

# ACPNS LEGAL CASE REPORTS SERIES

This series compiles short summaries of significant cases involving charitable, philanthropic, nonprofit and social enterprise organisations in Australia and overseas.



## The Queen (on the application of Cornerstone (Northeast) Adoption and Fostering Services Ltd v HM Chief Inspector of Education, Children's Services and Skills (OFSTED) [2021] EWCA Vic 1390

England and Wales Court of Appeal, Civil Division, Lord Justice Peter Jackson, Lady Justice Asplin, Lady Justice Nicola Davies, 24 September 2021

Whether it was lawful for Cornerstone only to accept heterosexual evangelical Christians as potential carers of children.

**Key words:** Charity, England and Wales, Foster Care, Restriction to Heterosexual and Evangelical Christians, Equality Act 2010, Human Rights Act 1998, Direct Discrimination, European Convention on Human Rights, Contravention

1. The judgement was given by Lord Justice Peter Jackson, with whom the other judges agreed.
2. Cornerstone (Northeast) Adoption and Fostering Services Ltd (Cornerstone) is a small, independent fostering agency (IFA) in the northeast of England founded in 1999. It is constituted as a charity by a trust deed registered with the Charity Commission, and is a company limited by guarantee.
3. It has been registered as an IFA since March 2006. It recruits and supports carers for children in local authority care who need to be fostered, and in some cases adopted. It specialises in working with children who can be hard to place, including large sibling groups, children from minority ethnic backgrounds, and those with complex medical needs.
4. Ofsted is the statutory body whose functions include the registration, regulation and inspection of IFAs.
5. The issue in this case was whether it was lawful for Cornerstone only to accept heterosexual evangelical Christians as potential carers. Ofsted considered that it was unlawful and, in a report issued in draft on 12 June 2019 it assessed the effectiveness of Cornerstone's leaders and managers as 'inadequate'. This was because Ofsted considered that, by only recruiting foster carers who are practising Christian carers in opposite sex marriages, Cornerstone's recruitment and selection process for foster carers did not comply with the requirements of the Equality Act 2010 (EA 2010) and the Human Rights Act 1998 (HRA 1998).
6. Ofsted took the view that the policy contravened both Acts as being discriminatory on the grounds of sexual orientation, and that it contravened the HRA 1998 on the grounds of religion or belief. It required Cornerstone not to discriminate in its recruitment of foster carers in either respect by 31 July 2019.

7. On 19 June 2019, Cornerstone issued judicial review proceedings seeking a declaration that Ofsted's finding that its recruitment policy contravened the EA 2010 or the HRA 1998 was unfounded, an order quashing the requirement in the draft report, and damages.
8. Cornerstone's claim was dismissed (except as to religious discrimination) and the Court ordered it to pay 75% of Ofsted's costs. Cornerstone appealed the finding of discrimination on the ground of sexual orientation.
9. Cornerstone makes clear in all its documentation that it is a Christian organisation. Its foundational purpose is to recruit evangelical Christian foster carers. Its charitable objects include "...to provide a high quality adoption and fostering childcare service according to Christian principles". Its memorandum and articles state: "The policy of the Charity shall be to restrict employment by the Charity and acceptance of any application to foster or adopt children through the charity to evangelical Christians..." (at clause 5). All the documentation has been approved by the Charity Commission and registered with Companies House.
10. Most at issue in this case was Cornerstone's Code of Practice at clause 10 expressing the expectation that all carers will:

Set a high standard in personal morality which recognises that God's gift of sexual intercourse is to be enjoyed exclusively within Christian marriage; abstain from all sexual sins including immodesty, the viewing of pornography, fornication, adultery, cohabitation, homosexual behaviour and wilful violation of your birth sex. (1 Cor 12:23; 1 Cor 6:12-20; Eph 4:17-24; 1 Thes 4:1-8; Rom 1:26-27; 1 Tim 1:9-11; Gen 1:27; Deut 22:5).

11. The case concerned the lawfulness of the requirements in Clause 10 that sexual intercourse is to be enjoyed exclusively within Christian marriage and that carers should abstain from homosexual behaviour
12. Only one complaint had been received about Cornerstone's policy, in 2016, and it was of a minor nature. In addition, although the Charity Commission had questioned Cornerstone's policy after the decision in *Catholic Care (Diocese of Leeds) v. Charity Commission for England and Wales* [2010] EWHC 520 (Ch), it had subsequently agreed that Cornerstone did not discriminate on the grounds of sexual orientation, although it gave no reasoning.
13. The first ground of the appeal questioned Ofsted's jurisdiction to interfere with Cornerstone's policy. The Court rejected this ground, holding that Ofsted was entitled to have regard to EA 2010 and HRA 1998 when carrying out its inspection.
14. The second ground concerned direct discrimination under section 13 (1) of EA 2010. Did Cornerstone's policy amount to direct discrimination? If so, was the policy, in the case of a charity, a proportionate means of achieving a legitimate aim, so that the exception under section 193(2)(a) EA 2010 applied?
15. Sexual orientation is a protected characteristic under EA 2010. On whether Cornerstone engaged in direct discrimination, the Court of Appeal said (at [67]):

On [an] objective factual inquiry, Cornerstone's policy, which specifically requires carers not to engage in homosexual behaviour, is as clear an instance of direct discrimination "because of" a protected characteristic as can be imagined.

16. Since direct and indirect discrimination are mutually exclusive under EA 2010, the Court of Appeal did not need to consider indirect discrimination.

17. At first instance, the judge had held that Cornerstone was a hybrid public authority. This was not challenged on appeal. As such, it is unlawful for Cornerstone to act in a way which is incompatible with a right under the European Convention on Human Rights: section 6 HRA 1998. The relevant Convention rights under this ground are Articles 8 (right to respect for private and family life) and 14 (prohibition of discrimination).
18. However, Cornerstone countered that its own rights had been interfered with by Ofsted's report criticising its policy. On this issue the Court of Appeal said (at [124]):

This appeal sees a collision between two protected characteristics, championed by parties whose arguments have, to an unusual extent, tended to pass each other by. On the one side, Ofsted is a national regulatory authority that seeks to uphold equality law by reference to general principles; on the other, Cornerstone is a small religious charity that seeks to justify difference in treatment by reference to its own experience. This asymmetry makes the court's task more demanding. Arguments of principle can be easier to evaluate when they come down to disputes about homely items like beds, necklaces or cakes, but in this case the gulf in perspectives is not embodied in individuals...Despite that, the principles underpinning the assessment of proportionality are clear enough.
19. There is no automatic hierarchy under the HRA 1998 as between qualified Convention rights, but the European Court for Human Rights has repeatedly emphasised the need for particularly weighty reasons to justify differential treatment on the ground of sexual orientation or other 'suspect' grounds of discrimination. These encompass birth out of wedlock, sex, sexual orientation, race and ethnic origin, and nationality.
20. There was no justification for Cornerstone's policy. It was not proportional or permissible. The Court of Appeal said that it was of particular significance that parliament had, in relation to religious organisations that offer a service to the public, given a clear indication that discrimination on the basis of sexual orientation is impermissible.
21. At first instance, the Judge described this as 'determinative' (at [287]) and 'conclusive' (at [305]). The Court of Appeal preferred the view that it was a significant indicator of what parliament intended when the question of proportionality was considered, rather than conclusive. This was because it was possible to envisage circumstances in which different treatment on grounds of sexual orientation could be justified on the facts of a particular case, for example where there was good evidence that a significant number of children would not be fostered at all but for a discriminatory policy.
22. The appeal was dismissed.

## IMPLICATIONS



This decision is in line with the previous case of *Catholic Care (Diocese of Leeds) v. Charity Commission for England and Wales* [2010] EWHC 520 (Ch).

The Court of Appeal noted at [128] the decision on 17 June 2021 of the United States Supreme Court in *Fulton v. Philadelphia* 593 U.S. 2021, where, in similar circumstances, a ban was imposed by the City of Philadelphia on a long-standing Catholic fostering agency because it would not place children with unmarried couples, regardless of sexual orientation, or with same-sex married couples. The ban was struck down by the Supreme Court, and in a concurring judgment Alito J placed emphasis on the fact that it had left children at risk of being homeless. However, that outcome was predicated on the First Amendment to the Constitution, which, amongst other things, protects the free exercise of religion.

In contrast, this English case had to be decided within the framework of the current equalities and human rights legislation in the UK, which does not give the same prominence to the rights of religious organisations.

## VIEW THE CASE



This case may be viewed at <https://www.bailii.org/ew/cases/EWCA/Civ/2021/1390.html>

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