

GOVERNMENT AND PARLIAMENTARY REPORT

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PARLIAMENT, THE EXECUTIVE AND THE SUPREME COURT

On 9 September, the European Union (Withdrawal) (No 2) Act 2019 received Royal Assent and Parliament was prorogued until 14 October. The prorogation was challenged in the courts both in England and Wales and in Scotland, and a strong Divisional Court of Queen's Bench and the Inner House of the Court of Session came to opposite conclusions as to its legality. The judgments were appealed to the Supreme Court, and on 24 September an eleven-judge bench handed down a unanimous judgment in the conjoined cases of *Miller* and *Cherry*.¹

Delivering it, Lady Hale emphasised that the two cases were not about when and on what terms the United Kingdom was to leave the European Union but about whether or not the advice given by the prime minister to Her Majesty that Parliament should be prorogued from a date between 9 and 12 September until 14 October was lawful – and about the legal consequences if it was not.

The court began by answering in the affirmative the question as to whether or not the lawfulness of the prime minister's advice to Her Majesty was justiciable. Further, a decision to prorogue (or advise the monarch to prorogue) would be unlawful if it had the effect of frustrating or preventing, without reasonable justification, the ability of Parliament to carry out its constitutional functions as a legislature and as the body responsible for the supervision of the executive. The court concluded that the prorogation had indeed had the effect of frustrating or preventing Parliament from carrying out its constitutional functions without reasonable justification and, therefore, that the decision to advise Her Majesty to prorogue Parliament had been unlawful. Therefore, both the order in council to which the advice had led and the prorogation itself were *also* unlawful,

¹ *R (Miller) v The Prime Minister* [2019] UKSC 41 and *Cherry and Ors v Advocate General for Scotland*.

void and of no effect. Accordingly, the order in council should be quashed and, consequently, Parliament had not been prorogued.

The court concluded that it was for Parliament, and in particular for the Speaker and the Lord Speaker, to decide what to do next. Both Houses were recalled and sat on the following day – and were prorogued on 9 October.

CHURCH REPRESENTATION AND MINISTERS MEASURE 2019

The Church Representation and Ministers Measure received Royal Assent on 4 July. The Measure emerged from the work of a simplification task group established by the Archbishops' Council, and section 1 substitutes new and completely redrafted Church Representation Rules for those originally enacted as Schedule 3 to the Synodical Government Measure 1969 (and subsequently amended). Section 2 provides the statutory basis for the General Synod to make provision by canon to extend the range of situations in which a newly ordained deacon or priest can serve his or her title. The operative provisions of the Measure will come into force on such day as the archbishops may by order jointly appoint; different days may be appointed for different purposes.

Concerns were raised at the February General Synod, however, about the provision in the new Rules that would limit parochial lay representatives on deanery synods to two consecutive terms of three years. At an Elections Review Group meeting on 1 April, it was agreed to consult widely on seven different options, and a consultation document was circulated to members of General Synod, diocesan secretaries, PCC secretaries, lay chairs of diocesan synods, lay chairs of deanery synods, area and rural deans and the National Deaneries Network. The consultation closed on 10 July.

CIVIL PARTNERSHIPS, MARRIAGES AND DEATHS (REGISTRATION ETC.) ACT 2019

Marriage registration

As noted in our last report, the Civil Partnerships, Marriages and Deaths (Registration Etc.) Bill received Royal Assent on 26 March and came into force two months after it was passed. Section 1 of the Act empowers the secretary of state to amend by regulations the Marriage Act 1949 to provide for a central register of marriages in England and Wales 'which is accessible in electronic form'.

As to the mechanism of registration, the basic proposal is that marriage certificates issued at the time of the wedding will be replaced by a marriage document to be prepared by the officiating minister before the wedding and signed at the ceremony by the couple, their witnesses and the officiant. The couple will then need to ensure that the marriage document is deposited at the local register office (either by themselves or by someone else on their

behalf) within seven days of the date of the wedding; the local superintendent registrar will then record the details and issue them with a marriage certificate.

The Faculty Office's 'Marriage law news' for August outlined details of how the marriage registration provisions of the Act 2019 are to be implemented.² The report noted that the General Register Office was under pressure from Government to bring the changes into effect as soon as possible and, when first published, the proposal was that they should come into force by 2 December 2019 – to which the Faculty Office added: 'As the necessary Regulations have not yet been laid before Parliament, the implementation time-scale and the timelines for lodging a completed Marriage Document/Schedule with the Registry Office set out in this article remain liable to revision.'

Opposite-sex civil partnership

In July the Government published 'Implementing opposite-sex civil partnerships: next steps'.³ The catalyst for change was the Supreme Court's decision in *Steinfeld*,⁴ in which the court held that, because it gave same-sex couples a choice between marriage and civil partnership, the Marriage (Same Sex Couples) Act 2013 had introduced an inequality of treatment between same-sex and opposite-sex couples that disadvantaged the latter to such a degree as to violate their ECHR rights under Article 14 (prohibition of discrimination), read in conjunction with Article 8 (respect for private and family life).

The consultation document declares at paragraph 34 that it intends 'to provide protections to ensure that faith or religious organisations are not compelled to act in a way that would be in contravention of their beliefs' – though it begins, somewhat curiously, by setting out the 'quadruple lock' in relation to same-sex marriage and presents it as a statement of principles. Further, 'following discussions with a number of faith groups', the Government states at paragraph 37 that it intends to 'provide similar protections for civil partnerships. This will allow religious groups to choose whether to host civil partnerships only for same-sex couples, only for opposite-sex couples, for both, or not to host civil partnerships at all.' At the time of writing, the Government was considering responses to the consultation.

In Scotland, there was a consultation in 2018 on whether to ban further civil partnerships or open them up to opposite-sex couples. The Government has opted for the latter and included a Civil Partnership Bill in the Programme for Government 2019–2020 announced on 3 September.

2 Available at <<http://www.facultyoffice.org.uk/special-licences/marriage-law-news/>>, accessed 9 September 2019.

3 Available at <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/815741/Civil_Partnerships_-_Next_Steps_and_Consultation_on_Conversion.pdf>, accessed 9 September 2019.

4 *R (Steinfeld and Keidan) v Secretary of State for International Development* [2018] UKSC 32.

FACULTY JURISDICTION (AMENDMENT) RULES 2019

In July, General Synod agreed the Faculty Jurisdiction (Amendment) Rules 2019. Various procedural changes have been made; but of greater significance are the revisions to Lists A and B in response to comments from around the dioceses. The amendments will come into effect on 1 April 2020.

FUNERALS IN SCOTLAND: DRAFT CODE OF PRACTICE

In June 2019, the Scottish Government published a consultation on a draft statutory code of practice for funeral directors pursuant to section 97 of the Burial and Cremation (Scotland) Act 2016. Once the terms have been finalised, funeral directors will be legally obliged to meet the Code's requirements, and inspectors of funeral directors, appointed by Scottish ministers, will inspect against the Code to ensure compliance.

LAW COMMISSION: WEDDING LAW IN ENGLAND AND WALES

At the end of June, the Law Commission announced the terms of reference for its review of wedding law in England and Wales.⁵ The project will consider where a wedding should be able to take place and how to remove unnecessary 'red tape' that can 'hamper choice and increase the cost of wedding venues'. It will aim to ensure that the law works for all couples and all faiths, including those who are not as well served by the current buildings-based system, and seek to make the law simpler and more certain, so that it is clear whether or not a couple's marriage is legally valid.

The remit for the project includes developing a scheme that would allow independent celebrants and non-religious belief groups such as humanists to conduct weddings, enabling the Government to widen the routes to legally binding ceremonies should it choose to do so. Among the various matters that the review will *not* be considering, however, is the common-law duty on parish clergy of the Church of England and the Church in Wales to marry parishioners.

At the time of writing, the consultation document had not yet been published.

PERSECUTED CHRISTIANS AND FREEDOM OF RELIGION OR BELIEF

In February, the Government announced the terms of reference for an independent review of Foreign and Commonwealth Office (FCO) support for

5 Available at <<https://s3-eu-west-2.amazonaws.com/lawcom-prod-storage-1j5xou24uy7q/uploads/2019/07/Terms-of-reference-for-the-Law-Commission-review-of-weddings-FINAL.pdf>>, accessed 9 September 2019.

persecuted Christians commissioned by the Foreign Secretary. The review was carried out by the Rt Revd Philip Mounstephen, Bishop of Truro. He published an interim report in May, explaining that ‘it rapidly became apparent that the scale and nature of the phenomenon simply required more time’.⁶

The final report was published on 9 July.⁷ In it, Bishop Mounstephen emphasises that

the focus of the Review’s recommendations is clearly on guaranteeing freedom of religion or belief [FoRB] for all, irrespective of faith tradition or belief system, taking full account of the scale, scope and severity of its abuse in various contexts (which in itself has justified the Foreign Secretary asking for a particular focus on Christian persecution at this present time). To argue for special pleading for one group over another would be antithetical to the Christian tradition. It would also, ironically, expose that group to greater risk. We must seek FoRB for all, without fear or favour.

On 12 September, the prime minister appointed Rehman Chishti MP as his Special Envoy for Freedom of Religion or Belief in succession to Lord Ahmad of Wimbledon, to ‘bring together efforts across the UK Government, with faith actors and civil society to promote the UK’s firm stance on religious tolerance abroad’ and ‘lead the implementation of the recommendations from the recent independent review into FCO support for persecuted Christians led by the Bishop of Truro’.⁸

PREVENT

In September, the Government published the terms of reference for the independent review of the Prevent programme.⁹ The review, led by Lord Carlile, is focusing on the current delivery of Prevent and will make recommendations for the future of the Government’s strategy for safeguarding those vulnerable to radicalisation. It will include looking at effectiveness of delivery, how effectively the Prevent statutory duty is being implemented, how it might be improved to respond to justified criticisms and complaints, and how it interacts with other safeguarding strategies. The review will report to Parliament by August 2020.

6 Available at <<https://christianpersecutionreview.org.uk/interim-report/>>, accessed 13 May 2019.

7 Available at <<https://christianpersecutionreview.org.uk/storage/2019/07/final-report-and-recommendations.pdf>>, accessed 9 September 2019.

8 Foreign & Commonwealth Office, ‘Press release: UK appoints new Prime Minister’s Envoy for Freedom of Religion and Belief’, 12 September 2019, <<https://www.gov.uk/government/news/uk-appoints-new-pm-envoy-for-freedom-of-religion-belief>>, accessed 9 October 2019.

9 Available at <<https://www.gov.uk/government/publications/independent-review-of-prevent-terms-of-reference/independent-review-of-prevent-terms-of-reference>>, accessed 9 October 2019. A call for evidence was published on 7 October.

SAFEGUARDING

In August, the All-Party Parliamentary Group on Safeguarding in Faith Settings issued a call for evidence for its second inquiry on whether there should be a change in legislation relating to ‘positions of trust’ within faith settings. It is currently illegal under the Sexual Offences Act 2003 for a teacher or a care worker to engage in sexual activity with a 16- or 17-year-old under his or her supervision, but adults who hold similar positions within faith and religious organisations (and within sports teams) are not covered by the current provisions. The group’s intention was to publish a report on whether there is a need for the ‘positions of trust’ provisions of the Sexual Offences Act 2003 to be amended to bring faith settings within scope. It was anticipated that the report would be published in November 2019.

SOCIAL FUND (CHILDREN’S FUNERAL FUND FOR ENGLAND) REGULATIONS 2019

The Social Fund (Children’s Funeral Fund for England) Regulations 2019 brought into operation the Children’s Funeral Fund for England as from 23 July. Under the Regulations, no bereaved family will have to pay the fees for a child’s cremation or burial or for a number of prescribed associated expenses. The fund will reimburse funeral costs for children under the age of 18 directly to burial authorities, cremation authorities and funeral directors. The scheme also provides for funeral directors to apply for reimbursement of certain associated expenses, including a £300 contribution towards the cost of a coffin. If the person responsible for organising the burial or cremation makes the funeral arrangements rather than using a funeral director, he or she will be able to claim those expenses directly from the fund. It is estimated that 3,800 children in England die under the age of 18 every year.

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