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**SEXUAL ORIENTATION EQUALITY AND RELIGIOUS
EXCEPTIONALISM IN THE LAW OF THE UNITED KINGDOM:
THE ROLE OF THE CHURCH OF ENGLAND**

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ABSTRACT

There is a growing literature that addresses the appropriateness and merits of including exceptions in law to accommodate faith-based objections to homosexuality. However, what has rarely been considered and, as a consequence, what is generally not understood, is how such religious exceptions come to exist in law. This article provides a detailed analysis of the contribution of the Church of England to ensuring the inclusion of religious exceptions in United Kingdom legislation designed to promote equality on the grounds of sexual orientation. Drawing on a case study that traces the life of one piece of anti-discrimination legislation, the article documents the multi-faceted approach of the Church of England to seeking, securing and shaping religious exceptions in law. The analysis contributes to broader debates about the role of the Church of England in Parliament and the extent to which the United Kingdom, as a liberal democracy, should continue to accommodate the Church's doctrine on homosexuality in statute law.

KEYWORDS

Church of England, Discrimination, Equality, Lords Spiritual, Parliament, Sexuality

I. INTRODUCTION

Since the beginning of the twenty-first century, a wide range of law has been enacted in the United Kingdom that is designed to address discrimination on the grounds of sexual orientation. In the process of enacting this law, legislators have often sought to accommodate faith-based objections to homosexuality and sexual orientation equality.

Such accommodation has resulted in the inclusion in legislation of numerous ‘religious exceptions’ that exempt religious individuals and organisations from the requirement to treat people equally regardless of sexual orientation. For example, religious organisations have been provided with bespoke exceptions in legislation that prohibits discrimination on the grounds of sexual orientation in respect of public services and functions, premises and associations.¹ Similar religious exceptions can be found in legislation relating to, for instance, civil partnership, employment, and marriage.²

There is a growing academic and policy literature in the United Kingdom³ and beyond⁴ that addresses the appropriateness and merits of accommodating faith-based objections, either at an individual or organisational level, to equal treatment based on sexual orientation. However, what has rarely been considered and, as a consequence, what is generally not understood, is how religious exceptions come to exist in law. Therefore, this article provides a detailed examination and critical account of the process by which religious exceptions have become included in United Kingdom legislation. By scrutinizing the influence of organised religion on the work of policy makers and legislators, the article provides an in-depth understanding of how faith-based objections to homosexuality are transformed into legal provisions that exempt religious individuals and organisations from legal requirements to treat people equally regardless of sexual orientation.

¹ Equality Act 2010, sch 23, para 2; Equality Act (Sexual Orientation) Regulations (Northern Ireland) 2006, reg 16.

² For a broad discussion see Paul Johnson and Robert M Vanderbeck, *Law, Religion and Homosexuality* (Routledge 2014).

³ Russell Sandberg and Norman Doe, ‘Religious exemptions in discrimination law’ (2007) 66(2) *The Cambridge Law Journal* 302-312; Ian Leigh, ‘Recent developments in religious liberty’ (2009) 11(1) *Ecclesiastical Law Journal* 65-72; Carl F Stychin, ‘Faith in the future: sexuality, religion and the public sphere’ (2009) 29(4) *Oxford Journal of Legal Studies* 729-755; Davina Cooper and Didi Herman, ‘Up against the property logic of equality law: conservative Christian accommodation claims and gay rights’ (2013) 21(1) *Feminist Legal Studies* 61-80; Robert Wintemute, ‘Accommodating religious beliefs: harm, clothing or symbols, and refusals to serve others’ (2014) 77(2) *The Modern Law Review* 223-253.

⁴ Elsje Bonthuys, ‘Irrational accommodation: conscience, religion and same-sex marriages in South Africa’ (2008) 125 *South African Law Journal* 473-482; Laura S Underkuffler, ‘Odious discrimination and the religious exemption question’ (2010-11) 32 *Cardozo Law Review* 2069-2091; Douglas NeJaime, ‘Marriage inequality: same-sex relationships, religious exemptions, and the production of sexual orientation discrimination’ (2012) 100 *California Law Review* 1169-1238; Nomi Maya Stolzenberg and Douglas NeJaime, ‘Introduction: religious accommodation in the age of civil rights’ (2015) 38 *Harvard Journal of Law and Gender* vii-xiii; Jonas Lindberg, ‘Renegotiating the role of majority churches in Nordic parliamentary debates on same-sex unions’ (2016) 58 *Journal of Church and State* 80-97.

This article focuses attention on the contribution of the Church of England (hereinafter ‘CoE’) to the process by which religious exceptions become included in United Kingdom sexual orientation equality law. It does so because of the wide range of ways in which the CoE is able to influence the legislative process in order to actively shape statute law.⁵ Such influence is possible because of the representation that the CoE has in the United Kingdom Parliament, most notably in the form of the 26 Lords Spiritual who sit in the House of Lords,⁶ as well as the Second Church Estates Commissioner who sits in the House of Commons.⁷ Alongside its formal parliamentary capacities, the CoE is also able to exercise considerable influence on the legislative process through its Archbishops’ Council. The work of the Council involves, amongst other things, ‘monitoring of Government policy where proposed legislative and other changes may bear directly on the [CoE]’.⁸ This ‘monitoring’ often takes the form of the Council making active interventions in the legislative process by, for example, meeting with civil servants who are members of a ‘Bill team’ or by making written or oral submissions to parliamentary Select Committees. Further, a senior bishop of the CoE serves as the chairman of the elected governors of the Churches’ Legislation Advisory Service (which succeeded the Churches Main Committee in 2008), a Judeo-Christian ecumenical charity that negotiates with Government on behalf of its membership.⁹

⁵ We are concerned in this article with the influence of the CoE on statute law made by the UK Parliament and not with the law that the CoE, through its General Synod, makes either by Canon or Measure. Measures, which require the approval of Parliament and Royal Assent, and Canons, which require Royal Assent and Licence, are forms of legislation dealing with matters of the CoE.

⁶ These comprise the Archbishops of Canterbury and York, the Bishops of London, Durham and Winchester, and the longest serving of the other qualifying diocesan bishops. The current number of Lords Spiritual permitted to sit in the House of Lords was set by An Act for establishing the Bishoprick of Manchester, and amending certain Acts relating to the Ecclesiastical Commissioners for England 1847 (10 & 11 Vict c 108).

⁷ The Second Church Estates Commissioner is an elected Member of Parliament appointed by the Crown.

⁸ Archbishops’ Council of the Church of England, ‘The Archbishops’ Council’ (2017) available at: <https://www.churchofengland.org/about-us/structure/archbishops-council.aspx#Objects>

⁹ Churches’ Legislation Advisory Service, ‘Annual report for the year ending 31 December 2008’ (2009) available at:

http://www.churcheslegislation.org.uk/files/reports/CLAS_Annual_Report_and_Accounts_2008.pdf. The charity’s nine governors currently include three from the CoE (including the chairman, Alastair Redfern, Bishop of Derby) and one each from the Salvation Army, Roman Catholic Church, United Reform Church, the Baptist Union, the Methodist Church, and the Free Churches Group.

Understanding the role of the CoE in fashioning religious exceptions in sexual orientation equality law is important, not only because of the potent position it occupies in the legislative process but because of its established doctrine on homosexuality. Despite considerable internal debate regarding issues of human sexuality,¹⁰ the authoritative statements of the CoE on homosexuality hold that ‘homosexual genital acts ... fall short of [the] ideal’ that ‘sexual intercourse is an act of total commitment which belongs properly within a permanent [opposite-sex] married relationship’.¹¹ Furthermore, the CoE officially respects the resolution of the worldwide Anglican Communion that ‘homosexual practice [is] incompatible with Scripture’.¹² It is from this standpoint that the CoE attempts to shape legislation in order to ensure the inclusion of provisions that accommodate the practice of its doctrine.

In order to facilitate an understanding of how the CoE influences United Kingdom sexual orientation equality law, we adopt a case study approach that focuses on the life of one piece of legislation: the Employment Equality (Sexual Orientation) Regulations 2003 (hereinafter ‘EESOR 2003’). This approach allows for an in-depth investigation of the ways in which the CoE has attempted to influence the legislative process and its success in doing so. The CoE’s interventions in the legislative process are often multi-faceted and, as we explained above, involve interactions between CoE representatives and a wide range of parliamentary and civil service stakeholders. This case study approach therefore allows for a more comprehensive understanding of the various strategies employed by the CoE to shape legislation in particular ways.

¹⁰ See, for example, Robert M Vanderbeck, Gill Valentine, Kevin Ward, Joanna Sadgrove and Johan Andersson, ‘The meanings of communion: Anglican identities, the sexuality debates, and Christian relationality’ (2010) 15(2) *Sociological Research Online*.

¹¹ Motion of the General Synod, 11 November 1987. This motion of the General Synod and *Issues in Human Sexuality: A Statement by the House of Bishops* (Church of England House of Bishops (1991) London: Church House Publishing) are considered the two authoritative statements of the CoE on homosexuality. See Archbishops’ Council of the Church of England, ‘Homosexuality’ (2017) available at: <https://www.churchofengland.org/our-views/marriage,-family-and-sexuality-issues/human-sexuality/homosexuality.aspx>

¹² Lambeth Conference 1998, Resolution I.10. See also Archbishops’ Council of the Church of England, *ibid*.

The EESOR 2003 was a significant piece of legislation that, for the first time, made it unlawful to discriminate on grounds of sexual orientation in employment.¹³ The EESOR 2003 prohibited direct discrimination,¹⁴ indirect discrimination,¹⁵ victimization,¹⁶ and harassment¹⁷ on the grounds of sexual orientation in employment and vocational training. The EESOR 2003 contained a number of exceptions that permitted a difference of treatment based on sexual orientation in particular circumstances. One exception, for instance, made provision for those circumstances where being of a particular sexual orientation is a genuine and determining occupational requirement for a post, and it is proportionate to apply that requirement in the particular case.¹⁸ The EESOR 2003 also contained a religious exception for a requirement related to sexual orientation to be applied by an employer where the employment is for purposes of an organised religion.¹⁹ This religious exception provides the particular focus of our analysis.

In the remainder of this article, we trace the development of the religious exception in the EESOR 2003 through a number of stages: first, we examine the background to the EESOR 2003 in European Union law; second, we consider the process by which the religious exception in the EESOR 2003 was conceived and drafted; third, we examine the parliamentary passage of the EESOR 2003 and the scrutiny of the religious exception by both Houses of the United Kingdom Parliament; fourth, we consider the judicial interpretation of the religious exception; and fifth, we consider further parliamentary scrutiny of the religious exception during the process by which the EESOR 2003 was consolidated in the Equality Act 2010. At every stage of our analysis, our principal aim is to show the critical role of the CoE in ensuring that it and other organised religions be provided with a bespoke exception enabling religious employers to continue to discriminate on grounds related to sexual orientation.

¹³ EESOR 2003 applied to Great Britain from commencement on 1 December 2003; similar provisions in the Employment Equality (Sexual Orientation) Regulations (Northern Ireland) 2003 commenced on 2 December 2003 and remain in force.

¹⁴ EESOR 2003, reg 3(1)(a).

¹⁵ *ibid* reg 3(1)(b).

¹⁶ *ibid* reg 4.

¹⁷ *ibid* reg 5.

¹⁸ *ibid* reg 7(2).

¹⁹ *ibid* reg 7(3).

II. THE BACKGROUND TO THE EESOR 2003: EUROPEAN UNION COUNCIL DIRECTIVE 2000/78/EC

The EESOR 2003 gave effect to obligations imposed on the United Kingdom by Council Directive 2000/78/EC of the European Union (hereinafter ‘the Directive’) which established a general framework for equal treatment in employment and occupation.²⁰ The Directive was first proposed in 1999 as a means of putting into effect in member states of the European Union ‘the principle of equal treatment as regards access to employment and occupation, including promotion, vocational training, employment conditions and membership of certain organisations, of all persons irrespective of racial or ethnic origin, religion or belief, disability, age or sexual orientation’.²¹ At the outset, the Directive proposed to prohibit all direct and indirect discrimination, harassment²² and victimization²³ in respect of the aforementioned personal characteristics, except in cases when a characteristic constituted a ‘genuine occupational qualification’.²⁴ The proposed Directive contained two provisions in respect of genuine occupational qualifications: first, a general exception for particular occupational activities or contexts for which a characteristic constituted a genuine occupational qualification,²⁵ and second, a religious exception for circumstances when certain jobs or occupations need to be performed by employees who share the religious opinion of their employing organisation.²⁶ This religious exception (hereinafter referred to as the ‘Article 4(2) exception’) was originally formulated as follows:

Member States may provide that, in the case of public or private organisations which pursue directly and essentially the aim of ideological guidance in the field of religion or belief with respect to education, information and the expression of opinions, and for the particular occupational activities within those organisations which are directly and essentially related to that aim, a

²⁰ Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, Official Journal L 303, 02/12/2000, P 0016–0022.

²¹ Proposal for a Council Directive establishing a general framework for equal treatment in employment and occupation, Official Journal C 177 E, 27/06/2000, P 0042–0046, art 1.

²² *ibid* art 2.

²³ *ibid* art 10.

²⁴ *ibid* art 4.

²⁵ *ibid* art 4(1).

²⁶ *ibid* art 4(2).

difference of treatment based on a relevant characteristic related to religion or belief shall not constitute discrimination where, by reason of the nature of these activities, the characteristic constitutes a genuine occupational qualification.²⁷

When the proposed Directive was published, there was considerable criticism of the Article 4(2) exception by members of the United Kingdom Parliament. For example, the House of Lords Select Committee on European Union stated that Article 4(2) was ‘narrow and convoluted’, ‘likely to limit the ability of religious organisations to apply the ‘genuine occupational qualification’ principle’, and ‘its meaning and scope should be clarified’.²⁸ The House of Commons Select Committee on European Scrutiny went further, suggesting that Article 4(2) should be deleted.²⁹

The debates in the United Kingdom Parliament on the proposed Directive focused on whether Article 4(2) was a broad³⁰ or narrow³¹ exception. The CoE, from the outset, expressed its ‘considerable anxiety’ about Article 4(2).³² To illustrate this anxiety, the Bishop of Southwark (Tom Butler), used the example of ‘a gay man, open and proud about his sexuality and practice, being appointed as a teacher in a voluntary-aided Muslim school’ whereupon ‘such an appointment would so undermine the Muslim ethos of the school that parents might lose confidence in the school and its future might come under threat, to the detriment of the pupils’.³³ Although Bishop Butler stated that it was ‘a little embarrassing to be seen to be arguing against any of the proposals of the directives’, he argued that the ‘legitimate anxieties of the faith communities’ must be addressed.³⁴ Implicit to Bishop Butler’s argument was the view that religious employers should be able to continue to discriminate against people on the grounds of sexual orientation.

²⁷ *ibid.*

²⁸ House of Lords, European Union Committee, Ninth Report (16 May 2000) para 111.

²⁹ House of Commons, European Scrutiny Committee, Nineteenth Report (24 May 2000) para 2.18.

³⁰ Lord Lester of Herne Hill, HL Deb 30 Jun 2000, vol 614, col 1191.

³¹ Lord Griffiths of Fforestfach, *ibid* col 1209.

³² Bishop of Southwark (Tom Butler), *ibid* col 1199.

³³ *ibid.*

³⁴ *ibid* cols 1199–1200.

It is clear that most European Union officials did not share the view expressed by the CoE on the proposed Directive. A report by the European Parliament stated that Article 4(2) ‘will apply only to religious beliefs and not, for example, to sexual orientation’,³⁵ and many members of the European Parliament were concerned to ensure that the scope of the religious exception remain very narrow:

It is essential that discrimination on religious grounds should not be a pretext to discriminate against employees on other grounds, for example, because they are homosexual. I am sure that sensible and moderate religious organisations would not seek to do so to exploit this as a loophole. But we must not allow fundamentalists with prejudiced views of any religion to allow their views to prevail against the non-discrimination standards of secular society.³⁶

To ensure the narrowness of the religious exception, the European Parliament agreed a change of wording to Article 4(2)³⁷ that was not ultimately incorporated into the Directive. Rather, the text agreed by the Council of the European Union, which resulted from negotiations in a working group that took place in private,³⁸ effectively broadened the scope of Article 4(2) in order to strengthen the protection given to religious organisations. This was achieved by way of the inclusion of a proviso which, in addition to the text permitting a difference of treatment based on a person’s religion or belief in the case of occupational activities within churches and other organisations with a religious or belief ethos (when a person’s religion or belief constitute a genuine, legitimate and justified occupational requirement), states:

Provided that its provisions are otherwise complied with, this Directive shall thus not prejudice the right of churches and other public or private organisations, the ethos of which is based on religion or belief, acting in conformity with national constitutions and laws, to require individuals

³⁵ European Parliament, ‘Report on the proposal for a Council Directive establishing a general framework for equal treatment in employment and occupation’, 21 September 2000, A5-0264/2000.

³⁶ Sarah Ludford MEP, European Parliament Debate 4 October 2000.

³⁷ European Parliament, Texts Adopted, 5 October 2000, Proposal for a Council Directive establishing a general framework for equal treatment in employment and occupation, Amendment 37. See also Amended proposal for a Council Directive establishing a general framework for equal treatment in employment and occupation, Official Journal C 62 E, 27/2/2001, P 0152–0163.

³⁸ For a discussion of this process see House of Lords, Select Committee on European Union, Fourth Report (19 December 2000) paras 10–11.

working for them to act in good faith and with loyalty to the organisation's ethos.³⁹

The scope of this proviso, as we explain below, has been the source of much contention in the United Kingdom in respect of sexual orientation discrimination. Although Article 4(2) is clear that any difference of treatment 'should not justify discrimination on another ground',⁴⁰ it has been interpreted to permit a difference in treatment based on 'sexual conduct' rather than 'sexual orientation'. As Tessa Jowell MP, then Minister of State at the Department for Education and Employment, explained at the point the Directive was adopted, Article 4(2) 'does not go so far as to permit discrimination on any other ground – including sexual orientation' and therefore, for example, if the Roman Catholic church sought to appoint a community worker to run a centre for young people it would not be entitled to discriminate between two Catholic applicants 'simply on the basis of their sexual orientation'.⁴¹ However, as Mrs Jowell went on to explain, the 'church may have appointed an applicant who turned out to be gay [and] Article 4(2) ... could ... allow the church to take action if the Community worker subsequently behaved in a manner which tended to undermine the ethos of the centre'.⁴² Mrs Jowell elaborated that religious organisations could not refuse to employ someone simply because of their 'identity' but could refuse to employ someone if their 'behaviour' was at variance with 'the values and beliefs of the organisation'.⁴³

The House of Lords Select Committee on European Union identified 'difficulties' with the distinction drawn by Mrs Jowell between sexual conduct and sexual identity for the following reasons:

It is not easy to draw clear lines between identity and conduct or to determine the constraints that may be imposed on the enjoyment of private life. One could imagine a situation in which the headmaster of a religious school was homosexual, but kept this part of his life wholly private and separate from his

³⁹ Council Directive 2000/78/EC (n 20) art 4(2).

⁴⁰ *ibid.*

⁴¹ House of Lords (n 38) para 47.

⁴² *ibid.*

⁴³ *ibid.*

work in the school. He might then be exposed by a newspaper. In such circumstances it is not clear what rights either he or his employer would be able to claim under Article 4(2) of the Directive.⁴⁴

Whether Article 4 of the Directive permits a difference in treatment based on sexual conduct, and how such a difference in treatment relates to sexual orientation (or identity), was at the heart of debates in the United Kingdom Parliament when the Directive was transposed into United Kingdom law.

III. THE ROLE OF THE COE DURING THE PROCESS OF TRANSPOSING THE DIRECTIVE INTO UNITED KINGDOM LAW

European Union member states were required to make provisions to ensure compliance with the Directive by 2 December 2003.⁴⁵ The United Kingdom government decided to meet its obligation by making secondary legislation under powers conferred by the European Communities Act 1972.⁴⁶ Therefore, in late 2001, the government issued a consultation document inviting views about, inter alia, the introduction of new legislation in Great Britain that would outlaw discrimination in employment and vocational training on the grounds of sexual orientation and religion or belief.⁴⁷ The content of this document was informed by ‘informal consultation’ with a number of organisations, including the General Synod of the CoE.⁴⁸ The consultation document paid specific attention to Article 4(2) of the Directive and proposed that a provision based on that Article would be included in new legislation to allow organisations, which have an ethos based on religion or belief, to pursue employment policies necessary to ensure the preservation of that ethos.⁴⁹ The consultation document stated that under the proposed provision a religious organisation would, for example, ‘be able to demonstrate that it is a genuine requirement that all staff – not just senior staff or people with a proselytising function

⁴⁴ *ibid* para 48.

⁴⁵ Council Directive 2000/78/EC (n 20) art 18.

⁴⁶ European Communities Act 1972, s 2(2).

⁴⁷ Department of Trade and Industry, *Towards Equality and Diversity: Implementing the Employment and Race Directives* (DTI 2001)

⁴⁸ *ibid* para A33.

⁴⁹ *ibid* para 13.14.

– should belong to the religion concerned, so as to ensure the preservation of the organisation’s particular ethos’.⁵⁰ However, in line with Article 4(2) of the Directive, the consultation document stated that the proposed provision would ‘not allow religious or belief organisations to discriminate on other grounds’.⁵¹

When the first draft of the EESOR 2003 was published in October 2002, it contained an ‘exception for genuine occupational requirement’ which allowed an employer to treat individuals differently on the grounds of sexual orientation if ‘having regard to the nature of the employment or the context in which it is carried out ... being of a particular sexual orientation is a genuine and determining occupational requirement’ and ‘it is proportionate to apply that requirement in the particular case’.⁵² This exception, designed to enable employers to specify sexual orientation as a genuine occupational requirement during the recruitment, promotion, transferring and training of employees, was formulated to follow the wording of the general exception contained in the Directive.⁵³ A similar exception for a genuine occupational requirement was simultaneously proposed in respect of existing anti-discrimination legislation relating to race,⁵⁴ and new anti-discrimination legislation relating to religion or belief.⁵⁵ In the religion or belief legislation, reflecting the commitment made in the consultation document, it was proposed that a further exception be available when ‘an employer has an ethos based on religion or belief and, having regard to that ethos and to the nature of the employment or the context in which it is carried out ... being of a particular religion or belief is a genuine occupational requirement for the job’ and ‘it is proportionate to apply that requirement in the particular case’.⁵⁶ This religious exception, drafted in wider terms than the general exception for genuine occupational requirement, proposed that an employer would not be required to show that being of a particular religion or belief was a determining (decisive) factor for a post. This religious exception was seen to follow the wording of Article 4(2) of the Directive.

⁵⁰ *ibid* para 13.12.

⁵¹ *ibid*.

⁵² EESOR 2003, draft published for consultation on 22 October 2002, reg 7.

⁵³ Council Directive 2000/78/EC (n 20) art 4(1).

⁵⁴ Race Relations Act 1976 (Amendment) Regulations 2003, draft published for consultation in 2002 (undated), reg 6.

⁵⁵ Employment Equality (Religion or Belief) Regulations 2003, draft published for consultation on 22 October 2002, reg 7(2).

⁵⁶ *ibid* reg 7(3).

The provisions contained in the draft EESOR 2003 and the corresponding religion or belief legislation had the overwhelming support of those who participated in the consultation exercise. In respect of the genuine occupational requirement exception, 95% of respondents to the consultation (619 of 654) had agreed that the legislation should contain a general provision allowing employers to recruit staff on the basis of a genuine occupational requirement in the limited circumstances in which this could be justified.⁵⁷ In respect of the religious exception granted to an employer that has an ethos based on religion or belief, 67% of organisations that had responded (263) supported the proposed approach, 14% of organisations thought the approach went further than necessary, and only 11% of organisations thought the approach did not do enough to support religious or belief organisations.⁵⁸

A. The CoE's response to the draft EESOR 2003

The Archbishops' Council of the CoE formally responded to the draft EESOR 2003 in January 2003. The focus of the Council's response was the 'fundamental issue' of 'the potential conflict' created by the EESOR 2003 'between the requirements of the law and religious belief'.⁵⁹ Such conflict, the Council argued, may arise from 'actions taken by the Church to enforce its own doctrines and beliefs in relation to sexual conduct', such as 'a bishop [denying] ordination to someone in a gay or lesbian relationship'.⁶⁰ The Council stated that it was concerned that applying a requirement to employment related to sexual 'conduct' would subsequently be found by the courts to constitute unlawful discrimination on the grounds of sexual 'orientation'.⁶¹ The Council argued that 'it is crucial that they [the EESOR 2003] do not encroach on the freedom which all religious organisations must have to set and enforce their own conduct rules in relation to those who work for and represent them' and that 'Churches and other faith-based organisations must not find themselves in a position

⁵⁷ Department of Trade and Industry, *Equality and Diversity: The Way Ahead* (DTI 2002) para 54.

⁵⁸ *ibid* para 82.

⁵⁹ Archbishops' Council of the Church of England, 'Equality and diversity: Church of England response to DTI consultation document', 23 January 2003, para 19.

⁶⁰ *ibid*.

⁶¹ *ibid*.

where the law of the land is preventing them from conscientiously applying their own sincerely held doctrines and beliefs on moral issues'.⁶²

It is clear from the Archbishops' Council's response that its officials had already proposed a legislative 'solution' to its 'difficulties' to the Department of Trade and Industry (DTI) and that this had not been accepted and incorporated into the draft EESOR 2003.⁶³ The proposed solution was in the form of a provision – modeled on an existing provision in sex discrimination legislation that provided an exception in respect of the employment of ministers of religion⁶⁴ – that afforded a general exemption for organised religions from the requirements of the EESOR 2003. The Council's proposed exception was worded as follows:

Nothing in parts II to IV of these Regulations [Discrimination in the Employment Field, Discrimination in the Vocational Training Field etc.] shall render unlawful anything done for the purposes or in connection with an organised religion so as to comply with the doctrines of the religion or avoid offending the religious susceptibilities of a significant number of its followers.⁶⁵

This proposed exception was worded to ensure that the CoE was given the widest possible scope to exempt its activities from the requirements of the EESOR 2003. It sought to allow the CoE to do *anything* in respect of employment and vocational training in order to comply with its doctrines *or* avoid offending the religious susceptibilities of a significant number of its followers. The Council 'strongly urge[d] the Government' to accept this exception and stated that it would 'want the opportunity for discussions at a very senior level of Government ... if a satisfactory solution cannot be found'.⁶⁶

⁶² *ibid* paras 20-21.

⁶³ *ibid* para 23.

⁶⁴ Sex Discrimination Act 1975, s 19 (as enacted).

⁶⁵ Archbishops' Council of the Church of England (n 59) para 24.

⁶⁶ *ibid* paras 24 and 26.

B. The government redrafts the EESOR 2003 in response to the CoE

The government clearly decided to meet the Archbishops' Council's request because the exception proposed by the Council was incorporated, in modified form, into the final draft of the EESOR 2003 that was placed before Parliament in May 2003. This draft of the EESOR 2003 contained, in regulation 7(3), an exception that disapplied certain anti-discrimination provisions – in respect of offering and refusing any employment; the promotion or transfer to, or training for, any employment; and dismissal from any employment – in relation to employment for purposes of an organised religion. This exception was also potentially relevant in the context of contract work,⁶⁷ office-holders,⁶⁸ partnerships,⁶⁹ vocational training,⁷⁰ employment agencies and careers guidance services,⁷¹ and institutions of further and higher education.⁷² In addition, a provision was included for qualification bodies that disapplied anti-discrimination requirements in respect of a professional or trade qualification for purposes of an organised religion.⁷³ Regulation 7(3) and associated provisions therefore provided organised religions with a broad exemption from the anti-discrimination requirements of the EESOR 2003.

Regulation 7(3) of the EESOR 2003 introduced a three-limb 'test' that an employer must satisfy in order to be exempt from certain requirements of the EESOR 2003. First, any employment must be for the 'purposes of an organised religion'.⁷⁴ Second, a requirement 'related to sexual orientation' must be applied either to 'comply with the doctrines of the religion' or 'to avoid conflicting with the strongly held religious convictions of a significant number of the religion's followers'.⁷⁵ And, third, it must be the case that either 'the person to whom that requirement is applied does not meet it' or 'the employer is not satisfied, and in all the circumstances it is reasonable for him not to be satisfied, that that person meets it'.⁷⁶

⁶⁷ EESOR, reg 8.

⁶⁸ EESOR, reg 10.

⁶⁹ EESOR, reg 14.

⁷⁰ EESOR, reg 17.

⁷¹ EESOR, reg 18.

⁷² EESOR, reg 20.

⁷³ EESOR, reg 16.

⁷⁴ EESOR, reg 7(3)(a).

⁷⁵ EESOR, reg 7(3)(b).

⁷⁶ EESOR, reg 7(3)(c).

The wording of the first two limbs of the regulation 7(3) test closely match the provision proposed by the Archbishops' Council and, as we argue below, can be seen as the direct result of the Council's demand that the CoE be granted a much wider exception than that contained in the general genuine occupational requirement exception.⁷⁷ The wording adopted allowed an employer to apply, to employment for purposes of an organised religion,⁷⁸ a requirement 'related to sexual orientation'. This made the regulation 7(3) exception wider in scope than the general genuine occupational requirement exception, which was limited to 'being of a particular sexual orientation'.⁷⁹ The phrase 'related to sexual orientation' was designed to include, as requested by the Council, sexual 'behaviour' rather than mere 'orientation' and, therefore, allow a requirement to be applied to 'conduct'.⁸⁰ In addition, regulation 7(3), in line with the Council's proposal, did not specify that applying a requirement related to sexual orientation must be 'proportionate' in each case. This is in contrast to the general genuine occupational requirement exception in the EESOR 2003,⁸¹ as well as both the general and religious genuine occupational requirement exceptions in the religion or belief regulations, which specified that the application of any requirement must be 'proportionate'.⁸² The third limb of the regulation 7(3) test cannot be seen to correspond with the Council's proposal and, as we discuss below, it

⁷⁷ The general genuine occupational requirement was enacted as EESOR 2003, reg 7(2).

⁷⁸ This was subsequently interpreted not to encompass all 'religious organisations'. Richards J confirmed that 'for purposes of an organised religion' has a narrower scope than 'for purposes of a religious organisation' and that, for example, 'employment as a teacher in a faith school is likely to be "for purposes of a religious organisation" but not "for purposes of an organised religion"'. *R (Amicus) v Secretary of State for Trade and Industry* [2004] EWHC 860 (Admin) para 116.

⁷⁹ EESOR, reg 7(2)(a).

⁸⁰ At the point that EESOR, reg 7(3) was proposed, Mr Magyar, Legal Director of the DTI, when asked to clarify the meaning of the phrase 'related to sexual orientation', explained that '[a] characteristic feature of a person who is gay could be his or her propensity to form sexual relations with persons of the same sex, so a requirement that a person not enter into sexual relations with a person or persons of the same sex would be, in our view, a requirement related to sexual orientation'. House of Lords and House of Commons, Joint Committee on Statutory Instruments, Twenty-First Report (13 June 2003) Oral evidence taken before the Joint Committee on Statutory Instruments on Tuesday 3 June 2003, Q 51. It should be remembered that until *R (Amicus)* (n 78) confirmed that '[t]he protection against discrimination on grounds of sexual orientation relates as much to the manifestation of that orientation in the form of sexual behaviour as it does to sexuality as such' (para 119), it was unclear whether anti-discrimination law in respect of sexual 'orientation' encompassed sexual 'conduct'. Therefore, as a referee of this article helpfully pointed out to us, the choice of wording in EESOR, reg 7(3) was understandable because 'it was not entirely obvious (from a strategic point of view) how to secure legal exemption for the CoE's historic position on sexual sin'.

⁸¹ EESOR, reg 7(2).

⁸² Employment Equality (Religion or Belief) Regulations 2003, regs 7(2)–(3).

created a hurdle that the CoE has been required to carefully navigate.⁸³

The principal evidence to suggest that regulation 7(3) of the EESOR 2003 was designed to satisfy the demands of the Archbishops' Council exists in the form of documented interaction between representatives of the DTI and the Joint Committee on Statutory Instruments (JCSI). When the JCSI examined the EESOR 2003, it received a memorandum from the DTI, and heard oral evidence from DTI representatives, in respect of regulation 7(3). The DTI memorandum stated that regulation 7(3) was 'designed to reflect specific comments received in response to the draft regulations' which made 'clear that the [general genuine occupational requirement] could cause practical difficulties in relation to employment for purposes of an organised religion'.⁸⁴ The memorandum elaborates that, having made a decision to insert a new provision, 'the [DTI] met a small number of representatives from churches to discuss the scope of the exception'.⁸⁵ When giving oral evidence to the JCSI, Mr Magyar, Legal Director of the DTI, explained the nature of the meeting with the 'small number of representatives from churches':

the real reason for the meetings was to find out precisely what the problem was for the churches. It has never been part of the Government's policy to interfere with religious doctrine or the genuinely and strongly held views of religious followers. The purpose of the meetings was to find out precisely what the problems were for the churches so as to enable us to draft a provision that addressed the problem, but I think it would be fair to say that the churches still felt that we had not gone anywhere near far enough in the provision that we drafted. We however felt that this would address the specific problems that they had raised and that is why we were talking to them.⁸⁶

⁸³ The third limb of the test contained in EESOR, reg 7(3)(c) corresponded exactly with the provision in the general genuine occupational requirement exception contained in EESOR, reg 7(2)(c).

⁸⁴ House of Lords and House of Commons (n 80) Appendix 2: Draft Employment Equality (Sexual Orientation) Regulations 2003: memorandum from the Department of Trade and Industry, para 16.

⁸⁵ *ibid.*

⁸⁶ *ibid* Oral evidence taken before the Joint Committee on Statutory Instruments on Tuesday 3 June 2003, Q 36.

Although the DTI refer to having met with representatives of ‘churches’,⁸⁷ it is reasonable to assume that the CoE took a principal role during negotiations with the DTI and was instrumental in ensuring the inclusion of regulation 7(3) in the EESOR 2003.⁸⁸ This is not only because the Archbishops’ Council had previously demanded ‘the opportunity for discussions at a very senior level of Government’⁸⁹ but also because, having secured those discussions, the wording of regulation 7(3) closely resembled the Council’s own proposed provision. Indeed, in a subsequent letter to the JCSI, the Secretary General of the General Synod and the Archbishops’ Council, William Fittall, confirmed that the CoE’s primary objective during negotiations had been:

to ensure that they [the EESOR 2003] do not deny faith communities a broad measure of freedom to determine what requirements in relation to sexual behaviour should apply to those who wish to serve or represent them, even though this might otherwise constitute direct or indirect discrimination in relation to sexual orientation.⁹⁰

In other words, as Mr Fittall explained, the inclusion of regulation 7(3) in the EESOR 2003 directly met the CoE’s request that it be furnished with a provision that enabled it to ‘defend successfully the application of a marriage or abstinence policy against a discrimination claim by arguing that the requirement was about behaviour rather than mere orientation’.⁹¹ It is clear, therefore, that, as the High Court subsequently concluded, regulation 7(3) of the EESOR ‘was added as a result of representations from the Churches, including *in particular, it would seem*, the Archbishops’ Council

⁸⁷ Lord Sainsbury of Turville later stated that representation was made by ‘the Archbishops’ Council of the Church of England, the Catholic Bishops’ Conference of England and Wales, the Muslim Council of Great Britain and the Baha’I Community of the UK. Many other representations supported this view’. HL Written Answer, 1 July 2003, vol 650, col WA96.

⁸⁸ See also the statement of the Secretary General of the General Synod in February 2003 that ‘in relation to the draft regulations relating to discrimination on grounds of religious belief and on grounds of sexual orientation, the Council did, however, argue strongly for some specific changes to safeguard the legitimate needs not only of the Church of England but of faith-based organizations more generally’. General Synod of the Church of England, *Report of Proceedings* (2003, February Group of Sessions) Vol 34, No 1, p 64.

⁸⁹ See n 66.

⁹⁰ William Fittall, ‘Letter to Joint Committee on Statutory Instruments from the Secretary General of the General Synod and the Archbishops’ Council’, 9 June 2003, para 10. Reproduced at http://www.thinkinganglicans.org.uk/archives/cat_employment_equality.html

⁹¹ *ibid* para 7.

of the Church of England'.⁹²

IV. PARLIAMENTARY ACCEPTANCE OF THE COE'S RELIGIOUS EXCEPTION

The CoE was successful in lobbying the DTI to include regulation 7(3) in the final draft of the EESOR 2003 that was laid before both Houses of the United Kingdom Parliament in May 2003. However, regulation 7(3) attracted considerable parliamentary scrutiny and criticism. In its report of 13 June 2003, the JCSI published its view that there was doubt as to whether regulation 7(3) was *intra vires*.⁹³ The JCSI's doubts arose from the potential for regulation 7(3) to permit a difference of treatment based on a characteristic related to sexual orientation where the characteristic could not be said to be a genuine and determining occupational requirement which was proportionate, as envisaged by the general exception contained in the Directive.⁹⁴ The JCSI stated:

It seems ... wholly within the bounds of possibility that, for example, an employer considering employing a custodian who would, as part of his or her duties, have care of religious artefacts might determine not to employ a worker solely on a ground related to his or her sexual orientation in order to avoid conflicting with the strongly held religious beliefs of a significant number of the religion's followers. Even if those beliefs were held only by a minority of the religion's followers, and by those located at only one of several places where the post holder might be required to work, the discrimination would seem ... apparently to be allowed by regulation 7(3) [of the EESOR 2003] ... Yet it is open to question whether either the intention or effect of Article 4.1 [the general genuine occupational qualification exception in the Directive] is to allow the personal beliefs (even of a majority within an organisation) to determine the position, on the basis that they are part of the context in which the work is to be carried out and, in the view of the employer, the factor is

⁹² *R (Amicus)* (n 78) para 90, our emphasis.

⁹³ House of Lords and House of Commons (n 80).

⁹⁴ *ibid* para 1.11.

decisive. Even if a characteristic of the worker could be said to be a ‘genuine and determining occupational requirement’ in these circumstances there seems ... to be a doubt as to whether the requirement is proportionate as the Directive requires.⁹⁵

The JCSI’s opinion that regulation 7(3) of the EESOR 2003 would potentially allow discrimination beyond that permitted by the Directive provided the foundation for a motion in the House of Lords, moved by Lord Lester of Herne Hill, inviting the government to withdraw the draft EESOR 2003 and to amend regulation 7(3) on the basis that it was ‘unnecessary and unlawful’.⁹⁶ It was unlawful, Lord Lester argued, because it was ‘a sweepingly broad exemption clause apparently permitting a religious body to refuse to employ not a priest but a cleaner or messenger because of their sexuality’.⁹⁷ There was support for Lord Lester’s motion on the basis that, as Lord Avebury put it, regulation 7(3) would permit ‘bigotry and prejudice’ and ‘would be the first time in any western country when anti-gay conduct has been approved by legislation’.⁹⁸

The CoE’s defence of regulation 7(3) of the EESOR 2003 was provided by the Bishop of Blackburn (Alan Chesters) who urged peers to ‘recognise that there are genuine issues of religious liberty here’.⁹⁹ Bishop Chesters’ principal defence rested on the assertion that regulation 7(3) was not concerned with sexual orientation ‘as such’ but with ‘posts and orders where, irrespective of sexual orientation, be it heterosexual or homosexual, the requirement remains for marriage or abstinence’.¹⁰⁰ He went on to argue that the exception was ‘emphatically not about pandering to prejudices’ and would only be used by the CoE ‘where doctrine and strongly held religious convictions are at stake’.¹⁰¹ The Bishop of Worcester (Peter Selby) dissented from this view and, with ‘some hesitation’, spoke against ‘the very strong representation of ... the Archbishops’ Council of my own church’ to voice his

⁹⁵ *ibid* paras 1.15–1.16.

⁹⁶ HL Deb 17 June 2003, vol 649, col 755.

⁹⁷ *ibid*.

⁹⁸ *ibid* col 768.

⁹⁹ *ibid* cols 758-759.

¹⁰⁰ *ibid* col 759.

¹⁰¹ *ibid* cols 759-760.

‘minority judgment’ against regulation 7(3).¹⁰² However, in doing so, Bishop Selby made absolutely clear that Bishop Chesters’ remarks ‘undoubtedly reflect what the Government have heard from our Church’ and ‘reflect the views of perhaps the overwhelming majority of bishops’.¹⁰³

Lord Alli, who likened regulation 7(3) of the EESOR 2003 to ‘a provision dreamed up by the Taliban’, advanced extremely strong criticism – uncommon in the House of Lords – of the role of the Lords Spiritual in supporting the CoE in ‘seeking to do a dangerous thing’ of ‘effectively absenting itself from normal civil society’:

I say to the Lords spiritual on the Bishops’ Benches that if they try to use the privilege that they enjoy ... of law-making, by using the civil law as a means of exempting themselves or their religion from the norms and values of civil society, they will have diminished their role in society. Gay people may be a minority in society, but so too are those who actively profess a faith. Each is entitled to protection, but not at the expense of the rights and dignity of the other. That is what equality means. Today we have the opportunity to demonstrate that this House is a modern Chamber, one that acknowledges that religion has a place in the national debate, but not a dominant or superior one.¹⁰⁴

These remarks resonated with the concern of some members of the CoE that had been expressed at the General Synod meeting of February 2003. For example, one member questioned how the CoE could ‘reconcile a continuing desire to remain the established Church, including substantial representation in a reformed second chamber, with its attempts to gain exemption from some statutory legislation, for example in relation to human rights and employment law’.¹⁰⁵ Another member articulated a sense of dismay at the CoE’s use of its privileged position to seek exemptions from equality law:

¹⁰² *ibid* cols 770–771.

¹⁰³ *ibid* col 770.

¹⁰⁴ *ibid* cols 765–766.

¹⁰⁵ Reverend Stephen Coles, General Synod of the Church of England (n 88) p 64.

My heart always sinks whenever the Church considers equality measures proposed by secular government. That the Church has an understanding of justice which is distinctive is understandable and right; that the Church so often has a narrower understanding of justice than the secular world is alarming; but that the Church consequently seeks to exclude itself from equality measures for its own institution is depressing.¹⁰⁶

Despite these forms of criticism, the Lords accepted the government's position that regulation 7(3) was necessary if legislation outlawing sexual orientation discrimination was 'not to interfere in Church doctrine'¹⁰⁷ and, rejecting Lord Lester's motion that the draft be amended,¹⁰⁸ approved the EESOR 2003.¹⁰⁹

Consideration of the final draft of the EESOR 2003 by the House of Commons took place primarily in a Standing Committee on Delegated Legislation.¹¹⁰ Much the same criticism as that advanced about regulation 7(3) of the EESOR 2003 in the House of Lords was advanced in the Standing Committee. Evan Harris MP, for example, stated that it was 'astonishing' that the government was proposing regulation 7(3) when it was 'supported only by the Church of England in a confused way and wholeheartedly by the Christian Institute and CARE [Christian Action Research and Education]'.¹¹¹ There was also criticism from those who, although supportive of an exception for organised religions, felt, as Edward Leigh MP put it, that regulation 7(3) was 'a complete dog's dinner'.¹¹² The chief criticism in this respect was that the scope of regulation 7(3) was unclear and that, as a consequence, it may be unworkable.¹¹³ Nevertheless, the Standing Committee agreed the EESOR 2003¹¹⁴ and, when it was

¹⁰⁶ Reverend Paul Collier, *ibid* pp 31-2.

¹⁰⁷ Lord Sainsbury of Turville, HL Deb 17 June 2003, vol 649, col 781.

¹⁰⁸ *ibid* Division No 3. The House divided, on Lord Lester's motion, Contents 50 and Not-Contents 85. The Bishops' Benches divided Contents 2 (Hereford and Worcester) and Not-Contents 2 (Blackburn and Chester).

¹⁰⁹ *ibid* col 785.

¹¹⁰ HC Com, Fourth Standing Committee on Delegated Legislation, 17 June 2003.

¹¹¹ *ibid* col 36. For a discussion of the role of the Christian Institute in this context see Johnson and Vanderbeck (n 2).

¹¹² HC Com, Fourth Standing Committee on Delegated Legislation, 17 June 2003, col 44.

¹¹³ *ibid* col 46.

¹¹⁴ *ibid* Division No 2. The Committee divided Ayes 9 and Noes 4.

subsequently considered in the main chamber of the House of Commons, it received overwhelming support from MPs.¹¹⁵

There was extensive media speculation about why the government had seemingly capitulated to ‘pressure from the Archbishops’ Council’ and included regulation 7(3) in the EESOR 2003.¹¹⁶ There was also considerable condemnation of Parliament for having accepted an ‘odious provision’¹¹⁷ that was seen as a mechanism for ensuring that ‘equality stops at the church gates’.¹¹⁸ Such strong criticism is unsurprising given that regulation 7(3) afforded organised religions a wider exception from anti-discrimination provisions relating to sexual orientation than that available to other employers. Moreover, despite the CoE’s claim that regulation 7(3) ‘attempts to strike a fair balance between the rights of individuals [in respect of sexual orientation] and the freedom of faith communities to apply their own beliefs and convictions in relation to those who serve and represent them’,¹¹⁹ the effect of regulation 7(3) was to create an imbalance between religion and sexual orientation in equality law. As argued elsewhere, the religious exception included in the EESOR 2003 can be seen to create a hierarchy in equality law because no bespoke exception equivalent to regulation 7(3) exists to enable organisations based on sexual orientation to refuse to employ, promote, train or dismiss someone on the basis of applying a requirement related to religion or belief.¹²⁰

V. THE COE DEFENDS ITSELF USING THE RELIGIOUS EXCEPTION

Less than three years after the enactment of the EESOR 2003, the CoE became embroiled in an employment dispute that led to it having to defend itself using

¹¹⁵ HC Deb 25 June 2003, vol 407, Division No 255. The House divided Ayes 267 and Noes 54.

¹¹⁶ ‘Churches will get right to sack gays’, *Sunday Times*, 1 June 2003.

¹¹⁷ Lesbian and Gay Christian Movement, ‘Press Release: LGCM deplors Employment Regulations’, 9 May 2003, cited in Johnson and Vanderbeck (n 2).

¹¹⁸ UNISON, cited in ‘Anti-discrimination regulations: fight concessions to the religious right’, *The Socialist*, 21 June 2003.

¹¹⁹ Bishop of Blackburn (Alan Chesters), HL Deb 17 Jun 2003, vol 649, col 760.

¹²⁰ Johnson and Vanderbeck (n 2). For a different perspective on the issue of equalities hierarchies see Megan Pearson, ‘Religious discrimination and the “hierarchy of rights”: non-existent, appropriate or problematic?’ (2016) 16(1) *International Journal of Discrimination and the Law* 37-50.

regulation 7(3) of the EESOR 2003.¹²¹ The dispute concerned Hereford Diocese's refusal of employment to John Reaney, following his application for the post of Youth Officer. Mr Reaney, although having been interviewed and unanimously recommended for the post by a panel of eight people, was ultimately declined employment by the Bishop of Hereford (Anthony Priddis). Bishop Priddis declined to employ Mr Reaney on the basis that, because Mr Reaney had previously been in a same-sex sexual relationship that had recently ended, he did not feel that Mr Reaney was able to meet the applied requirement to be celibate.¹²² Although Mr Reaney had committed to living a celibate life whilst in post, Bishop Priddis 'found himself wondering whether his [Mr Reaney's] heart and his emotions could deliver what [Mr Reaney's] head said'.¹²³ Bishop Priddis informed Mr Reaney: 'the issue is not about sexual orientation but rather about practice and lifestyle and the evidence of those from a long enough period of stability in one's life'.¹²⁴ In response to this, Mr Reaney claimed that he had been subjected, inter alia, to direct discrimination on the grounds of sexual orientation and that this was unlawful under the terms of the EESOR 2003.

When Mr Reaney's complaint was considered by the Employment Tribunal, the key issue was whether the refusal to employ him for the reasons given was permissible under regulation 7(3) of the EESOR. To determine the answer to this question, the Employment Tribunal considered whether Bishops Priddis' refusal to employ Mr Reaney satisfied the three-limb test contained in regulation 7(3). In respect of the first limb of the test, the Employment Tribunal held that the post in question could be deemed to meet the requirement that the employment is for purposes of an organised religion.¹²⁵ The Employment Tribunal was also satisfied that the refusal to offer Mr

¹²¹ *Reaney v Hereford Diocesan Board of Finance* (Cardiff Employment Tribunal, 17 July 2007, 1602844/2006).

¹²² The applied requirement was that a person with a 'homophile' orientation who is involved in pastoral practice within the CoE should abstain from committing same-sex sexual acts. This requirement was derived from Church of England House of Bishops (n 11).

¹²³ *Reaney* (n 121) para 41.

¹²⁴ *ibid.*

¹²⁵ *ibid* para 102. In reaching this conclusion the Employment Tribunal drew upon the observations in *R (Amicus)* (n 78) regarding the scope of the exception. In *R (Amicus)* *ibid* para 115, Richards J stated that the exception was 'very narrow', had to be 'construed strictly since it is a derogation from the principle of equal treatment', had to be 'construed purposively so as to ensure, so far as possible, compatibility with the Directive', and could 'be seen to afford an exception only in very limited circumstances'. Whether the Employment Tribunal's reading of the exception in respect of the post in question conforms to these principles is open to debate. As Ahdar and Leigh note, 'the Tribunal adopted a reading of the scope of the exception by applying it to a youth worker post which is wider

Reaney employment met the second limb of the test because it was the result of Bishop Priddis applying a requirement related to sexual orientation so as to comply with the doctrines of the religion¹²⁶ and so as to avoid conflicting with the strongly held religious convictions of a significant number of the religion's followers.¹²⁷ This left the Employment Tribunal to consider, in respect of the third limb of the test, whether Bishop Priddis' decision not to offer Mr Reaney employment met the requirement that 'the employer is not satisfied, and in all the circumstances it is reasonable for him not to be satisfied, that that person meets [the applied requirement]'.¹²⁸ The Employment Tribunal stated that, since this aspect of the test was worded in the present tense, the question of whether it was met had to be asked and answered on present circumstances since 'the future is not known to any person' and in 'an ordinary employment context a potential applicant for a job cannot give cast-iron guarantees as to circumstances which may happen in the future'.¹²⁹ On this basis, the Employment Tribunal rejected Bishop Priddis' claim that it was reasonable for him not to be satisfied that Mr Reaney met the requirement to be celibate since Bishop Priddis had no evidence to suggest that Mr Reaney was not telling the truth when he said that he was no longer in a sexual relationship.¹³⁰ Moreover, the Employment Tribunal held that, even if looking to the future, it was not reasonable for Bishop Priddis to 'rely upon some vague idea that a person whose relationship has recently come to an end cannot be relied upon to state a future intention' (and that it 'may well be that there was some unconscious discrimination on the part of Bishop Priddis in the refusal to accept the assurances of [Mr Reaney] because he was a gay man').¹³¹ Mr Reaney's claim of direct discrimination was therefore successful.

Although the CoE lost this case, the Diocese of Hereford regarded the Employment Tribunal's judgment as a 'mixed blessing' and Bishop Priddis stated that he was 'disappointed but not completely down'.¹³² This equivocal reaction is not surprising

than the preferred reading of many critics'. Rex Ahdar and Ian Leigh, *Religious Freedom in the Liberal State* (second edition, Oxford university Press 2013) 373.

¹²⁶ *Reaney* (n 121) para 103.

¹²⁷ *ibid* para 104.

¹²⁸ EESOR 2003, reg 7(3)(c)(ii).

¹²⁹ *Reaney* (n 121) para 105.

¹³⁰ *ibid* para 106.

¹³¹ *ibid* para 107.

¹³² Press statement by the Diocese of Hereford, 'Tribunal decision is mixed blessing for Church', 18 July 2007, available at <http://www.thinkinganglicans.org.uk/archives/002521.html>

because, as the Archbishops' Council of the CoE made clear, the CoE very much welcomed some aspects of the judgment.¹³³ The Council was, for instance, positive about the Employment Tribunal having 'helpfully confirmed' that regulation 7(3) of the EESOR 2003 was applicable to 'some non clergy posts'.¹³⁴ Although the Council implicitly conceded that Bishop Priddis had 'taken the wrong decision', it was confident that the Employment Tribunal's judgment showed that regulation 7(3) 'will continue to provide important protection for churches ... ensuring that their recruitment policies can reflect the organisation's beliefs'.¹³⁵ The CoE was able to express this view with such certainty because, as Julian Rivers notes, the judgment of the Employment Tribunal provided dioceses with the means by which to avoid falling foul of an adverse judgment in the future: the 'obvious solution from the point of view of the diocese is to become stricter in its criteria'.¹³⁶ In other words, CoE dioceses can more explicitly incorporate a requirement related to sexual orientation into their recruitment policies and processes in order to avoid a recruiting Bishop falling at the third limb of the test contained in regulation 7(3). Such a requirement may, for example, be expressed in a job advertisement that states that a post-holder must adhere to 'traditional church beliefs and teaching in matters of faith and conduct' and 'share and endorse the understanding [of] sexual and moral conduct and lifestyle' of the recruiting church.¹³⁷

VI. THE COE MAINTAINS THE RELIGIOUS EXCEPTION: THE EQUALITY ACT 2010

The EESOR 2003 was revoked by the Equality Act 2010, which consolidated and extended anti-discrimination law in Great Britain. When the Equality Bill 2008/09 was introduced in the United Kingdom Parliament, it reproduced in largely similar

¹³³ Archbishops' Council of the Church of England, 'Statement on judgement of Employment Tribunal between Mr John Reaney and the Hereford Diocesan Board of Finance', 18 July 2007, available at <https://www.churchofengland.org/media-centre/news/2007/07/pr6507.aspx>

¹³⁴ *ibid.*

¹³⁵ *ibid.*

¹³⁶ Julian Rivers, *The Law of Organized Religions: Between Establishment and Secularism* (Oxford University Press 2010) p 134.

¹³⁷ This example is taken from an 'Information and Job Profile' document issued on 23 February 2016, for the post of Pastor of Evangelism and Mission, by St John's Church, Harborne, which is a CoE organisation that describes itself as an 'evangelical, charismatic church'. We make no inference about this church's position on homosexuality and recruitment.

form the religious exception contained in regulation 7(3) of the EESOR 2003. However, the exception differed from regulation 7(3) in two key ways. The first difference was that the exception in the Equality Bill stated that when a requirement related to sexual orientation was applied as a means of complying with the doctrines of the religion (now called the ‘compliance principle’) or as a means of avoiding conflict with the strongly held religious convictions of a significant number of the religion’s followers (now called the ‘non-conflict principle’) that this must be ‘proportionate’.¹³⁸ As we detailed above, no proportionality test was included in regulation 7(3) of the EESOR 2003, in contrast to both the general and religious genuine occupational requirement exceptions contained in the religion or belief regulations.¹³⁹ Therefore, proposing the inclusion of a proportionately test in the religious exception in respect of sexual orientation can be seen as an attempt to harmonize these aspects of equality law.¹⁴⁰ The second difference was that the exception in the Equality Bill included a definition of the type of employment deemed to be ‘for the purposes of an organised religion’: specifically, employment that ‘wholly or mainly’ involved ‘leading or assisting in the observation of liturgical or ritualistic practices of the religion’ or ‘promoting or explaining the doctrine of the religion (whether to followers of the religion or to others)’.¹⁴¹ The inclusion of this definition can be seen as an attempt to put on the face of the Bill the government’s original intention that the exception should apply to ‘a very narrow range of employment: ministers of religion, plus a small number of posts outside the clergy, including those who exist to promote and represent religion’.¹⁴²

The changes to the religious exception proposed in the Equality Bill were widely regarded as an attempt to narrow its scope. For example, John Mason MP argued that the exception ‘leaves out’ forms of employment ‘that might otherwise be expected to

¹³⁸ Equality Bill 2008/09, sch 9, pt 1, paras 2(5)–(6), as introduced to House of Commons on 24 April 2009.

¹³⁹ Employment Equality (Religion or Belief) Regulations 2003, regs 7(2)–(3).

¹⁴⁰ Indeed, the Explanatory Notes accompanying the Equality Bill 2008/09 stated that the exception ‘replaces and harmonises exceptions contained in current discrimination law’ (as introduced to House of Commons on 24 April 2009, p E181).

¹⁴¹ Equality Bill 2008/09, sch 9, pt 1, para 2(8), as introduced to House of Commons on 24 April 2009.

¹⁴² Lord Sainsbury of Turville, HL Deb 17 Jun 2003, vol 649, col 779. This view was reiterated in *R (Amicus)* (n 78).

be included'.¹⁴³ To illustrate this point, Mr Mason cited the case taken by Mr Reaney against the CoE that we discussed above:

In *Reaney v. the Diocese of Hereford* ... the employment tribunal rejected the argument that the exemption applied only to Church ministers, and ruled that Churches could also require a youth worker to adhere to their doctrines on marriage and celibacy. However, explanatory note 747 on page E182 [of the Equality Bill 2008/09] insists that the new wording in paragraph 2 excludes youth workers. In that case, the new wording is intended to narrow the exception.¹⁴⁴

In fact, the Explanatory Notes cited by Mr Mason referred to a requirement that 'a church youth worker ... be heterosexual',¹⁴⁵ which was not the issue considered in *Reaney*. Nevertheless, some scholars have agreed with the view advanced by Mr Mason and argued that the changes to the religious exception proposed by the Equality Bill would have narrowed its scope and, as a result, reversed the interpretation adopted in *Reaney* that the post of Youth Officer fell within it.¹⁴⁶ In our view, this is far from conclusive since in *Reaney* the employment in question – which was to 'co-ordinate and to encourage and to promote church based youth organisations' – was deemed by the Employment Tribunal to be 'one of the small number of jobs which would be closely associated with the promotion of the Church'¹⁴⁷ and, as such, it is likely that such posts would have continued to have been deemed to be concerned with 'promoting or explaining the doctrine of the religion'. Therefore, the definition of employment 'for the purposes of an organised religion' proposed in the Equality Bill can be seen as an attempt to reflect the interpretation of the religious exception adopted in *Reaney* rather than as a means of reversing it.

However, the CoE's view, as expressed by the Secretary General of the General Synod, William Fittall, was that there was 'no doubt' that the changes proposed by

¹⁴³ HC Com 23 June 2009, cols 443-444.

¹⁴⁴ *ibid* col 444.

¹⁴⁵ Explanatory Notes for the Equality Bill 2008/09, as introduced to House of Commons on 24 April 2009, p E182.

¹⁴⁶ See, for example, Russell Sandberg, *Law and Religion* (Cambridge University Press 2011) p 121.

¹⁴⁷ *Reaney* (n 121) paras 101–102.

the Equality Bill represented ‘a substantial narrowing of the present exemption’.¹⁴⁸ Mr Fittall stated that the CoE wished to ‘preserve religious liberty’ and argued that

[h]owever wrong people might believe individual Churches or other faith groups are on some issues – whether it is their attitude to divorce, whether women should be priests or same-sex conduct – it must ultimately be part of the teaching of that particular faith strand.¹⁴⁹

There was strong disagreement with the CoE’s interpretation of the changes proposed by the Equality Bill by, for example, the British Humanist Association and the Muslim Women’s Network.¹⁵⁰ However, the Catholic Church agreed with the CoE that the proposed changes represented a ‘distinct tightening of the law’.¹⁵¹

On the basis of such concerns, amendments to the Equality Bill designed to omit the references to ‘proportionate’ and the definition of employment from the religious exception were proposed, but subsequently withdrawn, at Committee stage in the House of Commons.¹⁵² A further attempt to omit the definition of employment was defeated at Report stage in the House of Commons.¹⁵³ When the Bill reached the House of Lords, the Archbishop of York (John Sentamu) provided an extensive critique of the definition of employment included in the religious exception:

the definition of employment ‘for the purposes of an organised religion’ fails to reflect the way in which members of the church and many other religious groups understand their faith to be the bedrock of their lives ... The exemption is flawed even on its own terms. At the height of the floods in Cumbria, I visited Cockermouth, Workington and Keswick. A major part of the relief effort in those places was being carried out by Churches Together, with Christ Church, Cockermouth, as the hub of the activity. The church had been converted into a relief centre and the rector, Reverend Wendy Sanders, and

¹⁴⁸ HC Com 9 June 2009, col 69.

¹⁴⁹ *ibid* col 72.

¹⁵⁰ HC Com 9 June 2009.

¹⁵¹ Richard Kornicki, Parliamentary Co-ordinator, Catholic Bishops’ Conference, *ibid* col 68.

¹⁵² HC Com 23 June 2009, cols 441-457.

¹⁵³ HC Deb 2 December 2009, vol 501, Division No 12. The House divided Ayes 170 and Noes 314.

members of the churches did outstanding work which made a huge difference to the whole relief programme. They were, of course, providing help and care to all people, regardless of faith or no faith. How would the Bill classify this activity? Would it come under ‘liturgical or ritualistic practices’ or ‘explaining the doctrine of the religion’?¹⁵⁴

Archbishop Sentamu was not entirely clear whether he would seek to apply a requirement related to sexual orientation in the context of work that involved offering aid to victims of natural disasters, but what was clear was his desire to maintain the maximum scope of the religious exception. He stated that the religious exception would be ‘significantly narrowed’ by the changes proposed in the Equality Bill and argued that ‘[t]here is a danger here of legislation by stealth. We need to hold the line where it was set in 2003’.¹⁵⁵

The CoE was successful in its campaign to ‘hold the line’ set by regulation 7(3) of the EESOR 2003 when it sponsored amendments to the Equality Bill, moved by Baroness O’Cathain, that were accepted at Committee stage.¹⁵⁶ On moving the amendments, which omitted the references to ‘proportionate’ and the definition of employment from the religious exception, Baroness O’Cathain explained that they maintained the ‘legal status quo, which is supported by the Church of England, the Roman Catholic Church and others’.¹⁵⁷ The Bishop of Winchester (Michael Scott-Joynt) stated that the aim of the amendments was to omit provisions that the CoE found ‘profoundly objectionable’ and to ‘restore the status quo, which we believe to be entirely defensible’.¹⁵⁸ The parliamentary activity of the Lords Spiritual was therefore pivotal in ensuring the success of the amendments, and their voting was decisive in one of the two Divisions by which the amendments were accepted.¹⁵⁹

¹⁵⁴ HL Deb 15 December 2009, vol 715, col 1433.

¹⁵⁵ *ibid.*

¹⁵⁶ Amendments moved by Baroness O’Cathain were co-sponsored by the Bishop of Winchester (Michael Scott-Joynt).

¹⁵⁷ HL Deb 25 January 2010, vol 716, col 1214.

¹⁵⁸ *ibid* col 1227.

¹⁵⁹ The House divided Contents 216 and Not-Contents 178 on omitting the reference to ‘proportionate’ from the religious exception, with 8 Lords Spiritual voting with the majority (HL Deb 25 January 2010, vol 716, Division No 1). The House divided 177 Contents and 172 Not-Contents on omitting the definition of employment from the religious exception, with 8 Lords Spiritual making a crucial contribution in voting with the majority (*ibid* Division No 3).

The government acquiesced to the House of Lords and did not seek to reject its amendments to the religious employment exception when they were considered in the House of Commons.¹⁶⁰ As a consequence, the Equality Act 2010 maintains the employment exception for organised religions largely in the form enacted in regulation 7(3) of the EESOR 2003.¹⁶¹ Organised religions therefore retain access to a unique and bespoke provision that allows them wider scope than that available to other employers to discriminate on grounds related to sexual orientation. Crucially, unlike other employers, who are only able to apply a requirement to ‘have’ a particular sexual orientation,¹⁶² organised religions can apply a requirement ‘related’ to sexual orientation. Moreover, organised religions, unlike other employers, are not required to demonstrate that applying a requirement ‘is a proportionate means of achieving a legitimate aim’.¹⁶³

VII. CONCLUSION

In this article we have examined the ways in which the CoE has sought to influence the legislative process in order to ensure that it and other religious organisations are provided with exceptions in statute law that prohibits discrimination on the grounds of sexual orientation. Such exceptions effectively license the CoE and other religious organisations to discriminate against individuals because of either their homosexual

¹⁶⁰ HC Deb 6 April 2010, vol 508, col 931.

¹⁶¹ Equality Act 2010, sch 9, pt 1, para 2. The religious exception that permits an employer to apply a ‘requirement related to sexual orientation’ under certain circumstances is grouped with the following other permissible requirements: ‘to be of a particular sex’; ‘not to be a transsexual person’; ‘not to be married or a civil partner’; ‘not to be married to a person of the same sex’; ‘not to be married to, or the civil partner of, a person who has a living former spouse or civil partner’; and a ‘requirement relating to circumstances in which a marriage or civil partnership came to an end’. Several of these requirements are relevant to organised religions that wish to discriminate on the grounds of sexual orientation. For example, the CoE successfully relied upon the requirement ‘not to be married to a person of the same sex’ to defend itself against a claim of direct discrimination on the grounds of sexual orientation and/or marital status. See *Pemberton v Inwood, Acting Bishop of Southwell and Nottingham* (Nottingham Employment Tribunal, 28 October 2015, 2600962/2014); *Pemberton v Inwood, Former Acting Bishop of Southwell and Nottingham* (Employment Appeal Tribunal, 7 December 2016, UKEAT/0072/16/BA).

¹⁶² Equality Act 2010, sch 9, pt 1, para 1(1).

¹⁶³ *ibid.* Somewhat confusingly, the Explanatory Notes for Equality Act 2010, sch 9, pt 1, para 2 (paras 790–791) state that the exception only applies when a requirement is applied in a ‘proportionate way’. This contrasts with the language used in that part of the Act, where no use is made of the word ‘proportionate’. For a discussion see *Pemberton v Inwood, Former Acting Bishop of Southwell and Nottingham* (n 161).

orientation or conduct. By providing an in-depth analysis of the life of one piece of legislation, our aim has been to highlight the approach of the CoE, through its various limbs, to actively shaping statute law in ways that are advantageous to it. Whilst it has been claimed that there is ‘no culture of the Church of England publicly lobbying government’ and that the CoE suffers from a form of ‘reticence’ in its dealings with government,¹⁶⁴ our analysis clearly shows that the CoE has an organised and systematic approach to attempting to fashion sexual orientation equality law. This approach is sometimes publicly visible (for example, when the Lords Spiritual make interventions in Parliament) and, at other times, is less amenable to public scrutiny.

Our analysis of the strategies and tactics employed by the CoE to successfully secure religious exceptions in statute law offers some challenge to claims about the decline of the authority of religion as a result of a secularist onslaught.¹⁶⁵ Although widespread social change has meant that in contemporary British society ‘the churches have become increasingly irrelevant in the new cultural and ethical landscape’ that most people inhabit,¹⁶⁶ the CoE clearly retains its powerful presence in the process by which statute law is made in the United Kingdom. Therefore, despite the decline of the hegemony of ‘normative Christian culture’¹⁶⁷ in the United Kingdom that might be inferred from an analysis of trends in church attendance, rates of baptism or other religious practices, the CoE is still able to exert considerable influence upon the legislative process.

Our analysis also contributes to long-standing and on-going debates about the CoE’s involvement in the legislative process. One aspect of this debate concerns whether it is appropriate in a liberal democracy for the Lords Spiritual to exercise a legislative function in the United Kingdom Parliament, by way of which the CoE is able to directly shape statute law. Although the number of Lords Spiritual in the House of

¹⁶⁴ Mark Hill, ‘Voices in the wilderness: the established Church of England and the European Union’ (2009) 37(1-2) *Religion, State and Society* 167-180.

¹⁶⁵ Stephen Hunt, ‘Negotiating equality in the Equality Act 2010 (United Kingdom): Church-state relations in a post-Christian society’ (2013) 55(4) *Journal of Church and State* 690-711.

¹⁶⁶ Callum G Brown, *The Death of Christian Britain: Understanding Secularisation 1800–2000* (second edition, Routledge 2009) p 229.

¹⁶⁷ Callum Brown and Gordon Lynch, ‘Cultural perspectives’, in Linda Woodhead and Rebecca Catto (eds) *Religion and Change in Modern Britain* (Routledge 2012) p 333.

Lords limits their overall influence,¹⁶⁸ and whilst there is no official ‘Bishops’ whip’ that requires each Lord Spiritual to follow a ‘party line’,¹⁶⁹ the presence of the Lords Spiritual in the House of Lords provides the CoE with a direct means by which to shape law. Whilst all religious organisations can seek to lobby Parliament, only the CoE has a permanent and consistent voice inside Parliament. The CoE has exercised its parliamentary voice to influence a wide range of legislation relating to sexual orientation equality, including the recent Marriage (Same Sex Couples) Act 2013,¹⁷⁰ and is currently actively seeking exceptions for faith schools in relation to current proposed reforms to the statutory framework governing sex education in England.¹⁷¹

Relatedly, the analysis presented in this article contributes to debates about the need for further reform of the House of Lords to either limit or remove the influence of the Lords Spiritual in the legislative process. Whilst the Lords Spiritual have always had a presence in the House of Lords,¹⁷² the reformed composition of the House – which now largely comprises Life Peers appointed on merit¹⁷³ – has made the position of the Lords Spiritual anomalous.¹⁷⁴ Whereas the Lords Spiritual could once be seen as a category of ‘specialist peer’ akin to the now-departed Law Lords,¹⁷⁵ their presence might now be regarded as anachronistic. That view was expressed and endorsed by signatories to a petition to the government in 2016 which called for the removal of the

¹⁶⁸ In April 2017, the total membership of the House of Lords was 804, with 25 of those members being Bishops.

¹⁶⁹ Andrew P Connell, ‘Prelates as part-time parliamentarians: the attendance and participation of the Lords Spiritual in the contemporary House of Lords’ (2017) 70(2) *Parliamentary Affairs* 233-253, 246-247.

¹⁷⁰ For a discussion see Johnson and Vanderbeck (n 2).

¹⁷¹ Robert M Vanderbeck and Paul Johnson, ‘The Promotion of British Values: Sexual Orientation Equality, Religion, and England’s Schools’ (2016) 30(3) *Int J Law Policy Family* 292-321.

¹⁷² The CoE had no representation in the House of Lords during the English Civil War. An Act for disabling all persons in Holy Orders to exercise any temporall jurisdiction or authority 1640 (16 Cha 1 c 27) stated that ‘no Archbishop or Bishop or other person that now is or hereafter shall be in Holy Orders shall ... have any Seat or place suffrage or Voice or use or execute any power or authority in the Parliaments of this Realm’. This was repealed by An Act for Repeal of an Act of Parliament Entituled An Act for disabling all persons in Holy Orders to exercise any Temporall Jurisdiction or Authority 1661 (13 Cha 2 St 1 c 2).

¹⁷³ In April 2017, Life Peers made up approximately 86% of the House of Lords membership.

¹⁷⁴ Connell (n 169).

¹⁷⁵ Gavin Drewry and Jenny Brock, ‘Prelates in Parliament’ (1971) 24(3) *Parliamentary Affairs* 222-250.

Lords Spiritual from the House of Lords on the basis that the CoE ‘is quite out of step with UK Law and indeed common humanity’.¹⁷⁶

Perhaps the most important debate to which this article contributes concerns the extent to which the United Kingdom Parliament should legislate to exempt the CoE and other religious organisations from law requiring people to be treated equally regardless of their sexual orientation. Our detailed examination of the legislative accommodation of the CoE’s prejudice against homosexuality raises questions about whether it would be more appropriate, in a liberal democracy, for Parliament to require the CoE and other religious organisations to conform to the standards expected of secular institutions. Although Parliament has decided that it will not generally ‘legislate over and above, or directly at, the Church of England’,¹⁷⁷ it certainly retains the authority to do so.¹⁷⁸ Moreover, the CoE is required, as it has been since 1533, to abide by the principle that it does not make or execute any ‘canons constitucions or ordynance’ that are ‘contraryaunt or repugnant to the Kynges prerogatyve Royall or the customes lawes or statutes of this Realme’,¹⁷⁹ unless it is afforded an exception to do so.¹⁸⁰ The key question, therefore, is whether Parliament should, in the interests of advancing equality on the grounds of sexual orientation, cease to accommodate the hostility of the CoE (and other religious organisations) to homosexuality. When attending to this question, we hope that, in addition to considering issues such as the need to strike an appropriate balance between the right to freedom of religion and the right not to be discriminated against on the grounds of sexual orientation,¹⁸¹ legislators will give more critical consideration to the privileged position of the CoE in the legislative process and whether there is a need to reform or curtail it.

¹⁷⁶ UK Government and Parliament, Petitions, ‘Remove Church of England bishops from the House of Lords’, available at <https://petition.parliament.uk/petitions/118654>. The petition gained 15,793 signatures.

¹⁷⁷ Lord Cormack, HL Deb 15 December 2011, vol 733, col 1437.

¹⁷⁸ See, for example, Civil Partnership Act 2004, ss 255(1) and 259(3)(c) which make provision for a Minister of the Crown to, by order, amend, repeal or revoke CoE legislation.

¹⁷⁹ An Acte for the submission of the Clergie to the Kynges Majestie 1533 (25 Hen 8 c 19) s 3. Re-expressed and applied by Synodical Government Measure 1969, s 1(3)(b).

¹⁸⁰ Such an exception was provided, for example, by the Marriage (Same Sex Couples) Act 2013, s 1(3).

¹⁸¹ See n 3 and n 4.