

#### **EQUALITY COMMISSION FOR NORTHERN IRELAND**

## Response to Private Member's Consultation on NI Freedom of Conscience Amendment Bill

February 2015

#### 1 Executive Summary

- 1.1 The Equality Commission for Northern Ireland welcomes the opportunity to respond to the Private Member's Consultation on NI Freedom of Conscience Amendment Bill ("the draft Bill").
- The Commission **does not support** either of the proposed amendments to Equality Act (Sexual Orientation) Regulations (Northern Ireland) 2006 ("Sexual Orientation Regulations") as set out in the draft Bill.
- 1.3 Whilst we recognise that concerns have been raised by religious organisations and others that the current law does not strike a fair balance between the rights of a service provider to manifest their faith and the right of customers to obtain goods, facilities and services without discrimination on the grounds of their sexual orientation, we consider that the proposed approach suggested in the draft Bill does not strike a 'fair balance'.
- 1.4 We believe that if introduced, the proposed amendments would significantly weaken protection for LGB (Lesbian, Gay Bisexual) individuals against discrimination on the grounds of sexual orientation. There is also the potential for the exceptions, if introduced, to weaken protection not only for LGB individuals but also for those who associate with LGB individuals, such as family members or friends, and/or those who are perceived to be LGB.
- 1.5 We object to the proposed inclusion of exceptions which are not objectively justifiable which are targeted at restricting services to LGB individuals.

- We do not consider that the introductory section in the consultation document represents a balanced view of the law or the issues under consideration. For example, there is no consideration of the potential negative impact of such changes on LGB individuals who are seeking such goods and services.
- 1.7 We also do not consider that the questions are framed in an objective way but are intended to lead the reader towards a certain conclusion that supports the proposed amendments.
- The proposed exceptions are not consistent with the approach adopted under other areas of equality law in Northern Ireland. In addition, they are not consistent with the approach adopted in equality law in other parts of the UK. The introduction of such exceptions would therefore mean that LGB individuals in Northern Ireland would have less protection against discrimination when accessing goods, facilities and services or accommodation than LGB individuals in other parts of the UK.
- 1.9 We consider that the proposed business exception is fundamentally flawed. In particular, it is neither narrowly defined nor objectively justifiable. Further, the proposed business exception lacks legal clarity and certainty in a number of important areas and lacks appropriate safeguards.
- 1.10 As regards the proposed exception for faith based voluntary adoption agencies or fostering agencies, we consider that there should be no exemption for faith-based adoption or fostering agencies that provide publically-funded services from the Sexual Orientation Regulations.
- 1.11 We are of the view that any exception within equality, or other law, must be in compliance with human rights law. Whilst, the degree to which the proposed exceptions comply with human rights law is primarily a matter that falls within the remit of the Northern Ireland Human Rights Commission rather than the Equality Commission, we draw attention in the main paper to a number of important points relating to the question of compatibility with human rights law that require careful consideration.
- 1.12 Finally, we are of the view that there is the potential for LGB individuals to incur costs as a result of the introduction of the proposed business exception. In addition to any financial costs,

there is the potential for the LGB individual to experience injury to feelings or distress as a result of the subsequent denial of the service and/or inconvenience as a result of the subsequent withdrawal of the service.

#### 2 General Comments

- The Equality Commission for Northern Ireland welcomes the opportunity to respond to the Private Member's Consultation on NI Freedom of Conscience Amendment Bill ("the draft Bill").
- 2.2 The Commission **does not support** either of the proposed amendments to Equality Act (Sexual Orientation) Regulations (Northern Ireland) 2006 ("Sexual Orientation Regulations").
- 2.3 We recognise that concerns have been raised by religious organisations and others that the current law does not strike a fair balance between the rights of a service provider to manifest their faith and the right of customers to obtain goods, facilities and services without discrimination on the grounds of their sexual orientation.
- 2.4 However, for the reasons set out in more detail below, we consider that the proposed approach suggested in the draft Bill does not strike a 'fair balance' and, the exceptions proposed, are neither narrowly defined nor objectively justifiable.
  - Weaken protection for LGB people
- 2.5 We believe that if introduced, the proposed amendments would significantly weaken protection for LGB customers/clients/tenants against discrimination on the grounds of sexual orientation.
- There is also the potential for the exceptions, if introduced, to weaken protection not only for LGB individuals but also for those who associate with LGB individuals, such as family members or friends, and/or those who are perceived to be LGB.
- 2.7 This is because the law as it is currently framed gives protection against discrimination, not just on the grounds of a person's own sexual orientation, but also where a person is discriminated against due to their association with a LGB individual or where they are perceived to be LGB.

Targeted at restricting services to LGB people

- It is clear from the consultation document that the proposed changes are solely in relation to the sexual orientation Regulations. We object to the proposed inclusion of exceptions which are not objectively justifiable which are targeted at restricting services to LGB individuals.
- The consultation does not, for example, reflect the fact that there can be other situations where religious beliefs may result in a conflict with protection against discrimination on other equality grounds, such as gender. For example, members of a particular religion may believe that women should not occupy certain jobs, which would be in conflict with the right of women not to be discriminated against in employment.

Other exceptions already permitted

- In addition, it is important to stress that the Sexual Orientation Regulations already contain a wide exception that permits religious organisations to refuse to provide goods and services to LGB individuals so as to avoid conflicting with that organisation's strongly held religious convictions.
- 2.11 Further, outside equality law, we recognise that in certain specific and limited circumstances, such as in the criminal law relating to abortion, it may be appropriate to include a right of conscientious objection that permits employees to refuse to carry out duties which are in conflict with their conscience.
- 2.12 However we have made it clear that we only support the inclusion of a right of conscientious objection in the criminal law relating to abortion, provided it is narrowly and clearly defined and objectively justifiable.<sup>1</sup>

No equivalent provisions in other equality areas

2.13 There is also no equivalent provisions to the proposed exceptions in other areas of equality law. The proposed clauses are therefore inconsistent with the approach adopted under other equality strands, including in areas where there is also the potential for competing rights.

<sup>1</sup> http://www.equalityni.org/ECNI/media/ECNI/Consultation%20Responses/2015/DOJ\_consultation\_on\_abortion-Jan15.pdf January 2015.

Inconsistent with the approach adopted in other jurisdictions

In addition, the proposed exceptions are not consistent with the approach adopted in equality law in other parts of the UK. The introduction of such exceptions would mean that LGB individuals in Northern Ireland would have less protection against discrimination when accessing goods, facilities and services or accommodation than LGB individuals in other parts of the UK. Further, the proposed business exception is not contained in equality legislation in the Republic of Ireland under the Equal Status Act 2000 as amended.<sup>2</sup>

Lack of balance in consultation paper

- 2.15 Finally, we do not agree with many of the statements and conclusions outlined in the consultation document. For example, we do not agree with the statement in the consultation paper that the proposed changes will enhance the Sexual Orientation Regulations.
- We do not consider that the introductory section in the consultation document represents a balanced view of the law or the issues under consideration. The introductory section, for example, raises points on how there is a need for the law to be changed to "make space for people of faith to provide services". There is no equal consideration of the potential negative impact of such changes on LGB individuals who are seeking such goods and services.
- 2.17 Further, we do not consider that the questions are framed in an objective way but are intended to lead the reader towards a certain conclusion that supports the proposed amendments. For example, question two, is intended to lead the reader to the conclusion that the current law "narrows diversity and choice for service users who wish to access a service in the context of a faith/particular faith ethos".

<sup>&</sup>lt;sup>2</sup> Equal Status Act 2000 as amended. It will be noted that, unlike in Northern Ireland under the Sexual Orientation Regulations, this Act does not expressly prohibit discrimination by public bodies in the exercise of their functions. The Equal Status Act includes a very limited exemption from the Act on religious ethos grounds which relates solely to school enrolment selection decisions on religious grounds. Section 37 of the Employment Equality Act, does allow religious organisations, medical institutions or educational institutions an exemption on employment grounds. It is important to note that this applies to employment only.

### 3 Proposed business exception

3.1 We **do not support** the proposed business exception as set out in clause 16a of the Bill. In our view, as explained in more detail below, the proposed business exception is fundamentally flawed. In particular, we do not consider that the proposed business exception is either narrowly defined or objectively justifiable. Further, the proposed exception lacks legal clarity and certainty in a number of important areas and lacks appropriate safeguards.

#### Wide scope of exception

- 3.2 The Commission has consistently made it clear that any exception to either equality law or other law must be narrowly defined and objectively justifiable.
- In the first instance, the proposed business exception is not narrowly defined. It is proposed that the exception will apply to a wide range of commercial organisations involved in providing goods, facilities or services to the public, as well as those that let or rent property.
- Its intention is to allow all commercial businesses to discriminate on the grounds of sexual orientation and restrict the provision of goods, facilities or services so as to avoid endorsing, promoting, or facilitating behaviour or belief which conflicts with their strongly held religious convictions.
- The proposed exception is not limited to the provision of goods, facilities or services but also extends to commercial businesses that rent or let property to tenants or customers.
- In addition, it is proposed that the exception can be availed of by a wide range of individuals; namely the person (A) whose sole or main purpose is commercial; anyone acting on his behalf or under his auspices; or as the case may be, those holding the controlling interests in A. This widens the exception even further.
- 3.7 Further, it is proposed that commercial organisations can restrict the provision of goods, facilities or services or the use or disposal of premises so as to avoid endorsing, promoting or facilitating "behaviour or beliefs" which conflict with the strongly

held religious convictions of the organisation. Again, this could potentially apply to a wide range of activities as it is intended not just cover the "behaviour" or actions of a person of a particular sexual orientation but also their "beliefs".

#### Lacks legal certainty

- In the interests of legal certainty, any rights or responsibilities in legislation must be clearly defined so that the extent and limits to these rights and responsibilities are clear. The proposed business exception also lacks legal certainty and clarity. For example:
  - a) It is not clear what "endorsing, promoting, or facilitating" means;
  - b) There is no definition of what "behaviour or beliefs" includes. Does it for example include the situation where a service provider perceives a customer/client to have a particular belief which is in conflict with their religious convictions but in actual fact the person does not hold that belief?
  - c) The clause refers to the religious convictions of a person (A), anyone acting on his behalf or under his auspices, or those holding a controlling interest in A. It is not clear what the situation would be if those individuals purported to be covered by the exception have differing strongly held religious convictions. It is also not clear whether the exception is intended to apply to limited companies.

#### Lack of safeguards

- In addition, unlike the current exception within the Sexual Orientation Regulations that applies to religious organisations, there are no appropriate safeguards contained within the proposed exception.
- In particular, it will be noted that religious organisations can only rely on the exception contained within Regulation 16, which permits them to restrict the provision of goods, facilities and services and the use and disposal of premises, where the following conditions apply:-

- a) If it is necessary to comply with the doctrine of the organisations; or
- b) So as to avoid conflicting with the strongly held religious convictions of a significant number of the religion's followers.
- 3.11 There are no similar caveats outlined in the proposed exception. All that is required is that the person (A) has "a strongly held religious conviction".
- As highlighted above, the only requirement in the proposed exception is that the person has a religious conviction that is "strongly held". There is also no requirement that it is a "genuine" religious conviction or that the person (A) has made their religious conviction publically known so the customer/client is aware of it.
- Importantly, a religious conviction, regardless of whether or not it is strongly held, is of a subjective nature. The difficulties of conferring protection or preference upon a particular substantive moral position is succinctly set out by Lord Justice Laws in the Court of Appeal decision in *McFarlane v Relate*, in 2010, who stated that

"the conferment of any legal protection or preference upon a particular substantive moral position on the ground only that it is espoused by the adherents of a particular faith, however long its tradition, however rich its culture, is deeply unprincipled." <sup>3</sup>

#### 3.14 He further stated:

"The promulgation of law for the protection of a position held purely on religious grounds cannot therefore be justified. It is irrational, as preferring the subjective over the objective. But it is also divisive, capricious and arbitrary. We do not live in a society where all the people share uniform religious beliefs. The precepts of any one religion – any belief system – cannot, by force of their religious origins, sound any louder in the general law than the precepts of any other."

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<sup>&</sup>lt;sup>3</sup>Court of Appeal decision in McFarlane v Relate, in 2010 at para 23 http://www.employmentcasesupdate.co.uk/site.aspx?i=ed5719

Further, we note that there is also no consideration in the proposed exception to placing a duty on the service provider to take steps to ensure that the service is provided to the customer by another service provider in circumstances where they consider themselves unable to provide the service.

No exception when providing publically funded services

- Further, the exception for religious organisations makes it clear that they cannot rely on this exception where they are providing goods, facilities and services on behalf of a public authority.
- There is no similar exclusion in the proposed draft clause. In the absence of such a provision, the introduction of the proposed clause would significantly widen the exception so as to permit commercial businesses to discriminate when providing goods, facilities and services when they are carrying out functions of behalf of a public body.
- 3.18 As set out in more detail below, the Commission does not support exceptions to the Sexual Orientation Regulations that permit either religious organisations or commercial organisations with religious convictions to discriminate on grounds of sexual orientation in circumstances where they are providing goods, facilities or services on behalf of a public body.

# 4 Exception for faith based voluntary adoption/fostering agencies

- 4.1 The Commission **does not support** the proposed exception for faith based voluntary adoption agencies or fostering agencies so as to permit them to discriminate on grounds of sexual orientation when providing goods, facilities and services or carrying out public functions on behalf of a public body.
- 4.2 We consider that there should be no exemption for faith-based adoption or fostering agencies that provide publically-funded services from the sexual orientation Regulations.
- 4.3 We recognise that some faith-based adoption/fostering agencies hold genuine and strongly held religious convictions

- that are opposed to those in civil partnerships and same-sex couples being able to apply to adopt a child.<sup>4</sup>
- The Commission has already made it clear that it supports the rights of unmarried heterosexual couples, people in civil partnerships (either as an individual or as a couple) and samesex couples to have the right to apply to be allowed to adopt in Northern Ireland.
- 4.5 We therefore welcomed the outcome of the legal challenge on this matter by the Court of Appeal in June 2013 that determined that couples in Northern Ireland who are not married, those in civil partnerships, and same-sex couples could apply to adopt.<sup>5</sup>
- In that case, the Court of Appeal was of the view that, following the House of Lord's decision in  $Re\ G^6$ , under current domestic law in Northern Ireland, an unmarried heterosexual couple is eligible to be considered for adoption. The judgement also made it clear that once a State decides to extend adoption eligibility to unmarried heterosexuals, then a heavy onus lies on the State to justify a differential treatment of unmarried homosexual couples. It held that preventing someone from even being considered to be allowed to adopt because of their relationship status was a discriminatory practice.<sup>7</sup>

### 5 Compliance with human rights legislation

- The Commission is of the view that any exception within equality, or other law, must be in compliance with human rights law.
- The degree to which the proposed exceptions comply with human rights law is primarily a matter that falls within the remit of the Northern Ireland Human Rights Commission rather than the Equality Commission.
- 5.3 There are, however, are number of points that require consideration.

<sup>&</sup>lt;sup>4</sup> <u>Statement by the Catholic Bishops of Northern Ireland on the future of adoption services with the Catholic Church,</u> 4 December 2014.

<sup>&</sup>lt;sup>5</sup> CA decision in NIHRC application, June 2013, [2013] NICA 37

<sup>&</sup>lt;sup>6</sup> In *Re G* The House of Lords had rejected as "irrational, disproportionate and unjustified" the blanket ban on adoption by an unmarried couple.

<sup>&</sup>lt;sup>7</sup> See NIHRC Statement on Judgment, June 2013

- First, the Commission recognises and supports the right to freedom of thought, conscience and religion which is protected under Article 9 of the European Convention on Human Rights (ECHR) and Article 18 of the ICCPR.
- 5.5 Further, it is also clear from cases that have been brought before domestic courts in the Great Britain and to the European Court of Human Rights about religious rights in the workplace, that Article 9 of the ECHR provides unqualified protection for freedom of thought, conscience and religion. It also provides protection for the right to express or manifest religion or belief in worship, teaching practice or observance, though importantly, these rights are qualified and can be restricted in certain circumstances.<sup>8</sup>
- In particular, religion or belief manifestation rights under Article 9 can be limited provided the limitations are prescribed by law and necessary in a democratic society in the interests of public safety, the protection of public order, health or morals, or the protection of the rights and freedoms of others.
- In addition, Article 14 of the ECHR requires that people enjoy all the rights under the ECHR without discrimination. Article 14 is not a freestanding right and it can only operate when another Convention right is engaged.
- Nor does Article 14 confer an absolute right. A difference of treatment is discriminatory if it has no objective and reasonable justification. Further, although not specifically referred to, it has been held that sexual orientation discrimination is plainly within the ambit of Article 14.9 Court decisions have made it clear that a difference in treatment will be justified so as not to infringe Article 14, only if "particularly convincing and weighty reasons are shown". 10
- Of further note is the views of the High Court in the case of Catholic Care (Leeds) v Charity Commission for England and Wales in 2010, in which the court was asked to examine the decisions of the Charity Tribunal to refuse Catholic Care

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<sup>&</sup>lt;sup>8</sup>See for example, cases of *Ladele and McFarland, ECtHR, June 2013* highlighted below.

<sup>&</sup>lt;sup>9</sup> See judgement of High Court in *Catholic Care (Leeds) v Charity Commission for England and Wales*, 2010. [2010] EWHC 520 (Ch), <a href="http://www.bailii.org/ew/cases/EWHC/Ch/2010/520.html">http://www.bailii.org/ew/cases/EWHC/Ch/2010/520.html</a>
<sup>10</sup> Ditto

permission to amend its charitable objects. The charity had argued that it was outside the tenets of the Roman Catholic Church to provide adoption services to same-sex cohabiting couples or civil partners, and, in fact, it only provided adoption services to couples if they were married. The judge held that

"the respect for the religious beliefs motivating such faithbased adoption agencies would not be likely to constitute a justification of differential treatment in favour of heterosexual couples under Article 14 because of the essentially public nature of their activities, carried out to a significant extent on behalf of local authorities, and funded to a greater or lesser extent by them".<sup>11</sup>

- Further, the cases of *Ladele* and *McFarlane v the UK*, which were brought before the European Court of Human Rights in 2013, both involved situations where employees due to their religious beliefs about marriage and sexual relations objected to carrying out certain work duties in respect of same-sex couples. <sup>12</sup>
- It will also be noted that the European Court of Human Rights did not uphold their complaints. In particular, in Ladele, which concerned a registrar that refused to perform civil partnerships and her employer had refused to exempt her from particular duties, the majority of the Court concluded that the domestic courts had not exceeded the wide discretion given to them when determining this case which involved striking a balance between competing Convention rights. The majority of the Court did not accept the employees' argument that the employer should have accommodated her conscientious objection. <sup>13</sup>
- Further, in *McFarlane*, which concerned a counsellor who refused to offer psycho-sexual therapy to same-sex couples contrary to his employer's non-discrimination policy and was dismissed, the Court unanimously decided that a fair balance was struck between the competing interests at stake.

  Accordingly, although the Court recognised that the loss of a

<sup>&</sup>lt;sup>11</sup> Ditto at para 84

<sup>12</sup> Ladele and McFarlane v The UK Government, ECtHR, June 2013

See <u>EHRC religion or belief in the workplace an explanation of recent judgments</u>, Feb 2013

job was a severe sanction with grave consequences, it concluded the State had not exceeded the wide discretion it enjoys to determine the right balance between manifesting religious belief and protecting the rights of others. 14

- Court decisions have also made it clear that Article 9, whilst it 5.13 provides a measure of protection in relation to religious belief, "the more public and secular the sphere in which the conduct takes place, the less protection is afforded by Article 9."<sup>15</sup>
- Finally, as regards the proposed exception in relation to faith-5.14 based adoption/fostering agencies, we draw attention to the views of the Joint Committee on Human Rights in its legislative scrutiny of the Equality Bill who stated that "we consider that there is nothing in Art 9 of the ECHR, or any other human rights standards, that requires an exemption to be provided to permit religious organisations to discriminate when delivering services on behalf of a public body". 16

#### 6 Costs

- The consultation document has sought views on the likely 6.1 costs/financial implications of the proposed legislation.
- The Commission is of the view that there is the potential for 6.2 LGB individuals to incur costs as a result of the introduction of the proposed business exception.
- 6.3 In some instances, an LGB individual may not be aware that a particular commercial organisation holds a religious belief that places it in conflict with providing services to LGB individuals. For example, an LGB individual may not be aware that a particular bed and breakfast owner objects to renting rooms to same sex couples.
- There is the potential in those circumstances for an LGB 6.4 individual who has pre-booked a service which is then

<sup>&</sup>lt;sup>14</sup> Ditto

<sup>&</sup>lt;sup>15</sup>See judgement of High Court in Catholic Care (Leeds) v Charity Commission for England and Wales, 2010. [2010] EWHC 520 (Ch) http://www.bailii.org/ew/cases/EWHC/Ch/2010/520.html

<sup>&</sup>lt;sup>16</sup> Joint Com<u>mittee on Human Rights, Legislative Scrutiny: Equality Bill,</u> 26<sup>th</sup> Report of Session 2008-09, 2009

- subsequently declined once the service provider becomes aware of the person's sexual orientation, to incur costs.
- Further, in addition to any financial costs, there is the potential for the LGB individual to experience injury to feelings or distress as a result of the subsequent denial of the service and/or inconvenience as a result of the subsequent withdrawal of the service.
- We believe it is in the interests of all businesses to open their services to as wide a pool as possible and a business may actually incur costs as a result of refusing or withdrawing a service to a LGB individual.
- Further, the inclusion in equality law of potential provisions which lack legal clarity or certainty can also result in unnecessary legal action, and accompanying costs, for businesses who seek to clarify their rights and responsibilities under the provisions.

#### 7 Conclusion

- 7.1 In conclusion, the Commission does not support either of the proposed amendments to the Sexual Orientation Regulations as set out in the draft Bill.
- 7.2 We consider that the proposed business exception is fundamentally flawed. In particular, it is neither narrowly defined nor objectively justifiable, it lacks legal clarity and certainty in a number of important areas and lacks appropriate safeguards.
- As regards the proposed exception for faith based voluntary adoption agencies or fostering agencies, we consider that there should be no exemption for faith-based adoption or fostering agencies that provide publically-funded services from the Sexual Orientation Regulations.
- 7.4 We believe that if introduced, the proposed amendments would significantly weaken protection for LGB individuals against discrimination on the grounds of sexual orientation.