



ASSOCIATION OF
LONDON AUTHORITIES

Summary of the Legal Opinion
on Section 28 of the 1988 Local Government Act

Commissioned by the Association of London Authorities
from D.M. Barnes Q.C.

Contacts:

Jan Parker and Chris Baker, Lesbian and Gay Officer (job share)
Grahame Kean, Legal Officer
Mark Brangwyn, Voluntary Sector Officer

Co-Chairs, A.L.A. Lesbian and Gay Committee:

Cllr. Helen Dawson and Cllr. Graham Nicholas

24th April 1988

CONTENTS

1. Introduction
2. Section 28
3. Summary
4. Three definitions:
 - 'homosexuality',
 - 'intentionally' and
 - 'promote'.
5. The three prohibitions
6. Officers Reports and Members Votes
7. Challenges
8. Grant-aid to voluntary organisations.

1. INTRODUCTION

The Association of London Authorities has obtained a legal opinion from Michael Barnes Q.C. on the implications of Section 28 of the 1988 Local Government Act. The opinion was commissioned on behalf of the A.L.A.'s member authorities (all the London Labour boroughs and the I.L.E.A) and the London Borough Grants Scheme (to which all London Boroughs belong).

Given that there can be no recourse to Parliamentary debate to interpret the legislation, the ALA commissioned a legal opinion to help provide an interpretation of Section 28 and to assist authorities in maintaining equal opportunities policies in relation to lesbians and gay men. The opinion is a general one; it does not go into the details of, for example, specific housing or employment policies. The ALA is organising seminars on service delivery issues and hope to produce papers on specific policies, legal powers etc following further discussions. For copies of these papers and for copies of the legal opinion in full please contact the Lesbian and Gay Officer. Further legal opinions on specific areas may also be commissioned.

The following is a summary of the main points in the legal opinion and advice on how best to use it. The numbers in brackets following a quotation refer to the paragraph number in the full length opinion.

2. SECTION 28

Section 28 received Royal Assent on 24 March 1988 and comes into effect on 24 May 1988.

Section 28 in full is as follows:

- "2A (1) A local authority shall not -
- (a) intentionally promote homosexuality or publish material with the intention of promoting homosexuality;
 - (b) promote the teaching in any maintained school of the acceptability of homosexuality as a pretended family relationship.

- (2) Nothing in subsection (1) above shall be taken to prohibit the doing of anything for purpose of treating or preventing the spread of disease.
- (3) In any proceedings in connection with the application for this section a court shall draw such inferences as to the intention of the local authority as may reasonably be drawn from the evidence before it.
- (4) In subsection (1)(b) above "maintained school" means -
 - (a) in England and Wales, a county school, voluntary school, nursery school or special school, within the meaning of the Education Act 1944; and
 - (b) in Scotland, a public school, nursery school or special school, within the meaning of the Education (Scotland) Act 1980.
- (2) This section shall come into force at the end of the period of two months beginning with the day on which this Act is passed."

3. SUMMARY

The core of the legal opinion is that

"it is open to serious doubt whether it (Section 28) will render unlawful many decisions or actions presently lawful," (4)

Local authorities have never had specific powers to 'promote homosexuality'. The opinion does not "consider that discouraging forms of discrimination against homosexuals on the ground of their homosexuality is to be equated with the promotion of homosexuality". (7).

"The prohibitions," the opinion states, "are neither well drafted nor clear in effect." Even if the advice contained in the opinion is followed there is no guarantee that a decision will not be challenged.

"The first and necessary step in considering any decision or action remains for a local authority to satisfy itself that there are in any event statutory power authorising what is proposed and that there are considerations relevant to the exercise of such powers which make the proposal reasonable and desirable" (4)

Due care and attention to procedural matters is of utmost importance with regard to how policies and decisions are presented in officers reports and subsequent publicity, and how members vote.

4. THREE DEFINITIONS

There are three words whose meaning needs to be considered in the context of the Section.

a) 'Homosexuality'

The use of this word, especially in 2A(1)(b) of the Section broadens its ordinary use. As the Opinion says "As homosexuality as such is not a relationship of any description, this use of the term might be though meaningless It is, of course, unfortunate that Parliament should enact statutes in terms which are so unclear." (5a). Authorities are advised that in the context of the Section 'homosexuality should be taken to mean

"(a) propensity or inclination in a person to be sexually attracted to someone of the same sex and (b) the relations (including sexual acts) between people of the same sex which can arise out of that propensity or inclination." (16)

b) 'Intentionally'

"In order for it to be shown that the promotion of homosexuality, or the publication of material having that effect, by a local authority was intentional it would at least have to be shown either (a) that the authority acted with the motive or desire to promote homosexuality or (b) that the authority realised that the promotion of homosexuality was a very likely consequence of its actions." (16)

The main difficulty with this concept is how it applies, not to an individuals 'state of mind', but to a local authority - a body corporate - which ordinarily takes decisions by a majority of members present and voting for a particular measure at a meeting. See item 6 on Reports and Voting and 7 on Challenges for further clarification.

A further point in relation to 'intention' is that it must be judged subjectively, rather than objectively. However:

"in legal proceedings a person who asserts a breach of one of the statutory prohibitions will have to prove his case only by the ordinary civil standard of proof (on the balance of probabilities) not by the criminal standard of certainly of beyond reasonable doubt." (5b)

c) 'Promotion'

This means simply "to further, advance or bring about the increase of something". (5c)

5. THE THREE PROHIBITIONS

There are three specific new prohibitions in the Section to be considered.

- i) A local authority shall not intentionally promote homosexuality

This prohibition requires an authority:

"not to seek deliberately and designedly to further the establishment, growth or development of the propensity or inclination in any individual to be attracted to persons of his or her own sex or of sexual relations between persons of the same sex and as requiring it not to do anything which will, or is highly likely, to have these effects (barring some unforeseen intervention) even though it may have no desire to bring about these effects." (6)

The opinion goes on to stress:

"We would emphasize that a local authority need not be deterred from doing anything which is otherwise lawful and desirable that it should do, having regard to considerations relevant to the particular power it may be exercising, merely by the fear that there is a slight risk that what it does may have these consequences. Moreover we do not consider that discouraging forms of discrimination against homosexuals on the ground of their homosexuality is to be equated with the promotion of homosexuality. Thus preventing discrimination in employment or housing or discouraging unfair treatment of homosexuals in other fields where otherwise lawful would not be prohibited by this first prohibition. Nor do we consider for example that the giving of advice, assistance or information to or concerning homosexuals, if otherwise lawful, is of itself necessarily prohibited by the new section.

In contrast to many other limits on the powers of local authorities, it has always to be remembered that in this case what may be otherwise lawful is made unlawful by the intention (ALA emphasis) with which it is done. We understand that it has been suggested that any actions of a local authority which in any way concern or relate to homosexuals may be prohibited. We regard this as an extreme and incorrect construction of the Bill." (7)

- ii) A local authority shall not publish material with the intention of promoting homosexuality

"The prohibition in this case governs the authority's intention in publishing material. It does not relate directly to the intention of the author of that material (if different)." (8)

Part II of the 1986 Local Government Act defines 'publish' and 'publication' as "any communication in whatever form addressed to the public at large or to a section of the public." The definition of 'intention' and 'homosexuality' apply as above. The opinion points out that:

"Once again a local authority need not be deterred from publishing anything which is otherwise lawful and desirable that it should publish having regard to considerations relevant to the particular power it may be exercising, merely by the fear that there is a slight risk that what it does may have such an effect." (8)

It's also worth noting that under Section 4 of the 1986 Act the Secretary of State has power to issue codes of recommended practice as regards the content, style, distribution and cost of local authority publicity. Such a code is currently in its draft stage and, when finalised, should also be taken into account along with other provisions affecting publicity in the 1988 Act. It is however a code and not binding as a statute. Therefore it will always be permissible to depart from its provisions if a reasoned justification is given.

- iii) A local authority shall not promote the teaching in any maintained school of the acceptability of homosexuality as a pretended family relationship

"Notable by its absence from this provision is any reference to the intention of a local authority". (9)

To put this prohibition in context the opinion refers to three relevant provisions regarding the general duties of local education authorities. Firstly, section 7 of the 1944 Education Act which refers to the duty "to contribute towards the spiritual, moral, mental and physical development of the community". Section 76 of the same Act refers to the general principle that "pupils are to be educated in accordance with the wishes of their parents." Thirdly, Section 46 of the 1986 Education (No 2) Act states that sex education should "have due regard to moral considerations and the value of family life."

The opinion states that it is the promotion of such teaching, not the teaching itself, that is prohibited. In relation to teachers the opinion says:

"The prohibition affects only what local authorities do, not what teachers themselves decide to do. Teachers must of course be prepared if asked questions to tell the truth about the existence of homosexual relationships and about how they and others genuinely consider that such relationships should be regarded. The section imposes no obligation on teachers to lie or deceive pupils seeking the truth." (10)

Although the opinion notes again that this provision is treating homosexuality itself as if it were equivalent to a relationship, which it is not, it goes on to state that an authority should

"not ... encourage the teaching in any maintained school that homosexual relationships are acceptable as if they were a family relationship. We do not consider that this prohibition itself requires a local authority to secure or take reasonable steps to secure that it is taught that homosexual relationships are not acceptable as such, whether generally or in a particular case. The only teaching about the acceptability of homosexuality a local authority is required by this prohibition to refrain from promoting is teaching about its acceptability as a pretended family relationship." (11)

This prohibition also refers only to schools. F.E. and other colleges are still bound by 2A(1)(a) where the prohibition places onus on the local authority.

6. OFFICERS REPORTS AND MEMBERS VOTES

Decisions may still be challenged even if advice is followed. It will be very important how decisions are justified and presented in officers reports.

"To reduce the risk of challenge we consider it advisable that reports by officers should address not only the reasons for and against a particular decision having regard to the powers under which it may be taken but should also address directly the issue of whether the effect of any decision will be or is likely to promote homosexuality or do any other thing which these new provisions prohibit in cases where that may conceivably be said to be the case." (12)

Section 28 does not prohibit the use of specific powers, eg Sections III, 137 of the 1972 Local Government Act etc, in relation to lesbian and gay employees, ratepayers or residents. Contact the ALA Lesbian and Gay officer for papers outlining legal powers.

The opinion further adds that:

"if there is a risk that decision might be the subject of challenge it would be desirable for a vote to be taken not only on the measure proposed but on the reasons for taking it". (12)

See 7 below for further points on these issues.

7. CHALLENGES

One form of challenge may be by an application for judicial review. On this the opinion says:

"Experience indicates that the form of the resolution impugned and the exact content of reports of officers play a very important part in such proceedings." (12)

Evidence before the Court will not necessarily be limited to this but

"the Court will attach considerable significance to such documents in drawing inferences as to the intention of the authority in any particular case." (12)

As to the 'intentions' of councillors or, rather, 'the body corporate', the local authority, the opinion is

"inclined to the view that the Court will be concerned with the predominant intention of the majority of those present and voting for a particular measure.....An extreme view would be that if any person voting for the measure in question did so with the prohibited intention that would be enough to invalidate the conduct of the local authority. We do not think that this extreme view will prevail." (13)

8. GRANT AID TO VOLUNTARY ORGANISATIONS

In relation to organisations wholly or partly funded by a local authority a challenge would have to:

"show (1) that the activity carried out by the funded body did promote homosexuality (2) that the authority when it decided to grant the funds, or continue the funding, realised that it was highly likely both (a) that the funded body would engage in such activities and (b) that the activities in question would result in the promotion of homosexuality." (14)

It's no defence if an authority chooses to ignore what activities are carried out with the grant. The issues raised under (6) Officers Reports and Members Votes should be emphasised again. It will be necessary for grant officers to write detailed reports setting out the following:

- the aims and objective of the organisation;
- the organisations past activities and current purposes, management and programme;
- the specific aims of the project proposed and the plan for implementation of the project;
- which groups the project aims to service;
- what disadvantages the scheme intends to tackle;
- the legal powers to be used in funding the project e.g. Section 142 Local Government Act 1972 ["Getting in on the Act" from NCVO provides a good basic guide to the powers available];
- a view as to whether the project is likely to "promote" homosexuality within the meaning of the Act.

If these points are carefully considered there's a good reason to expect that the majority of projects may continue to receive grant aid from local authorities.

More detailed advice, including specific advice on particular cases, is available from the ALA Voluntary Sector Officer.