

A response to the Consultation on the Northern Ireland Freedom of Conscience Amendment Bill

This submission to the [consultation](#) prepared by Assembly Member Paul Givan in December 2014 is made by the National Secular Society (NSS). The NSS is a not-for-profit non-governmental organisation founded in 1866, funded by its members and by donations. We work towards a society in which all citizens, regardless of religious belief, or lack of religious belief, can live together fairly and cohesively. We campaign for a secular democracy with a separation of religion and state, where everyone's Human Rights are respected equally.

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?

No. It would not be appropriate to amend the Act and the proposed amendment would not serve the stated aim.

We wish to see a Northern Ireland that is tolerant of everyone's views and identities. But that tolerance should not enable or encourage intolerance and discrimination – even on religious grounds – in activities in the public square.

We actively support everyone's right to freedom of religion or belief and the right to manifest it, including, for example, the right to hold or preach in the public square the belief that homosexual acts are forbidden in the Bible, and even that homosexuals will go to Hell. However the proposed Bill goes far beyond this, to legitimising a wide range of discriminatory activity.

The Bill is fundamentally flawed in two distinct ways. Firstly, the cases it purports to address do not involve any individuals being demonstrably forced to violate their faith.

Secondly, despite claims to the contrary, the Bill is far too loosely constructed and would potentially give rise to a far wider range of discriminatory activity than it purports to.

Under Northern Ireland's current equalities framework (including but not limited to the Equality Act (Sexual Orientation) Regulations (Northern Ireland) 2006, the Human Rights Act 1998 and other international conventions to which Northern Ireland is bound as a member of the United Kingdom) the rights of individuals to hold their religious or non-religious beliefs are absolute. However the right to act on these religious beliefs is qualified and can be restricted where they unduly infringe on the rights of others.

For example the European Court of Human Rights ruled in the [Ladele and McFarlane](#) cases (2013) that the right to manifest religion by those in a public or commercial environment can be restricted when such manifestations lead to discrimination on grounds of sexual orientation, or where they impinge adversely on others. The Court considered that the harm suffered by those discriminated against justified proscription of such discrimination.

We draw both a legal and moral distinction between a business owner choosing not to serve an individual based on personal reasons and choosing not to serve an individual because of their membership of a specific (protected) class. Denying a service to an individual because the business owner doesn't like them may harm that individual. However, denying service to an individual based on their membership of a specific class harms that class of person, for example those collectively defined by their sexuality, gender or religion.

A religious shop keeper is fully entitled to disapprove of same-sex relationships and nothing in the current law prevents them from holding this view or expressing it and they are entitled not to invite those of which they disapprove into their home, unless part of a commercial transaction. However when an individual operates a commercial enterprise they are subject to the regulations and responsibilities associated with that enterprise including the equality duties. If one chooses to provide goods or services to the general public one cannot then choose to discriminate against protected classes of the general public.

If a private individual were to cook a meal for their friend and their (same or opposite sex) partner we might reasonably assume that the individual is supportive of the relationship. However if a chef at a restaurant cooks a meal for a (same or opposite sex) couple there is no reason to assume that they are supportive of the relationship. This is because when a business provides goods or services to a customer the relationship is commercial not personal and there is no assumption that the business "affirms" any aspect of the customer's identity or characteristics (protected or otherwise).

For example, an individual could buy flowers and an engagement card from a Christian gift shop to celebrate a friend's engagement. Selling these goods does not amount to the gift shop owner affirming the friend's relationship – which could be same or opposite sex without them knowing.

The consultation document asserts that the aim of the draft Bill would not be that:

- an Evangelical grocer would be able to refuse to sell apples to a gay man
- Muslim printer could refuse to print a brochure publicising coffee tables made by a lesbian cabinet maker
- a Catholic photographer could refuse to take a photograph of recipes created by a bisexual chef

Civil liberties groups and our own legal advice from an eminent published academic lawyer suggests, however, that the legislation is so widely drafted that it could be used to justify discrimination in any service, for example a sweet shop, or possibly even a private hospital.

The relevant part of our advice reads: "The courts have allowed individuals to determine for themselves what their faith requires. If the printer knows that the cabinet maker will use profits from the sale of the cabinets to pay for a romantic weekend away with her partner or to pay for their wedding, he may conclude that printing the brochures does involve facilitating sinful conduct. The courts generally do not second guess individuals' assessments of what their faith required (e.g. the court accepted that Ms. Eweida felt she was required to wear the cross even though most Christians do not see it as a requirement) therefore it is not certain that the exemption can be restricted as the [consultation claims]."

If a narrow definition of "affirming same-sex relationships" is used, then there is no evidence of anyone being required to so affirm in violation of their religious beliefs, and so the Bill is unjustified. If a wide definition of "affirming same-sex relationships" is used, almost anyone could claim that providing almost any service to anyone of the same-sex requires them to so affirm, also making the Bill unjustifiable and indeed unworkable.

To adopt a definition of "affirming" that is broad enough to include the type of activity this Bill seeks to legitimise would also legitimise a wide range of further discrimination. If providing the invitations for a same-sex wedding is affirming that relationship, is providing a hire car for the event, is a petrol attendant filling that car's tank? Could a religious taxi driver refuse to drop a customer off their same-sex partner's house? If a Christian printers can claim that printing an invitation to a same-sex wedding is requiring them to affirm something which is contrary to their religious beliefs, could they refuse to print invitations to the housewarming of same-sex couple? Could a business owner refuse an employee's holiday request if they intend to spend their time off to attend a same-sex wedding or in the company of a same-sex partner? Could same-sex partners be refused parental/adoption leave?

The consultation document gives the example of a Muslim printer refusing to print leaflets for a lesbian cabinet maker and says that this would not be covered as it would not involve "him" being involved in promoting or facilitating same sex relationships. That is not quite clear. The courts have allowed individuals to determine for themselves what

their faith requires. If the printer knows that the cabinet maker will use profits from the sale of the cabinets to pay for her wedding, he may conclude that printing the brochures does involve facilitating sinful conduct. The courts generally do not second guess individuals' assessments of what their faith required (e.g. the Court accepted that Ms. Eweida felt she was required to wear the cross even though most Christians do not see it as a requirement) therefore it is not certain that the exemption can be restricted as the consultation claims.

The same legal advice also included the following passage: "...deeply felt religious beliefs are not restricted to the issue of sexual orientation. Significant numbers of people reject marriages with individuals of a different religion. If an individual should believe that marriages between Muslims and non-Muslims or between Catholics and Protestants are wrong, would they be entitled to refuse any service which facilitates such relationships (e.g. refusing mixed faith couples hotel rooms). In the light of Northern Irish history, this is a very troubling scenario."

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?

No – subject of course to proportionate restrictions necessary for the general enforcement of law and order and the protection of the rights of others.

Under current law one could not choose to access an adoption agency that practised a religious belief in child sacrifice, one could not access a housing provider that practised a religious belief in racial segregation and if one had a religious objection to food safety laws they could reasonably expect some restrictions on their ability to operate a restaurant run along these principles.

Providing commercial or public service carries greater legal responsibilities than where the relationship is private/personal. For example an individual could cook meals for their friends, e.g. excluding people on grounds of race, religion or sexuality in a manner consistent with their religious beliefs with no interference from the state. But if they were to open a commercial enterprise such as a restaurant they would find themselves subject to a range of regulations covering subjects from health and safety to non-discrimination.

The state should not generally restrict individuals' choices to access or provide services in a manner consistent with their religious or belief convictions. Where the state is required to restrict such service provision it should be proportionate to achieving a legitimate aim, for example protecting public safety or preventing discrimination.

For example, the state could legitimately restrict a Christian business from discriminating against homosexual customers or staff. But they could not legitimately prevent the business from operating with a faith ethos – for example by stopping the business from advertising their ethos and beliefs. A Christian baker does not suddenly stop being a

Christian baker just because it serves all members of the public equally.

We are not convinced that the case said to have largely provoked this Bill, the refusal to make a cake with a slogan in support of gay marriage will be judged to be unlawful discrimination. Arguably, it is one of freedom of expression. If we are correct, the Bill would be unnecessary.

As secularists we would object to unfair or disproportionate restrictions on a religious individual's freedom to provide or access a service in the context of a faith/particular faith ethos. However the proposed bill does not identify or address any such restrictions.

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?

Before answering it is important to point out the manifest flaws in this leading question:

1. The question rests on the false claim that adoption agencies have been forced into "surrendering their faith identity". No adoption agency has been required to give up its religious identity. They have simply been prevented from discriminating.
2. The sub-question "Do you think that gay rights are more important than religious rights" is leading and ambiguous. It is also irrelevant as there is no demonstration that religious or homosexual rights have been treated with more or less importance.
3. The question rests on the further false claim that Catholic couples have been prevented from accessing Catholic adoption agencies as a consequence of this ruling. If Catholic adoption agencies volunteer to close rather than following the law and this results in less diversity of provision then that is their choice.

With these problems noted we now move on to addressing the final part of the question, whether the right balance has been struck? Broadly we believe that the right balance has been struck individuals are free to access a range of adoption services and these services can be provided for in the context of a wide variety of corporate or religious ethos. The ability to manifest those ethos are only restricted where it is necessary and proportionate to achieve a legitimate aim, e.g. preventing discrimination or promoting the best interests of the child.

Northern Ireland is a signatory (through the UK) to the UN Convention on the Rights of the Child. Article 3 of the Convention requires that the promotion of the best interests of the child should be the primary concern in making decisions that may affect them, including the provision and regulation of services. This underpins the legal norms of all

legislation affecting children's rights, childcare, fostering and adoption in the UK. Article 21 of the same convention requires that in arranging care for a child in the context of adoption or fostering "the first concern must be what is best for them."

A prospective parent's right to access the type of adoption service they want cannot be put before the rights and best interests of the child. Singling out religious-based voluntary adoption agencies for freedom to discriminate, which is unlawful in the UK, would permit discrimination against prospective adoptive parents of the "wrong" sexual orientation but potentially also those of other religions/denominations. Far worse, though, it would reduce the pool of prospective parents and therefore increase the likelihood of more children remaining in institutional care.

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

Negatively.

Current equality law is an important part of the human rights' framework in Northern Ireland, which this Bill would fundamentally undermine. The Bill would undermine the human rights of a specific class of citizens based on their protected characteristics. There are no human rights which would be strengthened as the Bill does not address any significant negative impacts on anyone's human rights.

In Northern Ireland, the hostility to LGBT people is already greater than in any other part of the UK. The Northern Ireland Suicide Prevention Strategy lists homosexuality and bisexuality as risk factors. The passing of this legislation would legitimise and increase such discrimination, potentially increasing that risk factor.

Were the Bill to become law, it could result in the widespread denial of services to homosexuals or same sex couples. It might even be invoked to justify discrimination against mixed race couples and invite "no gays" signs outside establishments.

The desire to accommodate the discriminators needs to be balanced against the demeaning effect on those discriminated against, humiliating them and reducing them to the status of second class citizens, or indeed confirming in the minds of many that second class status. Legislators should be seeking to protect the vulnerable, rather than facilitate greater oppression.

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

Negatively

While the proposed legislation would not enable any individuals previously prevented from having an equal opportunity to provide or access services, it would create two new categories of people that would have their equality of opportunity restricted.

1. Individuals whose equal opportunity to access services (including those which would impact their ability to provide subsequent services) could be restricted by anti-LGBT discrimination.

2. Individuals' equal opportunities could be restricted by any proliferation of organisations wishing to discriminate against LGBT customers as this could act to restrict employment opportunities for LGBT citizens (and others) who could not be comfortable working in such discriminatory environments.

There would be no increase in equality of opportunity for any groups as there is no demonstrable way that anyone's equality of opportunity is harmed by the current (un-amended) Act.

In the case of 1; under the Equality Act (Sexual Orientation) Regulations (Northern Ireland) 2006 (Section 5), everyone has the equal opportunity to access goods, facilities or services available to the public regardless of their sexual orientation. While under the proposed Bill LGBT citizens may not enjoy the equal opportunity to access services on offer to other citizens.

In the case of 2; under the Equality Act (Sexual Orientation) Regulations (Northern Ireland) 2006 (Section 16), religious or belief organisations can discriminate against LGBT citizens (for example by restricting membership, employment or service provision) where this would intrude on their religious freedom. To balance the rights of all citizens, including their equality of opportunity, this exemption is restricted to religious organisations as defined by Section 16(1)(a-d). Expanding this ability to discriminate to commercial services would decrease equality of opportunity for LGBT citizens seeking employment or to access services.

Individuals who cannot in good conscious work for an organisation which discriminates against LGBT customers could be restricted in the organisations for which they could apply. LGBT employees could find their equality of opportunity restricted by employers in a range of potentially unforeseen ways.

[Question 6: Do you have any comments on the likely cost / financial implications of the proposed legislation?](#)

The loose and short-sighted wording of the Bill will inevitable encourage individuals who wish to engage in a wider range of discrimination against LGBT citizens to push its boundaries. This will inevitably force the Equality Commission to engage in additional court cases at public expense.

The social cost of inequality and discrimination is hard to measure, as would the damage Northern Ireland's brand and reputation on the world stage would be likely to suffer should such regressive legislation be enacted. For example, in the last two years several American states have enacted 'freedom of religion' acts, which seek to expand the ability of religious business owners to discriminate against LGBT customers. States which have

enacted or considered these laws have been forced to consider the possibility of large LGBT friendly employers pulling out of or opting not to expand in their state.

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

Throughout this response we use the terms same-sex couples or homosexual to include those who are or who are perceived to be same-sex couples or homosexuals. An individual may be a victim of anti-homosexual discrimination whether or not they are homosexual. For example an opposite-sex couple where the woman is trans could be viewed as a same-sex couple or a heterosexual individual could be denied a service because a business owner thinks they are gay.

We believe the legislation is a wholly disproportionate response to a specific incident (the bakery's refusal to bake a cake with a pro-marriage equality message), which purports to address a problem which it is unable to demonstrate exists to any significant extent and which it would be dubiously effective at addressing.

We believe that if passed, this Bill will become a bigot's charter and will harm vulnerable individuals and would damage Northern Ireland's reputation and attractiveness to business investment. It would make Northern Ireland less protective of minorities and out of step with UK and European legal norms.

Given that the growing majority of Northern Ireland's citizens now support same-sex marriage equality, the Bill would be seen as an embarrassing step backwards and would not contribute to an open tolerant society in Northern Ireland which seeks to balance the rights of all citizens regardless of their religion or belief or sexual orientation.

For more information, please contact:

For more information please contact:

Keith Porteous Wood
Executive Director
National Secular Society
25 Red Lion Square
London WC1R 4RL
enquiries@secularism.org.uk