

**CHOOSING BISHOPS – THE EQUALITY ACT 2010
(REVISED)**

I attach for the information of Synod members a copy of an updated version of GS Misc 992. It now takes account of the decision taken by the House of Bishops in December in relation to civil partnerships and the episcopate.

William Fittall
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Secretary General
Church House

CHOOSING BISHOPS – THE EQUALITY ACT 2010 (REVISED)

1. The Equality Act 2010 ('the Act') codified and, in some respects, extended previous law in relation to discrimination. Most of the provisions of the Act came into force on 1 October 2010.
2. This note is an updated version of the note originally produced for the Crown Nominations Commission ('CNC') and for bishops in December 2010 and circulated to Synod members in June 2011. It does not involve any change of interpretation of the legislation or any departure from the House of Bishops' pastoral statement of 2005 on civil partnerships. It does, however, take account of the House of Bishops' further consideration of civil partnership and the episcopate in December 2012.
3. It is not intended as a comprehensive briefing on a long and complex piece of legislation. Instead, it seeks to summarise some key points which those involved in the process of nominating bishops need to keep in mind in their deliberations and when considering or interviewing candidates. It also provides more specific guidance on two particular areas.

General principles of the Act

4. The Act identifies nine 'protected characteristics'. They are: age; disability; gender reassignment; marriage and civil partnership; pregnancy and maternity; race; religion or belief; sex; and sexual orientation. It then goes on to define 'direct discrimination' (which arises where, because of a protected characteristic, one person is treated less favourably than another) and 'indirect discrimination' (which arises where a person applies a generally applicable provision, criterion or practice which puts another person with a protected characteristic at a disadvantage and which cannot be objectively justified).
5. The effect of the Act is to make it unlawful to engage in direct or indirect discrimination in certain contexts (including employment, certain sorts of office holding, the provision of services and access to premises) unless the Act provides for a specific exception.
6. The definitions and exceptions in the Act, which runs to 239 pages, are complex. There are, for example, various circumstances in which an 'occupational requirement' can be applied in the employment field even though it involves direct or indirect discrimination in relation to one or more of the protected characteristics.
7. Unless one of the exceptions applies, however, those responsible for selection processes will act unlawfully if, in any part of the process, they treat a person less favourably on account of a protected characteristic.
8. Thus, for example, direct discrimination because of the protected characteristic of age is generally unlawful. The effect of provisions in the Act is to permit the Church of England to continue to require that a person may not become a bishop until he has reached the age of 30 and also that he leave office on reaching the age of 70. But treating a candidate less favourably during a selection process because he was thought to be 'too young' or 'too old' would be unlawful.
9. It is also, in general, unlawful to discriminate on grounds of religion and belief. But, again, there is specific provision for Churches and other religious organisations in certain circumstances to impose relevant requirements when making appointments.

10. It is, therefore, lawful for the Church of England, when nominating bishops, not merely to give effect to the general legal requirements relating to the qualifications of those to be consecrated as bishops but also to take into account the particular convictions and Church tradition of candidates where that is relevant to the office for which they are being considered and the context in which they would be exercising their ministry if appointed.
11. Where those responsible for a particular nomination exercise wish to consider applying a requirement in relation to a protected characteristic, they should come to a decision at an early stage in the process before they begin their collective consideration of individual candidates. A requirement must be justifiable in law in relation to the particular episcopal office in question and then be applied even-handedly.

The role of the bishop

12. When selecting those who are to serve it as bishops, priests or deacons, the Church of England, like many other Churches and faiths, does not draw the same distinction as do most secular employers between a person's work life and his or her private life.
13. Thus, to be admitted to Holy Orders a person must be *'of virtuous conversation and good repute and such as to be a wholesome example and pattern to the flock of Christ'* (Canon C 4.1). Once in Holy Orders a cleric must be *'diligent to frame and fashion his life and that of his family according to the doctrine of Christ and to make himself and them, as much as in him lies, wholesome examples and patterns to the flock of Christ'* (Canon C 26.2).
14. Additionally, a bishop is required to be a focus of unity. Bishops are seen within the Anglican Communion as those who have the responsibility *'to guard the faith, unity and discipline of the whole Church'* (the Virginia Report 1998). A bishop's lifestyle is relevant to this. A diocesan bishop has a responsibility to be *'an example of righteous and godly living'* (Canon C 18.1). At their consecration bishops are asked: *'will you endeavour to fashion your own life and that of your household according to the way of Christ ...?'*

The legal basis for the imposition of a requirement

15. Against that background there are two particular issues – divorce and further marriage, and homosexuality and civil partnership – in relation to which questions may arise in the course of identifying those to be nominated for episcopal office as to what requirements may lawfully be imposed given the provisions of the Act.
16. Following statements made by the House of Bishops in 2011 and 2012 the position in the Church of England is now substantially the same in relation to both issues. There is no national impediment to nomination as a bishop of a person who (a) having been divorced, has married again whilst their former spouse is still living; or is married to someone whose former spouse is still living or (b) is in a civil partnership.
17. In both cases, however, it is open to those responsible for making a particular nomination to form a view as to whether, in the light of the understanding of a bishop's role as set out above, being in either of the categories referred to in the preceding paragraph would be an obstacle to effective episcopal ministry, as a focus of unity in the see in question. Such a view would need to be justifiable with reference to the strongly held religious convictions of a significant number of those

worshipping members of the Church of England to whom the holder of the episcopal office concerned would (once appointed) be ministering.

18. In both cases, if those responsible for making the nomination come to that view, they may, in law, impose a requirement that anyone nominated should not fall into the relevant category. This is because the Act allows Churches and religious organisations to impose a requirement of the relevant kind where *'because of the nature or context of the [particular office in question], the requirement is applied so as to avoid conflicting with the strongly held religious convictions of a significant number of the religion's followers'*. This principle is described in the Act as 'the non-conflict principle'.

Divorce and further marriage

19. It is generally unlawful under the Act to treat a candidate for appointment to an office falling within its scope less favourably than other candidates because of the protected characteristic relating to marriage, including because the person concerned is married despite having a former spouse still living or is married to someone whose former spouse is still living.
20. But the Act allows Churches and other religious organisations to apply a requirement not to be married, or a requirement not to be married to someone whose former spouse is still living, or a requirement relating to the circumstances in which a marriage came to an end, where that requirement is applied in order to give effect to the non-conflict principle.
21. The House of Bishops issued a statement on 18 June 2010 (GS Misc 960) clarifying the implications of marriage after divorce for eligibility for ordained ministry, including the episcopate. The statement noted that there was no legal prohibition on the consecration to the episcopate or appointment to episcopal office of someone who had married again and whose current and former spouse was still alive or who was married to someone whose spouse from a former marriage was still alive.
22. The statement went on to say that, in such circumstances, before someone could be considered for an episcopal appointment the archbishop of the province in which the clergyman was serving would want to satisfy himself, on the basis of enquiries carried out by the relevant diocesan bishop, that the marital history did not, in the light of all the circumstances, constitute an obstacle to episcopal appointment. These enquiries will be made before a candidate comes to be considered for a diocesan or suffragan bishop appointment.
23. The statement continued: *'The fact that someone in this situation has been added to the preferment list does not mean that the CNC or the diocesan bishop and those advising him in relation to a suffragan appointment are precluded thereafter from taking the marital history into account when considering his suitability for a particular office. As noted above in relation to parochial appointments, those with the relevant responsibility are entitled to reach a judgement on whether marital history might prove an obstacle given the strongly held religious convictions of a significant number of those to whom the person would be ministering'*.

Homosexuality and civil partnership

24. It is generally unlawful under the Act to treat a candidate for appointment to an office falling within its scope less favourably than other candidates because of the protected characteristics relating to sexual orientation or civil partnership. But the Act allows

- Churches and other religious organisations to apply a requirement related to sexual orientation (for example, in relation to sexual conduct) or a requirement not to be in a civil partnership, where that requirement is applied in order to give effect to the non-conflict principle.
25. A person's sexual *orientation* is, in itself, irrelevant to their suitability for episcopal office or indeed ordained ministry more generally. It would, therefore, be wrong if, during the consideration of a nomination to a diocesan see by the CNC or the selection process for a suffragan see, account were taken of the fact that a candidate had identified himself as of homosexual orientation.
 26. The Church of England's teaching in relation to same-sex relations and, more recently, civil partnerships can be found in the General Synod motion of 1987, the House of Bishops' teaching statement of 1991, *Issues in Human Sexuality*, Resolution I.10 of the Lambeth Conference 1998, and the House of Bishops' Pastoral Statement of 2005 on Civil Partnerships. These make it clear that someone in a sexually active relationship outside marriage is not eligible for the episcopate or, indeed, other ordained ministry.
 27. At its meeting in December 2012 the House of Bishops '*confirmed that the requirements in the 2005 statement concerning the eligibility for ordination of those in civil partnerships whose relationships are consistent with the teaching of the Church of England apply equally in relation to the episcopate*'.
 28. It follows that clergy in civil partnerships who are living in accordance with the teaching of the Church on human sexuality can be considered as candidates for the episcopate.
 29. As in the case of divorce and remarriage, before a priest in a civil partnership can be considered for episcopal nomination the archbishop of the province in which he is serving will wish to satisfy himself, following discussions between the diocesan bishop and the clergyman concerned, that his life is, and will remain, consistent with the teaching of the Church of England as set out in paragraph 26 above. As explained in the Archbishops' guidelines, these assurances will be sought before a candidate comes to be considered for nomination to a diocesan or suffragan see.
 30. As in the case of divorce and further marriage, the fact that there may be those who are in a non-sexually active civil partnership who have been added to the preferment list does not mean that the CNC, or the diocesan bishop and those advising him in relation to a suffragan nomination, are thereby precluded from imposing a requirement that anyone in a civil partnership cannot be nominated to the particular office concerned. Those responsible for making the nomination are entitled in law to reach a judgement on whether the fact that someone is in a civil partnership would prove an obstacle to nomination given the strongly held religious convictions of a significant number of those worshipping members of the Church of England to whom the bishop concerned would (once appointed) be ministering.

**The Legal Office
Church House, Westminster
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