

ARCHBISHOPS' GUIDELINES ON THE IMPLEMENTATION OF "CHOOSING BISHOPS – THE EQUALITY ACT 2010 (REVISED)" (GS Misc 1044)

Introduction

1. These guidelines set out the processes for the implementation of the Legal Office note "Choosing Bishops – the Equality Act 2010 (Revised)" (attached to GS Misc 1044), and should be read in conjunction with that document. They have been prepared so that the relevant information can be provided to members of the Crown Nominations Commission (CNC) in the light of their responsibilities for nominating bishops.
2. The paper needs to be understood in the context of the Church's wider teaching on marriage and on sexual relations as set out in the Canons and other formal statements of the Church of England's teaching.
3. Since the Legal Office note was last revised in June 2013, the House of Bishops has published its Pastoral Guidance on Same Sex Marriage, paragraph 27 of which stated that "*The House is not, therefore, willing for those who are in a same sex marriage to be ordained to any of the three orders of ministry.*" As persons in same sex marriages cannot be consecrated to the episcopate, the focus of these guidelines is on issues arising in connection with (a) those who are in a further marriage following divorce and have a previous spouse still alive (or are married to someone with a surviving spouse) [addressed in paragraphs 19 to 23 of the Legal Office note] and/or (b) those who are in a civil partnership [addressed in paragraphs 24 to 30 of that note].

The application of the Equality Act

4. The Legal Office note sets out the position that would apply if the Equality Act applied to the nomination of bishops. At that point, the position in that respect was unclear but the view taken by the Legal Office was that the Act did not apply.
5. Since the note was prepared, the position has been put beyond doubt by the Bishops and Priests (Consecration and Ordination of Women) Measure 2014, s.2 of which expressly provided that the office of diocesan or suffragan bishop is not a 'public office' for the purposes of the Act.
6. However, the position continues to be the same as it was before the 2014 Measure, namely that even though the appointment of bishops (and in general of incumbents) does not fall within the relevant provisions of the Equality Act, for reasons of equity the Church will nonetheless proceed in relation to appointments as if the Act applied.

Considering the imposition of a requirement in relation to re-marriage after divorce or civil partnership status

7. The needs of a diocese are determined by the CNC in the light of:
 - the Diocesan Statement of Needs;
 - the Secretaries' Memorandum;
 - a statement by the Archbishops on the national role of bishops;
 - a note provided by the outgoing bishop (on occasion); and
 - the main responsibilities of a bishop as set out in the generic role profile.
8. Either before or at the first meeting of the CNC, and having received and reviewed the paperwork set out above, it is open to a member of the CNC to advise the Archbishops' Secretary for Appointments that they wish the CNC to consider imposing a requirement that the nomination should be open only to (a) those who are not in a further marriage following divorce and have a previous spouse still alive (or are married to someone with a surviving spouse) and/or (b) those who are not in a civil partnership - see paragraphs 18 and 30 of the Legal Office note.
9. Members will see from the note that the imposition of any such requirement must be justified on the basis of the "*religious convictions of a significant number of the religion's followers*". It is clear from the judgment in the leading authority on the issue (*R (Amicus) v Secretary of State for Trade and Industry (2004)*) that (a) the expression 'a significant number' "is an ordinary English expression which courts or tribunals should have no difficulty applying in practice", (b) ultimately it is a question of fact which the decision maker has to decide in each case and (c) there is no need to undertake any detailed statistical analysis to be able to apply the test.
10. Whilst the Church teaches that membership of it is conferred through baptism, the way that the Equality Act is expressed means that, in deciding whether to apply a requirement, regard should be had to the convictions of the *worshipping members* of the Church of England to whom the bishop concerned would be ministering. The key question for consideration is, therefore, whether the proposed requirement could be justified by reference to a theologically rooted convictions about the nature of marriage or same-sex exclusive relationships (even if sexually abstinent) - as opposed, for example, to simply reflecting social conservatism.
11. The decision whether to impose a requirement is one for the whole Commission to take. But in coming to a view, it will need to give proper weight to the elected diocesan representatives' understanding of church traditions within the diocese.
12. If any member gives notice of their desire that it consider the imposition of a requirement, the full CNC will discuss that possibility in the course of their review of the needs of the diocese at their first meeting and before finalising the role profile for the diocese and considering candidates. In the light of the

discussion a vote will be taken (to be decided by a simple majority) as to whether a requirement should be imposed or not.

13. If a decision is taken to impose a requirement no one who is in the relevant category will be considered by the CNC.
14. If no notification is received of a desire that the CNC consider imposing a requirement, or if such notification is received but the CNC decides not to impose a requirement, the fact that a particular candidate may be in one or other of the categories referred to in paragraph 7 is not something that can properly be taken into account and may not therefore be the subject of discussion or questioning.

The relevance of a candidate's previous public statements on human sexuality

15. The focus of the Legal Office note is the imposition of a requirement of one of the kinds described in paragraph 7. The imposition of such a requirement is a significant thing, its effect being completely to exclude from consideration those whose circumstances are inconsistent with the requirement. But, as noted above, if a requirement is not imposed the fact that a candidate falls into one or other of the two categories is to be ignored and may not be the subject of any further discussion or questioning.
16. It is possible that a further issue may arise in the course of the CNC's deliberations which is distinct from the possible imposition of a requirement. That is whether, when considering whether the candidate can fulfil the fundamental calling of a bishop to be a 'focus of unity', the CNC can nonetheless lawfully take into account the **content and manner** of any public statements previously made by him or her about the Church's traditional teaching on same-sex relations, or other matters. (An issue of that kind could of course arise in relation to any candidate, whatever their sexuality.)
17. Taking a consideration of this kind into account is different from imposing a requirement. Rather, in terms of the Equality Act, it involves the application of a 'criterion', in the light of which (amongst other criteria) the decision on nomination would be made.
18. A discussion of this kind in relation to a candidate with a protected characteristic would not have involved indirect discrimination under the Equality Act, had the Act applied, even if in practice such a discussion might put such a candidate at a disadvantage when compared with other candidates. The concept of 'indirect discrimination' under the Act does not extend to a situation in which a criterion is applied as a proportionate means of meeting a legitimate aim; and a criterion designed to assess how well a candidate would, if nominated, be able to fulfil a fundamental aspect of a bishop's role would have passed that test.
19. It would accordingly be open to the CNC, in principle, to have a discussion of this kind, in an appropriate case, whatever the candidate's sexuality. Were it to

do so, then the criterion would need to be weighed alongside others. So it would be for each individual member of the CNC to decide how much weight to attach to it.

20. However, in the case of a homosexual candidate it would be essential that any discussion of this issue was confined to weighing the implications of the candidate's previous public statements for his or her ability to act as a focus of unity, rather than taking account of the implications of his or her sexuality or status as a civil partner. The latter would involve taking account of irrelevant, and unlawful, considerations, since those matters have either to be addressed through the imposition of a requirement or left out of account altogether.
21. In addition, the mere fact that a candidate had publicly questioned the Church of England's teaching on human sexuality, or indeed that of the Anglican Communion as articulated in Lambeth I:10, or any other significant part of Church teaching, would not be sufficient to raise any issue from this point of view: that is something that clergy are free to do, provided the views they express remain within the Chicago-Lambeth quadrilateral and demonstrate a serious and thoughtful attempt to engage with Scripture. An issue could only arise as a result of the way in which that disagreement had been expressed (for example, because it demeaned and disparaged those who took a different view from that held by the candidate or was expressed in such a way as to make them reasonably feel personally attacked).
22. Particular care would be needed in handling any considerations relating to the Anglican Communion. An adverse reaction in the Anglican Communion to the candidate's appointment on account of his or her previous public statements could in principle be a relevant consideration in so far as it touched on the candidate's ability to be a focus of unity in the Church of England – e.g. because it could fuel controversy within the Church of England of such a kind as to make it more difficult for the candidate to act as an effective focus of unity.
23. However, in practice considerable care needs to be taken in evaluating considerations relating to the Anglican Communion, where concerns about a homosexual candidate's appointment may well be based at least as much on his or her sexuality or civil partner status as on the nature of his or her previous public statements.

Archbishops' Secretary for Appointments
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