Sex Couples) Act 2013, “a person may not be compelled *by any means* (including by the enforcement of a contract or a statutory or other legal requirement)” [our italicised emphasis] to opt into registering premises for the solemnisation of same-sex marriage, to conduct a same-sex marriage, to be present at or otherwise participate in a same-sex marriage, or to consent to such a marriage being conducted.

Section 12 of the Marriage and Civil Partnership (Scotland) Act 2014 is also explicit that none of the provisions enabling religious bodies and celebrants to conduct same-sex marriages “imposes a duty” to do so.

### **The Equality Act**

Thirdly, the Equality Act 2010 was amended by the same-sex marriage legislation in GB to ensure that discrimination claims cannot be brought against religious bodies and celebrants who refuse to take part in same-sex marriages. New provisions in the Equality Act included:

- Paragraphs 25A – 25C of schedule 3. These paragraphs make clear that a person does not contravene section 29 of that Act (which prohibits discrimination in the provision of facilities or services to the public) only because they do not conduct, are not present at or do not otherwise participate in a same-sex marriage, or refuse to consent to such a marriage being conducted.

- Sub-sections (5A) to (5H) in section 110. This protects employees or agents in relation to refusing to be involved in same-sex marriages and civil partnerships.
- Sub-paragraphs 9A - 9D in paragraph 2 of schedule 23. These amended the exception for religious organisations from the general prohibition on discrimination on grounds of sexual orientation and religion or belief. The amendment protects religious organisations and groups of persons who refuse to allow their premises to be used for the marriage of same-sex couples or civil partnerships or who refuse to allow their celebrants to be involved.
- Paragraph 2(4)(ca) of schedule 9, to enable “a requirement not to be married to a person of the same sex” to be applied where employment is for the purposes of an organised religion.

By way of The Civil Partnership (Opposite-sex Couples) Regulations 2019, parallel provisions have been made in relation to protecting religious freedom and conscience for bodies which do not wish to be involved in opposite-sex civil partnerships.

Significantly, the above protections and exceptions do not relate only to discrimination on grounds of sexual orientation. The Equality Act consolidated discrimination law in relation to nine protected characteristics. Several exceptions to the Act inserted by the same-sex marriage legislation provide that a person “does not contravene this Act”, or “does not contravene section 29” (which relates to the provision of services), or “does not contravene Parts 3, 4 or 7” (which respectively relate to service provision, premises, and the activities of associations), but do not identify any one protected characteristic to which the exception applies. These exceptions therefore recognise that religious bodies and celebrants who refuse to participate in same-sex marriage might face claims on the basis of several protected characteristics. This could include sex or religion or belief, as well as sexual orientation. The protected characteristic of sex will be engaged if a difference of treatment is based on the gender of those in the marriage. And *religion or belief* may be engaged if a same-sex couple wished to marry in furtherance of their religious or philosophical beliefs.

It is also important that the most significant exceptions inserted into the Equality Act 2010 by the same-sex marriage legislation in GB do not rely upon religious bodies needing to justify their conduct by reference to their doctrinal beliefs. For example, the exceptions at paragraphs 25A – 25C of schedule 3 apply absolutely. This means that churches and other religious bodies in GB do not need to worry about publishing specific doctrinal statements or policies in order to be sure that they benefit from the exceptions. It is important that the protections do not depend on churches drawing up a statement, since failure to do so could mean loss of their basic rights of freedom of religion and association.

### Freedom of expression

The Marriage (Same Sex Couples) Act 2013 amended section 29JA of the Public Order Act 1986 to protect freedom of expression of those who disagree with same-sex marriage. Although the amendment applies to offences of inciting hatred on grounds of sexual orientation, including it on the face of legislation makes clear that the expression of a belief in traditional marriage engages Article 10 of the European Convention on Human Rights and, as such, is worthy of respect. In so doing, the amendment has wider effect. The courts in NI have long accepted that the belief that homosexual practice is sinful is “a long established part of the belief system of the world's major religions. This is not a belief that is unworthy of recognition” (see Christian Institute & Ors, Re: Judicial Review [2007] NIQB 66).

Part III of The Public Order (Northern Ireland) Order 1987 (“the 1987 Order”) contains incitement offences broadly equivalent to those in Part 3A of the Public Order Act 1986. However, the threshold for the offences in the 1987 Order are much lower. For example, unlike in England and Wales, the NI offences are not confined to threatening conduct, but include merely insulting speech. Given this lower threshold, and in light of same-sex marriage in NI, it would be unconscionable now not to amend the 1987 Order to include protections equivalent to section 29JA(1) and (2) of the 1986 Act. NI must not become the ‘poor relation’ in terms of free speech and civil liberties.

Section 16 of the Marriage and Civil Partnership (Scotland) Act 2014 also explicitly affirms the rights to freedom of thought, conscience and religion, and freedom of expression.

### Trust deeds

Finally, paragraph 1 of schedule 4 to the Marriage (Same Sex Couples) Act 2013 made provision to ensure that the redefinition of marriage did “not alter the effect of any private legal instrument made before that section comes into force”. This protected and preserved the meaning of marriage in existing trust deeds, thereby enshrining freedom for any association established to promote traditional marriage.

### **Convention rights**

The Marriage (Same Sex Couples) Act 2013 balanced the protection of religious freedom and expression with extending the rights of gay and lesbian couples.

The rights in relation to sexual orientation involve Articles 8 and 14 of the ECHR. Article 8 provides for the right to respect for private and family life as follows:

- “1. Everyone has the right to respect for his private and family life, his home and his correspondence.
2. There shall be no interference by a public authority with the exercise of this right except such as in accordance with the law and necessary in a democratic

society in the interests of national security, public safety or the economic wellbeing of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.”

Article 14 provides for the prohibition of discrimination as follows:

“The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.”

In terms of the exceptions and protections for those who do not agree with same-sex marriage, the 2013 Act also took appropriate account of at least the following rights:

Article 9 provides for freedom of thought, conscience and religion as follows:

“1. Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance.

2. Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.”

Article 10 provides for freedom of expression as follows:

“1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and receive and impart information and ideas without interference by public authority and regardless of frontiers. This article shall not prevent States from requiring the licensing of broadcasting television or cinema enterprises.

2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.”

Article 11 provides for freedom of association as follows:

“1. Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests.

2. No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others. This Article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces, of the police or of the administration of the State.”

Article 17 provides for the prohibition of abuse of rights as follows:

“Nothing in this Convention may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms set forth herein or at their limitation to a greater extent than is provided for in the Convention.”

As a minister of the Crown, you have a duty under section 6 of the Human Rights Act 1998 not to act in a way which is incompatible with a Convention right, including in terms of any regulations you make under section 8 of the 2019 Act.

### **NI discrimination law**

Unlike in the rest of the UK, equality law in NI is not consolidated. This means that the task of legislating in NI for religious freedom in the face of the introduction of same-sex marriage will involve amending several discrimination statutes. We believe this will involve amending at least the following legislation to ensure protection for religious bodies and celebrants:

- the Equality Act (Sexual Orientation) Regulations (Northern Ireland) 2006;
- the Employment Equality (Sexual Orientation) Regulations (Northern Ireland) 2003;
- the Sex Discrimination (Northern Ireland) Order 1976; and
- the Fair Employment and Treatment (Northern Ireland) Order 1998.

### **Judicial review**

Our client contends that in considering the NI context of this debate, any failure to legislate in NI to the same degree for religious and free speech protections as is now taken for granted in the rest of the UK would be irrational.

Given the significant level of opposition to same-sex marriage in NI, highlighted by the previous devolved government in NI being unable to agree on the implementation of such legislation, any such failure by ministers would result in the Province going **from** being the most protected part of the UK in terms of religious protections to the **least** protected. Furthermore, it would be inconsistent with the rights of religious bodies and their members under Articles 9, 10, 11, 14 and/or 17 of the ECHR.

Any such interferences would be neither proportionate nor necessary in a democratic society and would accordingly breach your obligations under section 6 of the Human Rights Act. The standard for protections in the rest of the UK raises a legitimate **and** reasonable expectation that ministers will legislate similarly in NI.

As secondary legislation, any regulations you make under section 8 of the 2019 Act will be susceptible to judicial review in the courts. For this reason, our client will consider carefully and take advice in relation to the regulations you bring forward under section 8, to ensure that they give proper weight to the rights to freedom of religion, expression and association. In particular, our clients will look to challenge by way of judicial review any failure to reflect the balanced treatment of the issues in a manner reflected in **the** same-sex marriage legislation in England & Wales and Scotland. We consider our client would have standing to bring such proceedings (see [The Christian Institute v The Lord Advocate \[2016\] UKSC 51](#)).

Yours faithfully



**Carson McDowell**

[Redacted contact information]

cc: Crown Solicitors Office, Royal Courts of Justice, Chichester Street, Belfast, BT1 3JE