



Consultation on the Northern Ireland Freedom of Conscience Amendment Bill

Consultation Paper

Assembly Member Paul Givan

December 2014

FOREWORD

The recent decision by the Equality Commission to launch a legal action against a bakery for refusing to make a cake with a slogan in support of gay marriage made headlines across the UK and beyond. The case highlighted the fact that some equality legislation, passed with the intention of protecting minorities, is having an adverse effect on those with religious belief when it comes to the provision of goods and services.

I believe that this is wrong and that there should be legislation in place that strikes a balance between the rights of people not to be discriminated against and the rights of conscience of religious believers. That is why I am consulting on this Bill as a remedy to this problem.

In the appendix to this consultation document you will find the text of a proposed Bill. This is very much a draft piece of legislation and I do not claim that it is the finished article. I am interested in the views of interested parties with regard to the legislation and will carefully consider responses to see if my proposals can be improved.

I hope that you will take the opportunity to respond and share your views on how we can balance and protect rights.

THE CONSULTATION WILL CLOSE AT 5pm ON FRIDAY 27th FEBURARY.

Please respond to:

**Northern Ireland Freedom of Conscience Amendment Bill Consultation
Democratic Unionist Party
91 Dundela Avenue
BELFAST
BT4 3BU**

PAUL GIVAN MLA

DEMOCRATIC UNIONIST PARTY

DECEMBER 2014

INTRODUCTION

I am proposing to enhance the Equality Act (Sexual Orientation) Regulations (Northern Ireland) 2006 through the Draft Private Members Bill in Appendix 1 of this consultation document. In what follows I set out the rationale for the changes I propose and then pose a series of consultation questions.

BACKGROUND

In the early days of democracy the focus was very much on protecting and promoting the needs of the majority. However, crudely majoritarian forms of democracy were problematic because of the way they ran roughshod over the rights of minorities.

Liberal democracy emerged as an approach that sought to follow the will of the majority but in a way that accommodated the needs of minorities, thereby protecting the rights of those individuals.

Where a law designed out of regard for the majority has a negative effect on minorities this was accommodated by different treatment under the law. Provision for this was initially made in relation to, for example, conscientious objection with respect to: military service, the giving of oaths and vaccinations. There have, however, been much more recent examples. Section 32 of the Road Traffic Act 1972 had the effect of requiring all Sikhs to either act in violation of their faith by removing their turbans in order to wear crash helmets if they wanted to ride motorbikes or to cease using motorbikes. This gave rise to a huge outcry and the passing of the Motor Cycle Crash Helmets (Religious Exemption) Act 1976 which provides Sikhs with different treatment under the law so that the law no longer discriminates against them in this manner. Even more recently a good example is found in Section 11 of the Employment Act 1989 which means that Sikhs wearing turbans are not required to wear helmets on construction sites. If it was not for this provision of different treatment under the law, Sikhs working in construction would have been required to either act in violation of their faith, removing their turbans, or to lose their livelihood. The liberal democratic tradition therefore involves ensuring all laws which are designed for the majority do not have adverse unintended consequences for minorities. If any law fails in this regard, legislators must consider whether the situation can be resolved through the provision of different treatment under the law.

Eroding Space for Difference: Equalities Legislation

Over time in addition to developing laws for the majority, liberal democracies have begun very properly to develop laws designed specifically for governing the interactions of others with minorities themselves. In just the same way that laws designed for the majority can have adverse unintended consequences on minorities, so too can laws designed for one minority strand have adverse unintended consequences on other minority strands. Mindful of this, in just the same way it is necessary to check laws designed for the majority for damaging and unintended consequences on minorities – protecting them through different treatment under the law – so too is it necessary to consider the impact of laws designed for one minority group on other minorities. Where such laws are found to have negative effects on other minority groups steps should be taken to protect those minorities through the provision different treatment under the law which results in what is sometimes called ‘reasonable accommodation.’

However, there is currently a marked double-standard in that whilst the basic liberal democratic discipline of checking laws designed for the majority for adverse unintended consequences for minorities has been respected, when it comes to laws designed for minorities themselves this practice has not been properly observed. The clear implication would seem that while it was right to qualify the impact of a law defined for the majority on negatively affected minority strands, it is not acceptable to properly qualify the impact of a law for a minority because the protection of minorities is so important that this step cannot be countenanced.

This logic, however, is completely flawed. The failure to provide proper differential treatment under the law in the narrow confines of protecting another minority strand from adverse and unintended consequences completely undermines the integrity of equality law. First, it disregards the fact that crucially the equality agenda is about protecting *all* minorities. Second, it fails to recognise that the cause of equality is not best served by arming different equality strands with different pieces of legislation they can use to press against and damage each other. Good equality law respects and makes space for difference.

Religion and Sexual Orientation: Making Space for Rights that Clash

The failure to prevent the rights of one strand being applied in a manner that damages another through different treatment under the law in the liberal democratic tradition has sadly become most pronounced in the context of the exercise of sexual orientation rights in relation to religious rights. We now urgently need to amend our current law, designed for the sexual orientation equality strand in relation to goods and services provision, so that it does not undermine another equality strand, religion. Specifically what is required, and delivered by my Bill, is enhancing the sexual orientation goods and services legislation in order to protect religious service providers and those who want to access services in the context of a religious ethos. Let us consider both in turn:

A. Clashing Rights – Making Space for Providers

At the moment the failure of our law to respect the liberal democratic tradition of ‘different treatment under the law’ means that if an orthodox Catholic or Evangelical printer was asked by a customer to print material promoting same sex sexual relationships they are effectively required to either print the material, and thus act in violation of their faith identity, or lose their livelihood. Rather than creating space and respect for difference, this kind of legislation is profoundly illiberal, effectively giving one strand the ability to make life exceptionally difficult for the other.

When confronted with the liberal democratic tradition and the importance of providing different treatment under the law, those opposed to creating appropriate space for people of faith have previously sought to pretend that different treatment under law is not an important liberal democratic principle and instead suggest that it amounts to allowing some people to operate outside the law: This, however, is patently absurd.

Firstly, different treatment under the law does not allow anyone to operate outside the law. The point is simply that in certain tightly defined circumstances in order to prevent unintended negative consequences not everyone/everything is treated by the law in exactly the same way.

Secondly, the equality law in question would be applied without any different treatment in relation to society as a whole and to all equality strands which would not be damaged by the law, and in relation to all aspects of the equality strand that would in certain

circumstances be damaged by that law in relation to those aspects where it would not be damaged. It would only be narrowly in relation to the equality strand that would otherwise be damaged, and narrowly in relation to where the damage would occur that the law would be applied with a different treatment. Mindful of this my Draft Bill:

- Would not mean that an Evangelical grocer would be able to refuse to sell apples to a gay man. The selling of apples would not involve the Evangelical grocer being required to endorse, promote or facilitate a same-sex sexual relationship in violation of his/her faith identity so there is no conflict.
- Would not mean that a Muslim printer could refuse to print a brochure publicising coffee tables made by a lesbian cabinet maker. The printing of a brochure outlining different coffee table designs would not involve the Muslim printer being required to endorse, promote or facilitate same-sex sexual relationships in violation of his faith identity so there is no conflict.
- Would not mean that a Catholic photographer could refuse to take a photograph of recipes created by a bisexual chef. Taking such photographs would not have the effect of endorsing, promoting or facilitating a same-sex sexual relationship in violation of his or her faith identity so there is no conflict.

However:

- It would mean that a Catholic adoption agency would not be required by law to choose between either being willing to act in violation of their faith by placing a child with a same sex couple, thereby endorsing a same-sex union and same-sex parenting, or ceasing operations.
- It would mean that a Muslim printer would not be required by law to choose between either being willing to print a book promoting same-sex sexual relationships, thereby acting in violation of his faith identity by becoming complicit in celebrating same-sex relationships, or losing his or her livelihood.
- It would mean that an Evangelical photographer would not be required by law to choose between either taking photos of a civil partnership ceremony, and thereby act in violation of their faith identity by endorsing, promoting and celebrating same-sex unions – or lose their livelihood.

Thirdly, it is also important to understand that different treatment under the law is not merely applied in relation to minorities but generally, resulting in what are called exceptions. The use of exceptions is wide-ranging. Far from placing the integrity of our legal system in jeopardy the truth is that our legal system would be placed in jeopardy if it was not for exceptions because the complicated nature of human existence is such that we need the option of different treatment under the law in order to prevent unintended consequences.

B. Clashing Rights – Making Space for the Service User

If a religious goods and services provider was required by the legislation to provide a service in a way that endorsed or promoted a same-sex union, or in some sense facilitated a same-sex sexual relationship, the provider would be made complicit in affirming same-sex sexual relationships. They would thus have to choose between acting in violation of their protected characteristic identity, surrendering their faith identity or ceasing service provision. Given that the nature of faith is that it deals with higher loyalties to God it is very likely that when confronted by such a choice many people of faith would rather lose their livelihood than be pressured by the state into violating their faith identity. This would result in their ceasing service provision, eroding the availability of some goods and services in the context of the faith ethos in question. This is a major problem not just for service providers but in some ways more importantly for *service users* who want to access goods and services whilst maintaining their integrity with regard to their faith.

By amending the law to make space for people of faith to provide services my Bill will respect the rights of service users who want to be able to continue to access services in the context of, for example, an Evangelical or Catholic faith ethos, e.g. an Evangelical guest house or a Catholic adoption agency.

Conclusion

Through this Private Members Bill, I believe that the Northern Ireland Assembly can strike a balance between the rights of people not to be discriminated against and the rights of conscience of religious believers in their daily lives. I strongly believe it is possible to navigate this difficult area much more effectively than is currently the case and that this Private Member's Bill can contribute to such efforts.

CONSULTATION QUESTIONS

I would like to hear from you on what you think about my proposals to enhance the Sexual Orientation Regulations 2006.

Please respond by 5pm on Friday 27th February.

Please respond to:

**Northern Ireland Freedom of Conscience Amendment Bill Consultation
Democratic Unionist Party
91 Dundela Avenue
BELFAST
BT4 3BU**

Questions

Question 1: Do you believe that it would be appropriate to amend the Equality Act (Sexual Orientation) Regulations (Northern Ireland) 2006 as proposed in Appendix 1 to ensure that individuals are not put in a position where as a result of this legislation they are forced to choose between either acting in violation of their faith conscience, by affirming same-sex relationships, or losing their livelihood?

Yes No Unsure

Comments: _____

Question 2: Is it appropriate that goods and services legislation should be applied in such a way that it narrows diversity and choice for service users who wish to access a service in the context of a faith/particular faith ethos?

Yes No Unsure

Comments: _____

Question 3: As an example: a recent High Court Judgement means that Northern Ireland’s Catholic adoption agency will now be required to either be willing to act in violation of its faith identity by endorsing same-sex unions and facilitating gay adoption (which means surrendering their faith identity if they wish to continue as a provider), or to cease service provision. Do you think that gay rights are more important than religious rights such that the need to ensure gay couples can access adoption services from every provider should be pressed even when the consequence is to remove from Catholic couples the right to access a Catholic adoption service from anywhere? Is this the right balance or is there a better balance to be struck?

Yes No Unsure

Comments: _____

Question 4: How do you think the proposed legislation will impact on human rights?

Positively Negatively Not at all/not significantly Unsure

Comments: _____

Question 5: How do you think the proposed legislation will impact on equality of opportunity?

Positively Negatively Not at all/not significantly Unsure

Comments: _____

Question 6: Do you have any comments on the likely cost / financial implications of the proposed legislation?

Comments: _____

**Question 7: Do you have any other comments on the proposed draft legislation?
Would you suggest any further amendments?**

Comments: _____

Contact details of person responding to consultation:

Name: _____

Organisation (if applicable): _____

Address: _____

Email address: _____

Tel. _____

Appendix 1: The Northern Ireland Freedom of Conscience Amendment Bill

1. (1) The Equality Act (Sexual Orientation) Regulations (Northern Ireland) 2006 are amended as follows.

(2) In Regulation 16 (Organisations relating to religion or belief)—

(a) in paragraph (8) for “This” substitute “Subject to paragraph (9), this”;

(b) after paragraph (8) insert—

“(9) Paragraph 8 does not apply to a voluntary adoption agency or fostering agency that

(a) is an organisation of the kind referred to in paragraph (1); or

(b) acts on behalf of such an organisation.”

(3) After Regulation 16 insert—

“Businesses: exception based on religious belief

16A

(1) This regulation applies to a person (“A”) whose sole or main purpose is commercial or anyone acting on his behalf or under his auspices.

(2) Nothing in these Regulations shall make it unlawful

(a) to restrict the provision of goods, facilities and services; or

(b) to restrict 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 A or, as the case may be, those holding the controlling interest in A.

(3) For the purposes of paragraph (2)(b), “disposal” shall not include disposal of an estate in premises by way of sale where the estate being disposed of is—

(a) the estate in fee simple absolute in possession; or

(b) the entire estate in the premises in respect of which A has power of disposal.