

NORTHERN IRELAND FREEDOM OF CONSCIENCE AMENDMENT BILL

Consultation by Assembly Member Paul Givan

Response of The Christian Institute

Introduction

The Christian Institute is a non-denominational charity established for the promotion of the Christian faith in the UK and elsewhere. We have over 6,500 supporters in Northern Ireland, including over 500 churches and church ministers from across the Christian denominations.

We seek to promote the Christian way of life and Christian teaching on moral and ethical issues and to defend the religious liberty of Christians in the UK. We do this through our publications, lectures, participation in church services, website, comment in the media and campaigns. We are regularly involved in advising churches, charities and Christians generally on equality law.

Protecting religious liberty and free debate on religious ideas has been a major focus of our work over many years. We hold traditional, mainstream Christian beliefs about marriage, sexual ethics and the sanctity of human life from conception – all subjects on which there is disagreement in our society and on which there should be freedom of conscience and freedom of speech.

We are especially concerned that Christians are being marginalised in the UK. We frequently provide advice and assistance to Christians who have been discriminated against because of their faith. We have a particular interest in human rights litigation to protect religious freedom. For example, we persuaded the Belfast High Court in 2007 to strike down the goods and services “harassment” provisions originally included in the Northern Ireland Sexual Orientation Regulations (NI SORs), which threatened freedom of speech. Over the past decade, The Christian Institute has been at the heart of major UK cases involving the conflict between equality provisions and the right of Christians to freedom of conscience.

We welcome this very important consultation. As we argued in 2006 when the legislation was first proposed by the UK Government, the NI SORs fail to strike a fair balance between rights based on sexual orientation and religious rights. The Assembly needs to take action to better protect the rights of Christians under Articles 9 and 10 of the European Convention on Human Rights.

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?

The NI SORs must be amended to provide a better balance between religious rights and rights based on sexual orientation. A free society that values the democratic consent of its people should respect and accommodate religious freedom and conscience.

There is a common sense expectation that the law should accommodate deeply-held religious beliefs. There are at least two major parallels from the United Kingdom: during conscription in this country, conscientious objectors to war were not required to be involved in combat; and doctors are given conscientious objection in relation to fertility treatment, abortion and contraceptive advice.¹ It would be considered very wrong for an architect with republican sympathies to be required to accept a contract to design an Orange hall, or for a unionist photographer to be required to accept a job as official photographer for an Easter Rising celebration.

On the same reasoning, freedom of conscience must be properly protected in the NI SORs. At present, this is not the case. When the law was first proposed, we pointed this out using scenarios such as a Christian printer refusing to produce a magazine promoting homosexual lifestyles.

We agree it is an unfair dilemma that pushes people of faith to choose between integrity of conscience and staying in business. The NI SORs are an unbalanced law, effectively elevating sexual orientation as a protected characteristic at the expense of religion. Consequently, Christians can be pressured to act against their conscience position – informed by Christian teaching – that sexual activity should be reserved for marriage between a man and a woman (Genesis 2:24; 1 Corinthians 6:9). A more balanced law would recognise that freedom of religion is not merely freedom to worship or to believe; it includes freedom to live out or to manifest beliefs.

We view the proposal set out in Appendix 1 as a good starting point for this important discussion. Crucially, it only protects actions which involve “endorsing, promoting or facilitating behaviour or beliefs” which conflict with “strongly held religious convictions”. This ensures that the proposal would only protect against involvement in endorsing, promoting or facilitating behaviour or beliefs that are

¹ ‘Conscientious objector’, *Encyclopaedia Britannica Online*, see <http://www.britannica.com/EBchecked/topic/133266/conscientious-objector> as at 13 February 2015; *Personal beliefs and medical practice*, General Medical Council, 2013, page 2; ‘Expressions of doctors’ beliefs’, BMA, see <http://bma.org.uk/practical-support-at-work/ethics/expressions-of-doctors-beliefs> as at 13 February 2015

contrary to Christian teaching. Obviously this does not apply to a whole range of normal everyday activities, e.g. transport, healthcare or sport. But whether involving a baker or a B&B, there ought to be a respect for beliefs on those rare occasions where doing what the customer wants would force a service provider into a moral compromise. In those circumstances, the law must respect freedom of conscience.

The 'strongly held religious convictions' test is already used in Regulation 16 of the NI SORs, which protects the freedom of churches and religious organisations. It has worked perfectly well. It is not the same as 'any old belief people feel strongly about'. For a belief to be protected it would have to reach a well-established threshold of cogency and seriousness.² It is not a matter of preference or feeling uncomfortable.

We agree that the law can alleviate the dilemma with a conscience clause of the kind proposed. It is both unjust and puzzling that mainstream religious views on homosexual behaviour should be deemed unacceptable in the goods and services sector, with no attempt at accommodation. Where the manifestation of religious belief can be accommodated, it should be. It is mistaken to focus solely on the sexual orientation rights of a consumer. The point of the conscience clause is to recognise the service provider's conscience. There is scope for the accommodation of religious rights without disproportionately affecting other equality priorities.

While we agree in principle with the proposed legislation, we would welcome a more limited scope. Regulation 16A rightly focuses on conscience and it is doubtful how far conscience rights can apply beyond family-run (or 'closely held'³ companies). It is difficult to see how the thousands of shareholders of a multinational company can share a collective Christian conscience.

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?

It is clear that restricting religious conscience in goods and services causes a chilling effect on Christians and others, who will be increasingly reluctant to participate in sectors in which they fear they are likely to be sued. Diversity in the goods and services sector will be impoverished.

² See *Grainger plc and Others v. Nicholson* [2010] IRLR 4, para. 24 and *Eweida and Others v. the United Kingdom* [2013] ECHR 37, para. 81

³ *Burwell v. Hobby Lobby Stores, Inc* 573 U. S. (2014), see www.supremecourt.gov/opinions/13pdf/13-354_olp1.pdf as at 13 February 2015

The proposed legislation does not enforce Christian sexual ethics or require that they are celebrated. It does not in any way prevent secularists from running their businesses along secular lines. In fact, with current formulations of 'belief', humanism and atheism would be protected alongside religions such as Christianity.

Under the present law, the loss will be increasingly felt in some areas where service users tend to seek providers with a shared ethos, e.g. B&Bs, counselling services and the care sector. An enforced secular orthodoxy in these areas will prevent socially conservative service provision for social conservatives.

We should also note that Christian contribution to the private sector will be impoverished. Business values such as honesty, industry and respect for all persons are especially fostered within a Christian worldview, as is a strong ethos of care.

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?

We believe this situation is patently unjust and a disservice to society. To prevent Roman Catholic adoption agencies acting in accordance with Roman Catholic teaching on marriage is absurd. The proposed amendment does not require that all adoption agencies be run along socially conservative lines – it simply allows them to be.

Faith-based agencies have an outstanding track record in helping to secure homes for some of the most vulnerable children. It is particularly crucial that once such children are adopted they feel that they are in a safe and stable environment. In this respect faith-based adoption agencies cannot be beaten. Before 2007, Roman Catholic adoption agencies were said to account for 4 per cent of all adoptions each year, including a third of those carried out in the voluntary sector.⁴ But now Roman

⁴ *BBC News online*, 25 January 2007, see http://news.bbc.co.uk/1/hi/uk_politics/6297107.stm as at 12 February 2015; House of Commons, Hansard, 21 February 2007, col. 110WH

Catholic adoption agencies in England have been forced to secularise or close under the Sexual Orientation Regulations for Great Britain.⁵

This service has been sacrificed in order to ensure that same-sex couples can use every single adoption agency in the country. The proposed legislation for faith-based agencies would allow these invaluable services to continue, while leaving homosexual couples free to use the secular adoption agencies which make up the vast majority of the sector.

The belief that homosexual adoption is wrong may not be shared by everyone in society, but it is the genuinely-held belief of many who have the best interests of children and adults at heart. In 2007 the High Court in Northern Ireland said that the belief that the “practice of homosexuality is sinful” is an “orthodox Christian belief”, “a long established part of the belief system of the world’s major religions” and “not a belief that is unworthy of recognition” in human rights law.⁶ In a society that embraces freedom of assembly and religious liberty, there surely should be opportunity for adoption agencies to exist which believe children should be placed with a married mother and father. It is worth noting that in the same case the judge recognised the ‘Brockie’ principle, which states that no person should be required to act against his or her core religious beliefs.⁷

Sexual orientation is still an area in which there is much moral debate. If the Northern Ireland Assembly has three times voted against same-sex marriage, it must be within the flexibility of the law to allow adoption agencies holding the same view to organise themselves accordingly.

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

The proposed legislation grants crucial space for freedom of religion and provides a better balance of rights. Goods and services law must allow space for religious conscience. We strongly object to the hierarchy of rights in which sexual orientation, in effect, trumps other rights. A conscience clause would correct a fundamental fault within equality law that fails to see religion in terms of conscience and duty, with implications for the whole of a person’s life. If religion is primarily viewed as a matter of autonomy and choice – as is apparently the approach in UK equality law –

⁵ *Catholic Herald*, 4 July 2013, see <http://www.catholicherald.co.uk/commentandblogs/2013/07/04/how-many-catholic-adoption-societies-have-actually-closed-down-and-how-many-are-now-quietly-handing-children-over-to-gay-adoptive-parents/> as at 13 February 2015

⁶ *The Christian Institute and Ors, Re Application for Judicial Review* [2007] NIQB 66, para. 50

⁷ *The Christian Institute and Ors, Re Application for Judicial Review* [2007] NIQB 66, para. 88

it will be more easily swept aside. But religious belief goes to the core of a person's identity and directs their actions in both the private and public sphere.

Equality legislation commonly draws exceptions and qualifications. For example, schedule 3 of the Equality Act 2010 exempts Parliament, broadcasters, insurance companies and others from its goods and services provisions.⁸ Section 195 exempts sport from aspects of sex equality. And section 193 means homosexual charities, for example, can restrict their services to homosexual people. Yet in goods and services, equality legislation gives a sword against religious views on sexual orientation but not a shield. It is apt for the legislature to consider specific exemptions, especially since the courts have not sought to properly address the question of balancing conflicting rights. A tightly defined conscience clause in goods and services would be well within the margin of appreciation in European human rights law, and would anticipate difficulties religious believers may have.

A common objection to human rights is that they are divisive (encouraging 'us' versus 'them' thinking). This criticism can also be applied to clashes between protected characteristics within equality law, perhaps especially in goods and services. Service providers operating with a religious conscience are vulnerable to legal action and uncertainty when accused of discrimination on grounds of sexual orientation. A conscience clause is necessary to protect this vulnerable group.

B&B owners Peter and Hazelmary Bull were successfully sued by a same-sex couple because of their longstanding policy of only allowing married couples to share a double bed in their guest house. In November 2013, the United Kingdom Supreme Court ruled that their policy amounted to unlawful discrimination on grounds of sexual orientation.⁹

Last summer, Ashers Baking Company in Northern Ireland was asked to produce a pro-gay marriage campaign cake with the slogan 'Support Gay Marriage'. The McArthur family, who own the bakery, said they could not fulfil the order because it conflicted with their belief that marriage is between one man and one woman. Yet the Equality Commission for Northern Ireland is taking the family-run business to court.¹⁰ Lawyers for Ashers Baking Company deny that it has breached any laws, but say a conscience clause would be helpful to prevent similar cases being brought in the future against people with firmly-held religious views.

In 2013, print designer Nick Williamson from Portadown was asked to print a homosexual magazine. Its website contained explicit material which he was unwilling to print. The magazine editor threatened Mr Williamson with legal action

⁸ Equality Act 2010, Schedule 3

⁹ *The Daily Telegraph*, 28 November 2013

¹⁰ *Daily Mail*, 7 November 2014

and reported his case to the Equality Commission in Belfast.¹¹ By failing to cater for religious conscience in the NI SORs, our law leaves Christians vulnerable to damaging legal action.

Cases like this have also arisen in the US. A couple in Iowa were forced to close their venue to all weddings in the face of legal action because they refused to rent it out to a gay couple.¹² Washington State's Attorney General filed a complaint with a court over a Christian florist who declined to provide flowers for a gay wedding.¹³ A court in New Mexico ruled against a Christian photographer who declined to shoot a same-sex 'commitment ceremony'.¹⁴ These sorts of unjust cases could be largely avoided by a tightly-defined conscience clause that allows some deviation from secular orthodoxy in the provision of goods and services.

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

The proposed legislation would improve equality of opportunity for Christians in Northern Ireland. It seems that the prevailing culture in public life – evident in goods and services legislation – is to protect and tolerate everything but a religiously-informed conscience in the public square. Those with strongly-held religious convictions are discouraged from participating in key areas of life. Steps need to be taken to ensure that such people do not have to choose between livelihood and conscience when a claim of discrimination on grounds of sexual orientation is made.

We believe that although a conscience clause is needed it must be tightly defined so as to be workable and not disproportionately affect the rights of others.

Whatever the type of business, it is obvious in an area the size of Northern Ireland that other service providers would be available and so the ability to access goods or services is not in question.

Protection for the manifestation of religious belief in goods and services is not a blank cheque to discriminate. We note that the proposed legislation is limited: it requires both evidence of a strongly-held religious belief, as well as evidence that

¹¹ *Guardian online*, 29 March 2013, see <http://www.theguardian.com/world/2013/mar/29/printer-refuses-publish-gay-magazine> as at 13 February 2015

¹² *World*, 14 January 2015, see http://www.worldmag.com/2015/01/forced_down_the_same_sex_wedding_aisle/page2 as at 13 February 2015

¹³ *Reuters.com*, 19 April 2013, see <http://www.reuters.com/article/2013/04/19/us-usa-gaymarriage-washington-idUSBRE93I08820130419> as at 13 February 2015

¹⁴ *NewYorkTimes.com*, 18 November 2013, see http://www.nytimes.com/2013/11/19/us/weighing-free-speech-in-refusal-to-photograph-ceremony.html?_r=0 as at 13 February 2015

providing the goods or service would amount to endorsing, promoting or facilitating behaviours or beliefs the service provider disagrees with. The law would not enable a service provider to refuse to serve someone merely because of the user's background or the provider's preference.

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

It is central to the social capital of a free society that freedom of religion is respected. This, rather than financial considerations, is what the legislation addresses.

That said, expensive taxpayer-funded legal actions such as that against Ashers bakery would be avoided in future. Also, by addressing the chilling effect caused by the NI SORs, a conscience clause would indirectly encourage commercial activity by service providers with religious convictions, while not affecting the freedom of service providers without religious convictions.

We believe that the introduction of a conscience clause would encourage more Christians to start up businesses and so generate more wealth for society as a whole.

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

We would suggest that it is limited to family-run businesses because attributing conscience to a company with many different shareholders is problematic. In the interests of effectiveness and clarity, the provision should be more focused.

13 February 2015