



Amnesty International UK

DUP Consultation on the Northern Ireland Freedom of Conscience Amendment Bill

Submission to the Democratic Unionist Party

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Amnesty International UK

Amnesty International UK (AIUK) is a national section of a global movement of over seven million supporters, members and activists. We represent over 250,000 supporters in the United Kingdom. Collectively, our vision is of a world in which every person enjoys all of the human rights enshrined in the Universal Declaration of Human Rights and other international human rights instruments. Our mission is to undertake research and action focused on preventing and ending grave abuses of these rights. We are independent of any government, political ideology, economic interest or religion.

Introduction

Amnesty International rejects both the premise and the proposals contained in the consultation paper on the Northern Ireland Freedom of Conscience Amendment Bill.

The paper describes the proposed Amendments as the solution to “clashing rights”. In Amnesty’s view, the proposals are, instead, a recipe for significant reduction in rights protections.

Amnesty does not accept that there is a need for a change in the law along the lines proposed in the paper.

The existing regulations are compatible with the European Convention of Human Rights, which balances the right to manifest religious beliefs and the rights of individuals not to be discriminated against on grounds of sexual orientation. Amnesty does not consider there to be any necessity for these regulations to be so amended.

Amnesty considers the proposed Amendments to be in fundamental conflict with the purpose of hard won anti-discrimination protections in Northern Ireland. They would lead to a two-tier system of protection against discrimination, where those with same-sex sexual orientation could find themselves barred from using certain businesses.

The proposals should be withdrawn and the proposers should recognise that a reasonable balance of rights is already provided for in law.

Discrimination, human rights and the law

Equality law in Northern Ireland

1. The Equality Act (Sexual Orientation) Regulations (Northern Ireland) 2006 (“the Regulations”) which this proposed Bill would alter are made under a power given to the Office of the First Minister and deputy First Minister (“OFMDFM”) under the Equality Act 2006.
2. Amnesty considers the proposed Amendments to be fundamentally inconsistent with the purpose of that Act. They would introduce a virtually unlimited exception to the statutory prohibition against discrimination in the provision of goods and services on the grounds of sexual orientation. The Bill would therefore in practice create a wide ranging right to directly discriminate against a significant number of people in Northern Ireland. Indeed, the Amendments are so broadly drawn that they are likely to permit discrimination in a strikingly broad number of situations – any occasion where doing business is felt to amount to *endorsing, promoting, or facilitating* not just any *behaviour* but also any *belief* that conflicts with the strongly held religious beliefs

of the person doing business or the business owner. In Amnesty's view, that contradicts the statutory purpose and spirit of the enabling legislation.

3. The Courts in England and Wales have already made clear that there is no room for a religious opt-out from discrimination protections for commercial providers. There have been numerous recent attempts by individuals to defend discrimination challenges - or bring their own - contending that there should be an exemption for those who believe their religion requires them to deny their services in any situation which they consider amounts to them condoning homosexuality. These have all failed¹. That includes a multi-organisational attempt led by the Christian Institute to challenge the existing Regulations in the Northern Irish Courts in 2007².
4. The basic point underpinning all those refusals was eloquently summarised by Baroness Hale in *Bull v Hall* [2013] UKSC 73 at 37:

"...To permit someone to discriminate on the ground that he did not believe that persons of homosexual orientation should be treated equally with persons of heterosexual orientation would be to create a class of people who were exempt from the discrimination legislation. We do not normally allow people to behave in a way which the law prohibits because they disagree with the law. But to allow discrimination against persons of homosexual orientation (or indeed of heterosexual orientation) because of a belief, however sincerely held, and however based on the biblical text, would be to do just that."³

5. There is no room for any kind of proportionality or justification argument when it comes to direct discrimination of this kind. What if it was gender was in issue? Race? Amnesty does not consider there to be any rational distinction here between the different protected characteristics. There is nothing special about sexual orientation which would justify the OFMDFM using its power to make Regulations in this way: to enshrine differential worth of different individuals in law. The proposed Amendments would go far beyond the existing exception for religious organisations (who cannot have a solely commercial purpose).
6. Even in the individual cases which have concerned indirect rather than direct discrimination (which cannot be objectively justified) in this area, the courts have consistently held that to be unlawful. That was because it was not possible either reasonably to justify the indirect discrimination by reference to matters other than sexual orientation, or to show it to be a proportionate means of achieving a legitimate aim. Whichever legal formulation is used, the outcome has generally been a Court finding of unlawful discrimination against the person seeking to justify denial of commercial services to a homosexual on grounds of religious belief.
7. As Munby LJ explained in *Johns v Derby City Council* [2011] EWHC 375 (Admin) [2011] H.R.L.R. 20, a case concerning the approval of a fostering application by a couple who had expressed deeply held religious beliefs opposing homosexuality⁴,

41...The starting point of the common law is ... respect for an individual's religious principles coupled with an essentially neutral view of religious beliefs

¹ Some have concerned the newer Equality Act 2010 framework in the UK, but that makes no significant difference to the analysis.

² *Christian Institute & Ors, Re Judicial Review* [2007] NIQB 66

³ emphasis added here and throughout

⁴ Amnesty cites this case, as others, to highlight the Court's approach to the fundamental question rather than necessarily to indicate approval of its outcome.

and benevolent tolerance of cultural and religious diversity. ... The court recognises no religious distinctions and generally speaking passes no judgment on religious beliefs or on the tenets, doctrines or rules of any particular section of society. All are entitled to equal respect

...

43 However it is important to realise that reliance upon religious belief, however conscientious the belief and however ancient and respectable the religion, can never of itself immunise the believer from the reach of the secular law

8. As such, Amnesty considers these Amendments to be in fundamental conflict with the purpose of hard won anti-discrimination protections in Northern Ireland. There can be no doubt they will lead to a two-tier system where those whose sexual orientation is disapproved of by certain religious traditions will find themselves barred from using certain businesses in the same way as others, directly because of that characteristic.
9. It will also lead to a significant difference in protection across the UK. As Lord Neuberger explained in *Ladele v Islington LBC* [2009] EWCA Civ 1357 [2010] 1 W.L.R. 955, concerning the refusal of a Registrar to perform civil partnerships for homosexual couples, the aim of the UK law is to prohibit discrimination other than in exceptional cases:

“[73] however much sympathy one may have with someone such as Ms Ladele, who is faced with choosing between giving up a post she plainly appreciates or officiating at events which she considers to be contrary to her religious beliefs, the legislature has decided that the requirements of a modern liberal democracy, such as the United Kingdom, include outlawing discrimination in the provision of goods, facilities and services on grounds of sexual orientation, subject only to very limited exceptions.”
10. This is not one of those very limited exceptions, and Amnesty would urge Northern Ireland legislators not to alter that requirement, as the equality impacts are likely to be very serious indeed.

Human rights protections and the law

11. One of the few questions phrased neutrally in the Consultation paper is Question 4: ‘*How do you think the proposed legislation will impact on human rights?*’ The paper describes the proposed Amendments as the solution to ‘clashing rights’. In Amnesty’s view, they are instead a recipe for reduction in rights.
12. Like all other public authorities⁵, the Courts are obliged like to act compatibly with the European Convention on Human Rights. They are also required to interpret legislation compatibly with the Convention as far as possible, and where that is not possible, to declare primary legislation to be incompatible. Further, section 24 of the Northern Ireland Act 1998 means the OFMDFM has no power to implement regulations that breach the ECHR.
13. It is well established that in cases⁶ concerning religious objection to commercial service provision to homosexuals, there are several ECHR rights engaged. Those include Article 9, the right to freedom of thought, conscience and religion of the

⁵ Human Rights Act 1998

⁶ See, inter alia, *Black v Wilkinson* [2013] EWCA Civ 820 [2013] 1 W.L.R. 2490

service provider, and Article 8, the right of the potential service users to respect for their private lives without unjustified discrimination on grounds of their sexual orientation. Article 14 will also be of direct relevance - the right not to have Convention rights secured in a discriminatory way:

Article 8 provides:

“1. Everyone has the right to respect for his private and family life, his home and his correspondence.

2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.”

Article 9 provides:

“1. Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance.

2. Freedom to manifest one’s religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.”

Article 14 provides:

“The enjoyment of the rights and freedoms set forth in [the] Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.”

14. The Northern Ireland High Court has already rejected any “*generalised complaints*” (see *Christian Institute* as above, at 93) about the existing Regulations being “*necessarily inconsistent with and in violation of*” Articles 9, 10 and 14 (*inter alia*) of the ECHR. In that challenge, the Christian Institute and others sought to argue that the prohibition against discrimination in the Regulations was automatically a disproportionate and unnecessary interference with those rights, for precisely the kind of reasons advanced in this Consultation Paper. The Court disagreed.
15. The important Article 9 right to “*manifest*” one’s religion in “*worship, teaching, practice and observance*” is subject to the qualifications in Article 9(2). When *Ladele* (above, concerning a registrar who refused to perform same sex civil partnerships) reached the European Court of Human Rights, the UK government submitted that the relevant English Regulations “*struck a balance*” in the United Kingdom “*between the right to manifest religious beliefs and the rights of individuals not to be discriminated against on grounds of sexual orientation*” (*Eweida v UK* (2013) 57 E.H.R.R. 8). The government contended that was a decision which (i) aimed to secure the rights of others and (ii) fell within the margin of appreciation allowed to the national authorities, as did those decisions of the local authority requiring Ms Ladele to officiate at same sex unions and of the UK courts in their favour. The Court agreed.
16. However, in its judgment the Court also considered very similar arguments to those in this Consultation Paper around “*reasonable accommodation*” of belief and the refusal to treat religiously motivated discrimination differently to other acts. On that

point, it reiterated that in order to determine whether the local authority's decision not to make an exception for the applicant *Ladele* and others in her situation amounted to indirect discrimination in breach of art.14 that needed a remedy, the Court must consider "*whether the policy pursued a legitimate aim and was proportionate*"[at 104].

17. With that in mind, Amnesty notes that the existing regulations (i) have already been the subject of direct consideration by the Northern Irish High Court on this point, and (ii) are clearly (like the English regulations) in pursuit of a legitimate aim (the securing of the rights and freedoms of others) and proportionate (applying the considerations given to indirect discrimination justification arguments by the English Supreme Court as above) as well as within the margin of appreciation of the UK state. The relevant sections are compatible with human rights law. Amnesty does not consider there to be any necessity for them to be amended as proposed.
18. What then would be the impact on human rights protections of the proposed Amendments if passed? As the English Court of Appeal explained in *Black v Wilkinson* [2013] EWCA Civ 820[2013] 1 W.L.R. 2490, concerning the Defendant's refusal to let a double room in her family-run bed and breakfast to a homosexual couple,

"It is clearly established that, as a matter of general principle, (i) the right of a homosexual not to suffer discrimination on the grounds of sexual orientation is an important human right (Article 8 and 14)"
19. Indeed, like religion, sexual orientation is one of the "*suspect categories*" the Courts have identified as requiring "*very weighty reasons*" in order to justify discrimination⁷.
20. Amnesty does not consider – as above – there to be any such weighty reasons here. Quite the reverse. The outcome of the amendments in practice is likely to be that homosexuals are denied the same Article 8 rights as others, because of their sexual orientation - whether or not that is because they wish the cake they have ordered to be used at their civil partnership or simply to be eaten for afternoon tea with their partner. The distinction the Consultation Paper sets up between a refusal to provide services because someone happens to be gay and because (in the words of the amendment) the provider *wishes to avoid endorsing, promoting or facilitating behaviour or beliefs which conflict with their strongly held religious convictions* is too vague to be meaningful.
21. Moreover, that vagueness underlines the lack of certainty and clarity in these Amendments – something the rule of law demands. Amnesty thus considers that they are thus unlikely to pass the '*in accordance with the law*' test for a lawful interference with Article 8, and will fall at the first hurdle.
22. Should they somehow be considered to indicate with sufficient certainty what the bounds of lawful conduct will be, then Amnesty notes additional significant concerns as to whether the Amendments can be considered proportionate and thus compatible with human rights law (or whether the Courts will be able to achieve that result in deciding individual cases brought under them).
23. Neither Article 8 nor Article 9 rights are intrinsically more important than the other. Neither in principle trumps the other. But there must be an overall fair balance of rights. Any interference with Article 8 must be necessary, and the minimum possible

⁷ See for example *Black* at 35, *EB v France* (2008) 47 EHRR 21, *Eweida*

to achieve a legitimate aim: there must be a “reasonable relationship of proportionality between the means employed and the aim sought to be achieved”⁸. Hence the relevance of the distinction between a very limited exception for non-commercial religious organisations, and a very broad one as here proposed for all commercial providers where religious beliefs are in play.

24. The Court of Appeal has made clear that any proper public consultation by the executive on legislation should be taken into account in considering necessity and the balance (as explained in *Black* at 36). Here, Amnesty considers it highly relevant that the Consultation on the existing Regulations was clearly in favour of the current framework. For example, as the published summary response document sets out:

Question 1: Do you agree that the new sexual orientation Regulations should apply to goods, facilities and services?

There were 27 responses received to this question, comprising 22 organisations and 5 individuals, and only one organisation answered negatively.... However the broad message from the consultation, is that discrimination on the basis of a person’s sexual orientation is not acceptable and that all people regardless of their sexual orientation should be provided the same access to goods, facilities and services.

25. As to proportionality, Amnesty considers the following excerpt from McCombe LJ’s concurring judgment in *Black* to be highly relevant:

“76 For my own part, I would find that the primary reason why the restriction operated by the defendant in the present case was not a proportionate means of fulfilling the legitimate aim of enabling the manifestation of her religious belief was that (as the recorder said) the balance lies in allowing the defendant to hold her religious views and to manifest them, but requiring her, if she chooses to run a commercial venture to operate it in a manner which does not discriminate against homosexuals. This is broadly in line with the Government’s conclusion on the competing public interests, quoted in para 102 of the recorder’s judgment, that “[where] businesses are open to the public on a commercial basis they have to accept the public as it is constituted ...”

26. Further, the margin of appreciation for the state is narrow in the area of measures legitimising discrimination on sexual orientation grounds in this way. The measure must be suitable and necessary in the circumstances (as explained in, for example, *Kozak v Poland* [2010] ECHR 280 at 92)

27. Finally, it is important to remember, as Baroness Hale again put it on the related question of permitting discrimination by an individual service provider, citing Justice Sachs of the South African Constitutional Court in *National Coalition for Gay and Lesbian Equality v Minister of Justice*, 1999 (1) SA 6 [at 117] that

“While recognising the unique worth of each person, the Constitution does not presuppose that a holder of rights is an isolated, lonely and abstract figure possessing a disembodied and socially disconnected self. It acknowledges that people live in their bodies, their communities, their cultures, their places and their times. The expression of sexuality requires a partner, real or imagined.”

⁸ *Francesco Sessa v Italy*, App No 28790/08, Judgment of 3 April 2012, [at 38]

[53] *Heterosexuals have known this about themselves and been able to fulfil themselves in this way throughout history. Homosexuals have also known this about themselves but were long denied the possibility of fulfilling themselves through relationships with others. This was an affront to their dignity as human beings which our law has now (some would say belatedly) recognised. Homosexuals can enjoy the same freedom and the same relationships as any others. But we should not underestimate the continuing legacy of those centuries of discrimination, persecution even, which is still going on in many parts of the world. It is no doubt for that reason that Strasbourg requires “very weighty reasons” to justify discrimination on grounds of sexual orientation. It is for that reason that we should be slow to accept that prohibiting hotel keepers from discriminating against homosexuals is a disproportionate limitation on their right to manifest their religion.*

[54] *There is no question of (as Rafferty LJ put it) replacing “legal oppression of one community (homosexual couples) with legal oppression of another (those sharing the Defendants’ beliefs)” (para 56). If Mr Preddy and Mr Hall ran a hotel which denied a double room to Mr and Mrs Bull, whether on the ground of their Christian beliefs or on the ground of their sexual orientation, they would find themselves in the same situation that Mr and Mrs Bull find themselves today”*

Further points as to legality

28. The points as to lack of legal certainty and clarity apply just as much outside the sphere of human rights considerations as within it. This regulation, on any sensible construction, fails to satisfy this basic requirement of the rule of law. What kind of ‘belief’ can the service denier rely on? How far does it go? How strong must the religious conviction be? These are just some of the myriad questions this Bill does not answer.
29. Notable also is the complete lack of safeguards mirroring those in the existing narrow exception for religious organisations.
30. Moreover, there will be obvious difficulties where businesses contract with public authorities, or provide public services. How will this exemption operate in practice when there are already competing duties on public authorities to avoid discrimination (regulation 12) and have *due regard to the need to promote equality of opportunity between persons of different sexual orientation* in section 75 of the Northern Ireland Act 1998? Can a public authority lawfully contract with a business that effectively has a ‘No homosexuals’ sign over its door, or (as the Paper would have it) even a ‘no service for anything we think might facilitate, endorse or promote homosexual behaviour’?

Conclusion and recommendation

The proposals contained in the consultation paper on the Northern Ireland Freedom of Conscience Amendment Bill should be withdrawn and the proposers should recognise that a reasonable balance of the right to manifest religious beliefs, and the rights of individuals not to be discriminated against on grounds of sexual orientation, has already been achieved in law.

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