department for culture, media and sport

**ANALYSIS OF AIDAN O'NEILL QC SCENARIOS**

We have seen the scenarios on which Aidan O'Neill QC was asked to advise by the Coalition for Marriage. Below is our analysis of these scenarios.

Scenario A – Hospital chaplain

1. A minister is also a hospital chaplain. He conducts a wedding at his church and preaches a sermon referring to marriage in New Testament teaching only being between a man and a woman. The NHS hospital management learns of this and terminates his contract as chaplain, stating that it is against their diversity policy and the public sector equality duty ("the equality duty") (section 149 of the Equality Act 2010 ("the EA 2010")) requires them to tackle prejudice and promote understanding of homosexual rights.

2. This concerns conduct outside employment and whether it should affect employment – which is possible depending on the circumstances. However, the minister's views are entirely lawful (and indeed would be a completely mainstream view) and it would not be a permissible application of the equality duty to say that a religious person holding such lawful religious beliefs should not be a chaplain in the public sector. The equality duty concerns other protected characteristics including religion, not just sexual orientation. In addition, the equality duty does not require public authorities to do anything other than to have due regard to certain matters. It could not of itself make right an otherwise wrong or oppressive decision, which would remain vulnerable on traditional administrative law grounds or human rights grounds, bearing in mind Article 9 of the European Convention on Human Rights ("the Convention").

3. This is clearly not gross misconduct since the chaplain has not refused to carry out his duties. Even if he did refuse to conduct a same-sex wedding in the hospital (either under the house-bound or deathbed provisions), he would have to refuse if his religious organisation had not opted in to conducting same sex marriages; and even if it had opted in, the chaplain would

legally still be able to refuse to conduct such a ceremony under clause 2 of the Bill. It might nonetheless be argued that he is therefore refusing to carry out an element of his duties and so should be disciplined as a result. But, even if one discounted the protection in clause 2 of the Bill, this would still be such a small element of his job that it would be disproportionate to dismiss him on that basis. He is therefore likely to have a right to claim unfair dismissal.

4. There are some parallels with the *Ladele v Islington*[1] case in terms of the employer pursuing a legitimate aim of a non-discrimination policy. However, there is a significant difference in that Ms Ladele was acting in a purely civil capacity, whereas the chaplain in this scenario is a religious minister and indeed is employed as a chaplain on that basis. As a minister of religion, he can have a justifiable expectation that he will be allowed to act in accordance with his beliefs as such a minister, and this is reinforced by the "locks" that have been placed in the Bill to ensure that his right not to solemnize a marriage of a same sex couple is protected. He may well have a claim for unlawful direct/indirect discrimination against his employer because of religion or belief arising from such a scenario.

5. Another example of a potential employment issue could be a marriage guidance counsellor who does not wish to provide counselling to same sex couples (see *McFarlane v the United Kingdom*[2]). The European Court of Human Rights ("the ECtHR") has on various occasions found against employees in "conscientious objections" claims[3].

6. In itself an employee simply expressing the view that according to their religious teaching marriage should be between a man and a woman could not be said to interfere with their ability to carry out their work. Nor could it be said to be so offensive that it would affect the reputation of the employer to continue to employ them. If there is no suggestion that the employee holds homophobic views or that expressing views as to religious teaching on marriage indicates that they may act inappropriately or in a discriminatory manner towards an individual because of their sexual orientation, then the employer is unlikely to be able to show that it is acting in a proportionate manner in pursuit of a legitimate aim and any dismissal would be unlawful.

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[1] *Ladele v the United Kingdom* Application no. 51671/10 (c.f. *Lillian Ladele v the London Borough of Islington* [2009] EWCA Civ 1357).
[2] Application no. 36516/10 (c.f. *McFarlane v Relate Avon Ltd* [2010] ICR 507).
[3] For example, *X v Denmark* (1976) 5 DR 157, *Ahmad v the United Kingdom* (1982) 4 EHRR 126, *Kontinnen v Finland* (1996) 87-A DR 68 and *Stedman v the United Kingdom* [1997] ECHR 178.

7. See in particular the recent decision in *Smith v Trafford Housing Trust*[4], where an employee was demoted because of comments on his personal Facebook page regarding civil partnerships on religious premises. The High Court found in favour of Mr Smith, showing that the expression of such views in non-inflammatory language outside work is acceptable.

8. It should be noted that the same issues as those outlined above would arise in relation to expressions of other views, for example if a person preaches that civil partnerships are contrary to religious teaching or that people (whether in a same sex or opposite sex relationship) should not have children outside marriage etc. In any particular case, if an employee was disciplined or dismissed for expressing such views, the same legal framework, and in particular the question of justification and proportionality, would apply. This means that the employer would have to demonstrate that their action met a legitimate aim, and that it was proportionate.

Scenario B – Accessing public facilities

9. A church hires a local community centre for its youth activities. It publishes on its website that it only marries opposite-sex couples, as permitted by the law. But the local authority decides to withdraw the use of by the church of the community centre facilities, citing the equality duty.

10. As in the previous scenario, the equality duty would not justify such a decision by the local authority, which would be unlawful on that basis. A local authority cannot choose only to hire out facilities to individuals and groups which share their religious or philosophical views. Providing youth activities would not involve discriminatory activity by the church. The concern simply seems to be that the church believes something which the local authority does not like. There may be a counter-argument that a policy of only hiring out facilities to those who have 'compliant' views about marriage would be indirectly discriminatory against many religious people and religious organisations.

11. In *Wheeler v Leicester City Council*[5] the council banned a rugby club from using its ground after some of its members attended a tour of South Africa. The House of Lords held that the decision was irrational - it also found that the decision was procedurally unfair and there

[4] [2012] EWHC 3221 (Ch)
[5] [1985] AC 1054

was an improper purpose, resulting in the council's decision being quashed. This reasoning would also apply here.

Scenario C – Church weddings

12. Parliament legislates for same sex marriage in England and Wales. A same sex couple want to get married in a Baptist church. However, the leadership and trustees of that church have chosen not to opt in to marrying same sex couples. The couple ask the pastor and deacons to opt in to the new arrangements so they can get married in the chapel. The pastor and church officers decline to do so and tell the couple that the church believes that marriage can only be between a man and a woman. The couple sue the pastor and trustees under the EA 2010, alleging discrimination because of sex and sexual orientation. The county court strikes out the application because there is no cause of action. The couple fail to get permission to appeal and take the UK to the ECtHR. They argue that now marriage has been redefined, it should be provided on the same basis to everyone.

13. It is also suggested that non-Anglican religious organisations may be under the threat of being refused a licence for their place of worship to be used for conducting marriages for opposite sex couples because of their opposition to same sex marriage. A public authority could seek to rely on the equality duty to justify refusing such a licence.

14. Aidan O'Neill tentatively accepts that in this scenario the couple would not succeed before the ECtHR.

15. The right to marry under Article 12 does not guarantee the right to marriage for same sex couples[6]. In *Schalk and Kopf v Austria* the ECtHR held that the issue of whether to allow such marriages falls within States' margin of appreciation. As such, Article 12 does not impose an obligation to grant same sex couples the right to marry[7]. (A right to marry for same sex couples also cannot be derived from Article 14 read with Article 8, since the Convention is to be read as a whole and its Articles should therefore be construed in harmony with one another.)

[6] *Schalk and Kopf v Austria* [2010] ECHR 1996 (para 61)
[7] *Schalk* (para 63)

16. The ECtHR noted in *Schalk* that there is an emerging European consensus towards legal recognition of same sex couples. But there is not yet a majority of States providing for legal recognition of same-sex couples and so it stated that the area in question must still be regarded as one of evolving rights with no established consensus, where States must also enjoy a margin of appreciation in the timing of the introduction of legislative changes[8]. To date we are aware of only eight States[9] (out of the 47 in the Council of Europe) that have implemented legislation permitting marriage for same sex couples. There is therefore no clear consensus, as noted above, and the policy can be considered to be highly progressive at this time.

17. An application was made to the ECtHR in February 2011 by individuals involved in the Equal Love campaign[10]. As part of this application, four same sex couples claim breach of Article 12, alone or in conjunction with Article 14, because they cannot marry. No decision on the admissibility of this application has yet been made.

18. Article 9 provides protection for both individuals and churches and other religious organisations. The provisions of the Bill which concern marriage of same sex couples according to religious rites and usages clearly engage Article 9 as being concerned with the right to freedom of religion.

19. The Bill provides for a process to allow religious organisations to opt in to solemnizing marriages of same sex couples. It also provides protection for those organisations that do not wish to solemnize such marriages. There is therefore potential interference with the Article 9 right, considered below.

20. Any compulsion by a State on a religious organisation to engage in a practice contrary to the beliefs of its members would potentially interfere with the Article 9 rights of the organisation and its members. A same sex couple wishing to marry where this has been refused by the religious organisation (which has not opted in) or a particular minister may argue that any such interference is justified as necessary to protect the couple's rights and freedoms. However, we consider that it could not be proportionate to interfere with the religious freedom of religious organisations by requiring them to solemnize marriages that

[8] See *Courten* [2008] ECHR 1546 and *M.W. v the United Kingdom* [2009] ECHR 1113
[9] Belgium, Denmark, Iceland, Netherlands, Norway, Portugal, Spain and Sweden
[10] http://equallove.org.uk/the-legal-case/

they consider to be doctrinally impermissible. In reaching this conclusion, we note the importance of the rights under Article 9 and the case law of the ECtHR. As the case law makes clear, "[t]he autonomous exercise of religious communities is indispensable for pluralism in a democratic society"[11]. It also positively anticipates that accommodations might be required to facilitate "conscientious objection"[12]. The ECtHR has not been sympathetic to "conscientious objections" in the context of employment, but principally on the basis that one is not required to accept or remain in particular employment[13]. This is plainly not relevant in the context of the practices of a religious organisation where it may be appropriate to permit conscientious objections.

21. A religious marriage solemnized in a church or other religious building is wholly different to the position considered in the application to the ECtHR by Lillian Ladele, a marriage registrar employed by the London Borough of Islington, who was designated as a civil partnership registrar even though she objected to that because of her religious beliefs[14]. A religious body or individual solemnizing a marriage is, at least in the eyes of some, celebrating a sacrament. Although marriages solemnized according to religious rites and in a religious building may by virtue of the arrangements under the Marriage Act 1949 ("the MA 1949") create legally binding marriages, the celebrants are also conducting "acts of worship or devotion forming part of the practice of a religion or belief"[15] which will fall within the protection of Article 9.

22. It is therefore considered that any requirement upon a church or other religious organisation to marry same sex couples, contrary to its religious doctrines, would infringe their Article 9 rights (and those of any person compelled to take part, for example a minister). The Bill does not require that any religious organisation or individual must solemnize marriages of same sex couples and so there is no infringement.

23. We consider 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, is so small as to be negligible in significance. In balancing the

[11] *The Supreme Holy Council of the Muslim Community v Bulgaria* [2004] ECHR 690, para 93-96
[12] For example, *Thlimmenos v Greece* [2000] ECHR 162
[13] For example, *X v Denmark* (1976) 5 DR 157, *Ahmad v the United Kingdom* (1982) 4 EHRR 126, *Kontinnen v Finland* (1996) 87-A DR 68 and *Stedman v the United Kingdom* [1997] ECHR 178
[14] *Ladele v the United Kingdom* Application no. 51671/10 (c.f. *Lillian Ladele v the London Borough of Islington* [2009] EWCA Civ 1357).
[15] *Pichon & Sajous v France* Application no. 49853/99 (2 October 2001)

rights of a same sex couple and a religious organisation's rights under Article 9 (in particular, in relation to a matter such as marriage, so closely touching upon a religious organisation's beliefs), we think the domestic courts (and also the ECtHR) would be bound to give priority to the religious organisation's Article 9 rights, since to do otherwise would almost inevitably constitute a breach of that organisation's rights. In our view, any interference with the rights of the same sex couple which results would be justified. The legitimate aim would be the protection of the rights and freedoms of others (the religious organisation and its members) in terms of protecting their Article 9 rights as to what takes place on their premises according to their rites. We think the measure is proportionate in that couples have the choice of a religious ceremony where a religious organisation has opted in to that process, so there is no blanket ban on such ceremonies. In addition, the requirement of the consent of the religious organisation and individuals is also proportionate, in our view. We therefore consider that the balance between the rights of same sex couples and the rights of organisations and individuals representing those organisations is properly drawn.

24. The availability of an opt-in for most religious organisations does not alter this balance and 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.

25. We note in this context the case of *Gas and Dubois v France*[16], which concerned the right to adopt of the lesbian partner of a couple who had registered a Pacte Civil de Solidarité (PACS). It was reported in the UK press that the ECtHR had ruled in this case that "if gay couples are allowed to marry, any church that offers weddings will be guilty of discrimination if it declines to marry same-sex couples"[17]. This is incorrect: the ECtHR did not consider (and indeed has never done so) the issue of religious marriage ceremonies for same sex couples.

26. A refusal by a church or other religious organisation to marry a same sex couple could engage the couple's rights under Article 14 (read with Articles 12, 9 and possibly Article 8[18]). The couple would be likely to be able to show that the difference in treatment to that of an

[16] [2010] ECHR 444
[17] http://www.dailymail.co.uk/news/article-2117920/Gay-marriage-human-right-European-ruling-torpedoes-Coalition-stance.html
[18] *Schalk* (paras 94-95)

opposite sex couple is in the ambit of those Articles, as concerning marriage, religion and family life.

27. The couple would then need to show that the treatment is based on a personal characteristic or status. In this case, difference in treatment on grounds of sexual orientation would fall within Article 14.

28. As for justification of any interference, the Article 9 rights of the church or religious organisation concerned (which are considered above) would be highly material. Article 9 is given particular weight under the Convention and this is reflected in the Human Rights Act 1998 (section 13). It is considered highly likely that a refusal by a church or other religious organisation to solemnize a marriage of a same sex couple, so as to comply with the doctrine of its religion or the strongly held and faith-based convictions of its members, would be regarded by any court as justified.

29. Indeed, a requirement that a church or other religious organisation solemnize marriages of same sex couples, contrary to their religious doctrine, could be regarded as discriminatory under Article 14 read with Article 9. Treating churches and religious organisations that have doctrinal objections to marriage of same sex couples in the same way as those that do not, in the context of whether or not they should themselves solemnize such marriages, is to fail to make a distinction between the two which might well result in a discriminatory outcome.

30. As for the suggestion that the Registrar General would seek to rely on the equality duty in order to reject applications by non-Anglican religious organisations for their place of worship to be registered for the solemnization of marriages for opposite sex couples, because of their opposition to same sex marriage, this would not be legally permissible. Under section 41(3) of the MA 1949, there is no discretion for the Registrar General in this matter. As long as the proprietor or trustee of the building provides an application which meets the statutory criteria set out in section 41(1) and (2), the Registrar General "shall" register the building for the solemnization of marriages. Although the Registrar General is subject to the equality duty, that would not override her statutory functions where no discretion is given.

Scenario D – Church trustees

31. A church leaves a denomination but continues to use the same building and the former denomination remains as trustees of the building. The local minister does not wish to conduct same-sex marriage ceremonies, nor does the congregation wish to use 'its building' for this, though the denomination is happy to allow it. The denomination, fearing legal action, agrees to allow a same-sex wedding on the premises as long as the couple can find their own minister. The congregation is upset, particularly as the church is now seen as being in favour of marriage for same-sex couples.

32. Schedule 23 paragraph 2 to the EA 2010 (organisations relating to religion or belief) would not apply to the congregation because their church does not own or control the use of the premises. The Bill sets out provisions regarding the formal sharing of buildings, requiring that all religious organisations must consent to the registration of buildings for marriages of same sex couples. Where there is no sharing agreement, the Secretary of State has the power to make regulations.

Scenario E – Teacher loses job

33. A primary school teacher is told to teach using a book about a prince who marries a man; she is also asked to help the children perform the story as a play. She says it goes against her religious beliefs. Disciplinary proceedings are taken against her.

34. Teachers will continue to have the clear right to express their own beliefs, or that of their faith - such as that marriage should be between a man and a woman - as long as it is done in an appropriate way and a suitable context. No teacher will be required to promote or endorse views which go against their beliefs.

35. Teachers will of course be expected to explain the world as it is, in a way which is appropriate to the age, stage and level of understanding of their pupils and within the context of the school's curriculum, policies and ethos. This may include the factual position that under the law marriage can be between opposite sex couples and same sex couples. There are many areas within teaching, particularly within faith schools, where teachers and schools already deal with areas relating to religious conscience, such as homosexuality and divorce, with professionalism and sensitivity. The guidance governing these issues is the same guidance that will govern how same sex marriage in the classroom will be approached.

No teacher can be compelled to promote or endorse views which go against their conscience. We expect heads, governors and teachers will come to sensible arrangements about any teaching that includes discussion of same sex marriage as they currently do in all other areas of the curriculum.

Scenario F – Christian child mocked

36. A homosexual advocacy group comes into a secondary school to give an anti-bullying presentation to pupils. A Christian child says that his church teaches that marriage is only between a man and a woman. The child is told that this is a homophobic view and is mocked for his views. When the parents raise this with the school, the school says they are under a duty to teach the value of marriage and that means teaching them the new legal definition.

37. The Sex and Relationship Education (SRE) Guidance[19] issued by the Department for Education emphasises that pupils must be protected from teaching and materials which are inappropriate having regard to the age and the religious and cultural background of the pupils concerned. It should be noted that section 403(1) of the Education Act 1996 ("the EA 1996") provides that, where sex education is given, it is given in such a way as to encourage due regard for moral considerations and the value of family life. Section 403(1A) provides that the Secretary of State must issue guidance designed to secure that, when sex education is given to registered pupils at maintained schools, they learn about the nature of marriage and its importance for family life and the bringing up of children. However, the subject matter in this scenario would not be covered by the SRE Guidance.

38. In terms of domestic discrimination law, section 89(2) of the EA 2010 provides that the EA 2010 does not apply to "anything done in connection with the content of the curriculum". So the subject matter itself would not give rise to a claim for religious discrimination against a child whose parents did not believe in same sex marriage, and the parents could not object to children being taught that marriage of same sex couples is lawful as part of the curriculum. However, the parents would be permitted to request that their child is exempted from sex education classes (if the school is a maintained school) pursuant to

[19] https://www.education.gov.uk/publications/standard/publicationdetail/page1/dfes%200116%202000

section 405 of the EA 1996 except insofar as the education is comprised in the National Curriculum (for example, as part of a science lesson on reproduction).

39. However, the way in which the subject of marriage for same sex couples is taught could be caught by the EA 2010. Accordingly, if a school (or someone authorised by the school) conveyed its belief in a way that involved haranguing, harassing or berating a particular pupil or group of pupils, then this would be unacceptable in any circumstances and is likely to constitute unlawful discrimination. None of this, however, is a problem particular to beliefs about the nature of marriage. The same issues would arise if a pupil was bullied or mocked for expressing any other religious or philosophical beliefs, and there is no basis for altering the law specifically to deal with marriage for same sex couples.

Scenario G – Children forced into lessons

40. Christian parents do not wish their child to attend lessons during Gay and Lesbian History Month about the history of the homosexual civil rights movement, in particular the campaign for equal marriage equality. The school insists their child attend. The parents keep their child away from school and the school threatens them with proceedings. The parents cite Article 2 of the First Protocol of the Convention (right to education) in response.

41. There may be parents who do not want their children to learn about marriage of same sex couples at school. A number of domestic provisions would apply to that situation, as outlined above in relation to Scenario F.

42. If a lesson is not part of sex education, the parents would have no right to withdraw their child. Any action by a school resulting from withdrawal of a child from a lesson which is not part of sex education would not be on the basis of the child's religious beliefs, but the unauthorised withdrawal from school, and would not therefore constitute unlawful discrimination.

43. Parents might attempt to argue that the classes constitute "political indoctrination" which is prohibited pursuant to section 406 of the EA 1996. Assuming, however, that the lesson is properly taught and does not constitute "the promotion of partisan political views" within section 406(1)(b), it would not fall foul of the EA 1996.

44. Some parents may also try to claim under Article 2 of the First Protocol of the Convention ("A2P1") that requiring their child to attend lessons about, for example, the history of the homosexual civil rights movement constitutes a failure to "respect" their right to ensure education is in conformity with their religious and philosophical convictions. However, we consider that such an argument is likely to fail. The case law of the ECtHR has interpreted the requirement to "respect" the rights of parents in A2P1 in such a way as to impose a high threshold on parents to establish a breach (see *Folgero v Norway*[20] in which the ECtHR considered the limits of the requirement to respect parental views). The Convention certainly does not require all educational provision to occur in a way which parents agree is consistent with their religious and philosophical convictions. Provided that the lessons are taught in a balanced way and do not constitute political indoctrination, requiring a pupil to attend will not breach A2P1.

45. Furthermore, objections by parents to a curriculum can occur for all manner of reasons. There is no reason to treat objections to teaching about marriage for same sex couples as a different category. It would be peculiar if pupils were not exempted from lessons which consider civil partnerships, the history of the homosexual civil rights movement or same sex relations more generally, but that if marriage for same sex couples is mentioned parents are permitted to withdraw their children from the class. Provided the teaching occurs in a manner which is sensitive, does not constitute political indoctrination and is not dismissive of the views of those that consider, on the basis of sincerely held religious or philosophical beliefs, that marriage should be a union between a man and a woman, we do not consider that there is any reason why a school should not include, as part of its curriculum, teaching about marriage for same sex couples.

Scenario H – Foster couple turned down

46. A Christian couple wish to foster. The social worker wants to know their views on marriage for same-sex couples. They say they oppose it but don't see it as relevant. Their application is refused by the local council on the basis that their failure to commit fully to society's understanding of marriage would breach their diversity policy.

[20] (2008) 46 EHRR 47

47. Potential fosterers may argue that it is their belief about marriage which gives rise to their not being considered suitable as fosterers (see *Johns v Derby CC*[21]). However, views on marriage of same sex couples would not justify a refusal to allow individuals to act as foster carers, as such views in themselves would not impact on how a foster carer cares for a child. It is difficult to justify why a person who considers that marriage should be between a man and a woman, but exhibits no discriminatory views about sexual orientation, would be unsuitable to be a foster parent simply because of their attitude to marriage of same sex couples. The High Court in *Johns* held that "the local authority is entitled to explore the extent to which prospective foster carers' beliefs may affect their *behaviour*, their *treatment* of a child being fostered by them"[22]. Accordingly, it is not necessarily inappropriate for a local authority to ask about attitudes to marriage of same sex couples; but if a person expresses views that marriage should be between a man and a woman, that in itself should not affect their treatment of a foster child (though see below for further in this regard). A refusal is therefore likely to be unlawful.

48. It should be noted that there is a two stage approval system for foster parents. First, a person applies to be assessed and approved as a foster parent *per se*, under the Fostering Services (England) Regulations 2011[23]. At that stage their views on same sex marriage are unlikely to justify a decision that they are not suitable to be foster parents, as described above.

49. Second, a local authority looking to place a particular child with foster parents makes a decision about where to place that child. The local authority is under a duty in section 22C of the Children Act 1989 to place the child in the most appropriate placement available, and under the duty in section 22(3)(a) of that Act to safeguard and promote the child's welfare. So the local authority might legitimately decide that a child of a same sex couple could not be placed with those foster parents if their views on same sex marriage would affect the child, or for example frustrate contact between the child and his parents. This would not be a decision that they were unsuitable to be foster parents, but a decision that it was not appropriate for them to foster a particular child. This is in line with the *Johns* case, in that the foster carer's beliefs in that particular case may affect their behaviour and treatment of

[21] [2011] EWHC 375
[22] Para 97
[23] S.I. 2011/581

the child. However, irrelevant considerations of religious or cultural background should not prevent children from being placed with loving and stable families.

Scenario I – Marriage registrar

50. A Christian registrar of births, deaths and marriages has been concerned that she might, at some point, be required to officiate at civil partnership ceremonies, to which she would have genuine conscientious objections flowing from her Christian faith. However, the local authority has deliberately not designated her as a civil partnership registrar, allowing her to continue to conduct marriages only. However, following the extension of marriage to same sex couples, the registrar is told by her employer that they regret to tell her that she will now be required to carry out same sex marriage duties, otherwise the local authority will be in breach of the EA 2010. The employer states that same sex marriage and opposite sex marriage are not separate legal designations, unlike marriage and civil partnerships. The local authority quotes the Court of Appeal decision in *Ladele v Islington.*

51. Under the Bill, marriage registrars whose role it is to register marriages for civil purposes pursuant to the MA 1949 will be responsible for marriages of same sex couples as well as opposite sex couples. The Bill does not make provision for the conscientious objection of those registrars whose religious or philosophical beliefs mean that they do not want to solemnize marriage of same sex couples.

52. Following the recent judgment (published on 15 January 2013 and not yet final) of the ECtHR in *Ladele*, refusing to permit civil partnership registrars to conscientiously object to registering civil partnerships is lawful pursuant to both the EA 2010 and the Convention.

53. There is also 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 they do not want to conduct same sex marriage ceremonies. We consider that any interference is justified by the legitimate aim that public officials should offer their services to all without discrimination based on the sexual orientation of customers. There is a balance to be struck between the rights of same sex couples in this regard and 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. But there can be little doubt

that promoting equality and tackling discrimination because of sexual orientation is a legitimate, indeed a weighty, aim for a public authority – the ECtHR held that this aim was legitimate in *Ladele*. The ECtHR has held on many occasions that particularly convincing and weighty reasons are necessary to justify subjecting individuals to differences in treatment on the grounds of their sexual orientation.

54. As for proportionality, Ms Ladele argued that there were "less severe and intrusive means available to Islington" and services could have been arranged so that other registrars, without her beliefs, would register civil partnerships. However, Islington argued that it was entitled to conclude that it would undermine its pursuit of its aim if it were to make exceptions for employees as to the work they were required to perform because those employees did not wish to provide services to same sex couples. The ECtHR held in *Ladele* that there is a wide margin of appreciation for national authorities when it comes to striking a balance between competing Convention rights (cf *Evans v the United Kingdom*[24]) and that Islington did not exceed the margin of appreciation in this case[25]. Similar considerations would apply to registrars in relation to marriage of same sex couples.

55. Arising from this, there is a question as to whether 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.

56. It is clear that, if a local authority did not have sufficient registrars to cover marriage of same sex couples because it permitted conscientious objection, it would be acting in breach of the EA 2010. It would be providing less favourable treatment in the provision of its services to same sex couples.

57. In *Ladele* the Court of Appeal held that it would constitute a breach of the Equality Act (Sexual Orientation) Regulations 2007[26] (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. (This issue was not considered by the ECtHR in its judgment.) If that reasoning is applied to marriage of same sex couples, it means that a

[24] [GC], no. 6339/05, para 77, ECHR 2007-I
[25] Para 106
[26] S.I. 2007/1263

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.

58. There may be criticism of the Court of Appeal's conclusion that there will be less favourable treatment of a same sex couple even where they are able to register their partnership on the day and in the manner they wish, without knowing of the internal arrangements as to who should act as their registrar. However, it is arguable that the prohibition on discrimination requires offering services equally to all, and that offering services in a different way (including their being provided by different personnel), in and of itself, constitutes less favourable treatment. That is so even if the couple are able to get married at the time and place they choose.

59. Accordingly, 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.