

GENERAL SYNOD

WOMEN IN THE EPISCOPATE

Note by the Legal Advisers on clause 2 of the draft Bishops and Priests (Consecration and Ordination of Women) Measure

Introduction

1. Clause 2 of the draft Bishops and Priests (Consecration and Ordination of Women) Measure ('the draft Measure') is a clarificatory amendment to the Equality Act 2010 designed to make clear that the office of diocesan or suffragan bishop is not subject to sections 50 and 51 of that Act which are concerned with appointments to certain categories of public office.
2. The background to, and the effect of, clause 2 was explained in paragraphs 121 – 129 of *Women in the Episcopate – New Legislative Proposals: Report from the House of Bishops* (GS 1886) and paragraphs 20 – 23 of the Report of the Steering Committee (GS 1924).
3. In summary, they explained that:
 - Under section 50 of the Equality Act it is unlawful for a person with the power to make an appointment to a 'public office' to discriminate either in making the appointment or in the terms on which such an appointment is offered.
 - A 'public office' for this purpose includes one "*made on the recommendation of or subject to the approval of a member of the executive*".
 - Government officials share the view of the Legal Office that:
 - it is not entirely clear whether, under the arrangements for appointing bishops that have applied since 2008, the Prime Minister's role in advising the Crown on episcopal appointments is such that a diocesan bishopric falls within the definition of 'public office' contained in the Equality Act;
 - if diocesan bishoprics do fall within the definition it would not be lawful for the Church of England to create the *expectation* (even though it were not a legal *requirement*) that diocesan bishops would, in certain circumstances, invite other bishops to exercise ministry in parishes which, on grounds of theological conviction, did not wish to receive episcopal oversight from a woman; and
 - if the Church of England wishes to have certainty in that connection, the draft Measure would accordingly need to contain some clarificatory provision.
 - Clause 2 has therefore been included in the draft Measure for that purpose, following discussion and with the agreement of the then Prime Minister's Appointments Secretary and the Government Equality Office.

4. This note provides a more detailed explanation of some of these points and seeks to address certain questions which have been raised subsequently about the need for, and the effect of, clause 2.

Why is it unclear whether a diocesan bishopric is a 'public office' for the purpose of the Equality Act?

5. It is already the case, in the view of the Legal Office, that the office of a bishop does not fall within the definition of 'public office' contained in the Equality Act, though, as noted, the present position is not entirely free from doubt.
6. The basis for our view is that, since 2008 in relation to diocesan appointments¹ and 2010 in relation to suffragans, one recommended name has been forwarded to the Prime Minister. In the case of diocesan appointments, this follows the statement in *The Governance of Britain – Constitutional Renewal*² that in future the Prime Minister would ask for only one name, which he would then forward to Her Majesty The Queen.
7. The position now, therefore, is that the Prime Minister does not exercise any choice in deciding the name that is put to Her Majesty. His role consists of advising The Queen to approve the choice made by the Crown Nominations Commission (in the case of a diocesan appointment) or by the diocesan bishop (in the case of a suffragan appointment). The role of the Prime Minister is therefore a formal one that continues as a matter of constitutional propriety and to ensure that the Church of England has conducted the processes properly. The choice of person to be appointed is now the responsibility of the relevant bodies and persons within the Church of England.
8. It is our view that the formal constitutional advice given by the Prime Minister is not such that a diocesan or suffragan bishop can be said to be appointed "*on the recommendation of, or subject to the approval of, a member of the executive*". The position is as described in paragraph 63 of *The Governance of Britain*, namely that the Prime Minister conveys to Her Majesty a recommendation that has been made by somebody else.
9. As a consequence, we consider that the definition of 'public office' in section 50 of the Equality Act does not include the office of diocesan or suffragan bishop.
10. But, as explained in paragraph 22 of GS 1924 and more fully in paragraphs 127-129 of GS 1886, the matter is not entirely free from doubt; and it would be highly undesirable for there to be any scope for the legal position to be subject to challenge in the courts in the context of the arrangements surrounding the opening of the episcopate to women.

¹ In the case of diocesan vacancies the Crown Nominations Commission continues to identify the names of two appointable candidates, which are available to the Prime Minister in the unlikely event that the recommended candidate declines or is for some other reason unable to take up the appointment

² Cm 7342-I, paragraph 254.

How will clause 2 change the current position under the Equality Act?

11. Since, as explained above, the view of the Legal Office is that the office of a bishop does not fall within the definition of 'public office' contained in the Equality Act, it follows that we do not consider that clause 2 of the draft Measure will change the current legal position – in the sense that clause 2 does no more than state, in terms, what we believe the current legal position to be. Thus in our view it will not deprive anyone of any protection from unlawful discrimination, whether in relation to gender or any other of the protected characteristics (age, disability, marital status, sexual orientation etc.) which they currently enjoy.

Rather than making specific statutory provision, could not reliance simply be placed on the exception contained in Schedule 9 of the Equality Act?

12. If clause 2 were not included and if, in the event of a claim of unlawful discrimination, a court were to hold, contrary to the view set out above, that a bishop *was* the holder of a public office as defined in section 50 of the Equality Act, those involved in making an appointment would have to demonstrate that no unlawful discrimination had taken place.
13. If the claim were that person A had been preferred over person B on grounds of gender, age, sexual orientation etc. the defence would need to be either that there had in fact been no discrimination or that the discrimination fell within the exception contained in paragraph 2 of Schedule 9 to the Equality Act. Thus, for example, where a man was preferred over a woman to avoid conflicting with the strongly held religious convictions of a significant number of those to whom the bishop would be ministering that would not constitute unlawful discrimination on grounds of gender or religion and belief.
14. The problem that clause 2 is designed to tackle does not therefore concern discrimination in the appointment process. It is about discrimination in relation to a person who is to be or who has actually been appointed to a public office. The exception in Schedule 9 would, in particular, not allow a woman to be appointed a diocesan bishop on the understanding that, in relation to certain parishes, she would refrain from carrying out certain functions herself (because of her sex).
15. The Government Equalities Office accept that to be the case and that, if the Church of England wishes to have certainty that the sort of arrangements we envisage are to be free from the risk of legal challenge, the draft Measure will need to make provision for that.

Will clause 2 put the Church of England in a privileged position?

16. The effect of clause 2 will not be to put the Church of England in a special position. Rather, its effect will simply be that, in relation to possible discrimination claims, the Church of England is in the same position so far as the Equality Act is concerned as all other denominations and faiths where senior appointments are concerned.

Does clause 2 have implications beyond the application of the Equality Act, particularly in relation to the established nature of the Church of England?

17. As explained in paragraph 23 of GS 1924, clause 2 of the draft Measure is concerned only with the definition of ‘public office’ that has been specifically formulated for the purposes of the Equality Act. That definition is not concerned with whether the person holding office has an official public role. It is concerned solely with the manner in which the appointment to the office is made and is dependent on the government or Parliament having a particular role in the appointment. It is not concerned with the concept of ‘public office’ in any more general sense in which the term might be used. Thus the effect of clause 2 is confined to a highly specific context and has no implications for the public role of bishops more generally.
18. In particular, clause 2 will not have any impact upon the questions whether, in relation to the exercise of any of their functions, bishops:
 - are susceptible to judicial review; or
 - constitute ‘public authorities’ for the purposes of the Human Rights Act 1998.
19. More generally, given that the effect of clause 2 is restricted to the application of section 50 of the Equality Act, it is hard to see how it could provide any basis for arguing that the role of bishops in public life should be restricted, whether in the House of Lords or otherwise. Notably, life peerages, whose holders make up the large majority of the membership of the House of Lords, are already excluded from the definition of ‘public office’ in the Equality Act (by paragraph 3 of Schedule 6). So are Government ministerial offices.

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