NORTHERN IRELAND HUMAN RIGHTS COMMISSION

Consultation on the Northern Ireland Freedom of Conscience Amendment Bill

Summary

The Northern Ireland Human Rights Commission (the NIHRC):

(para 10) advises that discrimination on the grounds of both religion and sexual orientation, are equally protected in Northern Ireland's domestic law by virtue of the European Convention on Human Rights (ECHR), Article 14.

(para 11) advises that the underlying premise of the proposed Bill, which is that freedom to manifest one's religion is undermined by the protection of individuals from discrimination on the ground of sexual orientation, is unfounded. This matter has been given substantial consideration by domestic courts on a number of occasions. In addition, the European Court of Human Rights (ECtHR) has ruled that in general the UK legislative framework strikes a balance operating the margin of appreciation allowed within the ECHR.

(para 13) advises that it is incorrect to suggest a dichotomy between the protections afforded by human rights standards on grounds of religion and sexual orientation.

(para 17) advises that in carrying out a function that is of public nature, a voluntary agency providing an adoption or fostering service is a public authority for that purpose as defined in accordance with the Human Rights Act 1998, Section 6. It is unlawful for a voluntary agency to act in a way which is incompatible with the ECHR when providing an adoption or fostering service. The proposed amendment would not remove this legal obligation.

(para 19) view is that the proposed exception for a voluntary adoption agency or fostering agency is incompatible with the ECHR,

Article 8 read together with Article 14. This being the case, the proposed Bill is outside the legislative competence of the Northern Ireland Assembly under the Northern Ireland Act 1998, Section 6(2) c.

(para 23) advises that the proposed clause is retrogressive and will undermine a fundamental principle of human rights. The restriction on access to goods, facilities and services by private companies would be permitted by a law that in practice will be applied against one community or one protected group.

(para 27) advises that manifestation of a religious belief that involves discrimination against a protected group does not have the protection of human rights law.

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Introduction

1. The Northern Ireland Human Rights Commission (NIHRC) pursuant to Section 69 (1) of the Northern Ireland Act 1998, reviews the adequacy and effectiveness of law and practice relating to the protection of Human Rights.[1] In accordance with this function the following statutory advice is submitted to Mr Paul Givan MLA in response to the consultation on the proposed Northern Ireland Freedom of Conscience Amendment Bill ('the proposed Bill').

2. The NIHRC bases its advice on the full range of internationally accepted human rights standards, including the European Convention on Human Rights as incorporated by the Human Rights Act 1998 and the treaty obligations of the Council of Europe (CoE) and United Nations (UN) systems. The relevant international treaties in this context include:

- the CoE European Convention on Human Rights (ECHR)[2];
- the International Covenant on Civil and Political Rights (ICCPR)[3];
- The Convention on the Elimination of Discrimination Against Women (CEDAW);[4]
- The United Nations Convention on the Rights of the Child (CRC);[5]
- Charter of Fundamental Rights of the European Union.[6]

3. The Northern Ireland Executive (NI Executive) is subject to the obligations contained within these international treaties by virtue of the United Kingdom (UK) Government's ratification. In addition, the Northern Ireland Act 1998, section 26 (1) provides that 'if the

[1] Northern Ireland Act 1998, Section 69(1)
[2] Ratified by the UK in 1951.
[3] Ratified by the UK in 1976.
[4] Ratified by the UK in 1986
[5] Ratified by the UK in 1991
[6] Ratified by the UK in 2000

Secretary of State considers that any action proposed to be taken by a Minister or Northern Ireland department would be incompatible with any international obligations... he may by order direct that the proposed action shall not be taken.'

4. The NIHRC further recalls that the Northern Ireland Act 1998, section 24(1) states that 'a Minister or Northern Ireland department has no power to make, confirm or approve any subordinate legislation, or to do any act, so far as the legislation or act – (a) is incompatible with any of the Convention rights'.

5. In addition to the treaties, there exists a body of 'soft law' developed by the human rights bodies of the UN and CoE. These declarations and principles are non-binding but provide further guidance in respect of specific areas. The relevant standards in this context include:

- The Universal Declaration of Human Rights;[7]
- Yogkakarta Principles on the Application of International Human Rights Law in relation to Sexual Orientation and Gender Identity;
- Recommendation of the Committee of Ministers to member states on measures to combat discrimination on grounds of sexual orientation or gender identity;[8]
- UN General Assembly Resolution 60/11 on the Promotion of religious and cultural understanding, harmony and cooperation.[9]

The underpinning principles of the Bill

6. In providing its advice, the NIHRC observes that the proposed Bill is premised in part upon a claim that legislation is necessary to ensure that "all laws which are designed for the majority do not have adverse unintended consequences for minorities."[10] It is further stated that "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".[11] In addition, it is pointed out that under the Equality Act (Sexual Orientation) Regulations (Northern Ireland) 2006 a services provider may have to choose "between acting in violation of their protected characteristic identity, surrendering their faith identity or ceasing service provision."[12]

[7] UDHR, 1948
[8] CM/Rec(2010)5
[9] A/RES/60/11
[10] Consultation on the Northern Ireland Freedom of Conscience Amendment Bill, p.2
[11] ibid, p.4
[12] ibid, p.6

7. In the consultation document the example of the Motor Cycle Crash Helmets (Religious Exemption) Act 1976 is cited as having provided "Sikhs with different treatment under the law so that the law no longer discriminates against them."[13] The NIHRC understands that the crash helmet exemption was not introduced in the UK to remedy an established discrimination on grounds of religious belief as suggested. On the contrary, in *X v. the United Kingdom* the applicant, a practising Sikh, had been ordered to pay fines for failing to comply with a regulation requiring motorcyclists to wear a protective helmet. He alleged a violation of the ECHR, Article 9, arguing that, as his religion required him to wear a turban, it was not possible for him to wear a helmet. However, the European Commission of Human Rights found that the obligation to wear a helmet was a necessary safety measure and that any resulting interference with the applicant's freedom of religion was justified for the protection of health by virtue of Article 9 (2). The Commission further stated:

> The facts that Sikhs were later granted an exemption to the traffic regulations does not in the Commission's opinion vitiate the valid health considerations on which the regulations are based. The Commission concludes therefore that the penalisation of the applicant for failing to comply with these regulations did not constitute a violation of Article 9.[14]

8. The ECHR, Article 9 and the similar provision contained in the ICCPR, Article 18 are not absolute, thus, the freedom to manifest one's religion or beliefs may be subject 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. Crucially, exempting Sikhs from the mandatory requirement to wear a helmet when travelling on a motorcycle does not impact on the provision of goods or services to the members of any other minority in the way that would result from the proposed Bill.

9. In 2013, the UK Supreme Court considered a case of hotel owners who on the basis of their Christian beliefs refused a double bedroom to a same sex couple. On the specific issue of freedom to manifest one's religion, Baroness Hale stated that in finding the hotel owners had discriminated against same sex couple there was no question of replacing "legal oppression of one community (homosexual couples) with legal oppression of another (those sharing the defendants' beliefs)"[15] This view reinforced the prior Court of Appeal judgment in which Lady Justice Rafferty stated:

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[13] ibid
[14] X v United Kingdom (1978) Application N° 7992/7 7
[15] Bull and another (Appellants) v Hall and another (Respondents) (2013), para 54

> It would be unfortunate to replace legal oppression of one community (homosexual couples) with legal oppression of another (those sharing the Appellants' beliefs)… Any interference with religious rights, specifically identified in article 9 and listed in article 14 of the ECHR, must satisfy the test of `anxious scrutiny'. However, in a pluralist society it is inevitable that from time to time, as here, views, beliefs and rights of some are not compatible with those of others… I do not consider that the Appellants face any difficulty in manifesting their religious beliefs, they are merely prohibited from so doing in the commercial context they have chosen.[16]

10. **The NIHRC advises that discrimination on the grounds of both religion and sexual orientation, are equally protected in Northern Ireland's domestic law by virtue of the ECHR, Article 14** which states:

> The enjoyment of the rights and freedoms set forth in this 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.

11. **The NIHRC advises that the underlying premise of the proposed Bill, which is that freedom to manifest one's religion is undermined by the protection of individuals from discrimination on the ground of sexual orientation, is unfounded. This matter has been given substantial consideration by domestic courts on a number of occasions. In addition, the European Court of Human Rights (ECtHR) has ruled that in general the UK legislative framework strikes a balance operating the margin of appreciation allowed within the ECHR.**[17]

The proposed exception for a voluntary adoption agency or fostering agency

12. The NIHRC notes the proposed amendment to the Equality Act (Sexual Orientation) Regulations (Northern Ireland) 2006. It is concerned that the suggested need for an exception for organisations

[16] Bull and Bull (Appellants) Hall & Preddy (Respondents) (2012), para.56
[17] See, for example, McFarlane v Relate (2010); Christian Institute and Ors Re Judicial Review [2007] NIQB 66; Eweida and Others v the UK 48428/10, 36516/10, 5167/10; Bull and another (Appellants) v Hall and another (Respondents) (2013); Ladele and McFarlane v the UK (2013)

relating to religion or belief is supported by the following consultation question:

> 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?[18]

13. The Universal Declaration of Human Rights, Article 2 states "Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind." **The NIHRC advises that it is incorrect to suggest a dichotomy between the protections afforded by human rights standards on grounds of religion and sexual orientation.**

14. The Adoption Order (NI) 1997 which prevented unmarried (including same sex) couples being considered as prospective adoptive parents in Northern Ireland, was successfully challenge by the NIHRC. Mr Justice Treacy in the High Court stated that:

> it is clear that the difference in treatment cannot be justified on any grounds and unmarried couples are suffering an ongoing breach of their [ECHR, Article 8] rights read together with [the ECHR, Article 14] by the continued denial to them of the legal opportunity to apply to adopt jointly which is available to those who enjoy the status of being married.[19]

15. A voluntary agency that provides an adoption or fostering service may be founded upon a particular religious ethos. However, in the provision of that service the agency is carrying out a function of a public nature regulated by the Department of Health Social Services and Public Safety.

16. The NIHRC notes that an exception to the Equality Act (Sexual Orientation) Regulations (Northern Ireland) 2006 already exists. Anyone acting on behalf of, or under the auspices of an organisations "the purpose of which is (a) to practice a religion or belief; (b) to advance a religion or belief; (c) to teach the practice or principles of a religion or belief; (d) to enable persons of a religion or belief to receive any benefit, or to engage in any activity, within the framework of that religion or belief" may "restrict the provision of goods, facilities and services in the course of activities undertaken by the organisation or

[18] Consultation on the Northern Ireland Freedom of Conscience Amendment Bill, p.8
[19] The Northern Ireland Human Rights Commission's Application [2012] NIQB 77 An Application by the NIHRC for Judicial review [Compatibility of the Adoption Order (NI) 1987 with the ECHR], para 75.

on its behalf" or under its auspices "restrict the use or disposal of premises owned or controlled by the organisation." This exception does not extend, however, to a voluntary agency that provides an adoption or fostering service and is therefore in carrying out a function of a public nature regulated by the Department of Health Social Services and Public Safety.

17. **The NIHRC advises that in carrying out a function that is of public nature, a voluntary agency providing an adoption or fostering service is a public authority for that purpose as defined in accordance with the Human Rights Act 1998, Section 6. It is unlawful for a voluntary agency to act in a way which is incompatible with the ECHR when providing an adoption or fostering service. The proposed amendment would not remove this legal obligation.**[20]

18. In accordance with the Northern Ireland Act 1998, it is outside the legislative competence of the Northern Ireland Assembly to enact laws that are incompatible with any of the ECHR rights.[21] The Presiding Officer (Speaker) should not introduce a Bill to the Assembly if he or she decides that any provision would not be within the legislative competence of the Assembly.[22]

19. **The NIHRC view is that the proposed exception for a voluntary adoption agency or fostering agency is incompatible with the ECHR, Article 8 read together with Article 14. This being the case, the proposed Bill is outside the legislative competence of the Northern Ireland Assembly under the Northern Ireland Act 1998, Section 6(2) c.**

Businesses: exception based on religious belief

20. The NIHRC notes the proposed insertion to the Equality Act (Sexual Orientation) Regulations (Northern Ireland) 2006 regarding the provision of goods, facilities and service; or to restrict the use or disposal of premises.[23] This will engage a number of human rights including, inter alia, the right to respect for private and family life[24]; the right to freedom of expression[25]; and, the right to an adequate standard of living (which includes the right to adequate housing).[26]

[20] Human Rights Act 1998, Section 6 (1).
[21] Northern Ireland Act 1998, Section 6 (2) c.
[22] ibid, Section 10 (1); See also, Standing Orders as amended 16 October 2012, 30, available at: www.niassembly.gov.uk/Assembly-Business/Standing-Orders/Standing-Orders/#30.
[23] Consultation on the Northern Ireland Freedom of Conscience Amendment Bill, p.8
[24] ECHR; Article 8 and ICCPR, Article 17.
[25] ECHR; Article 10 and ICCPR, Article 19.
[26] ICESCR, Article 11.

21. One example of what the proposed clause could mean in practice concerns access to rental accommodation whereby a same sex couple could be refused a tenancy by a private landlord on a basis so as to "avoid endorsing, promoting or facilitating behaviour or beliefs which conflict with the strongly held religious convictions."[27]

22. The UN Committee on Economic, Social and Cultural Rights, has highlighted the importance of protecting individuals from discrimination in the private sphere recalling that:

> Discrimination is frequently encountered in families, workplaces, and other sectors of society. For example, actors in the private housing sector (e.g. private landlords, credit providers and public housing providers) may directly or indirectly deny access to housing or mortgages on the basis of… sexual orientation. States parties must therefore adopt measures, which should include legislation, to ensure that individuals and entities in the private sphere do not discriminate on prohibited grounds.[28]

23. **The NIHRC advises that the proposed clause is retrogressive and will undermine a fundamental principle of human rights. The restriction on access to goods, facilities and services by private companies would be permitted by a law that in practice will be applied against one community or one protected group.**

24. The NIHRC recalls that the argument for an exception has been considered by both the domestic courts and ECtHR on a number of occasions. For example, in *Bull v Hall and Preddy* Baroness Hale commented that she was "more than ready to accept that the scope for reasonable accommodation is part of the proportionality assessment, at least in some cases."[29] This point was reinforced in *Eweida and others v the UK*.[30]

25. The right to hold beliefs is absolute, but the right to manifest one's religion or beliefs is qualified. The courts have emphasised the role of the state and public authorities as the neutral and impartial organiser of the exercise of various religions, faiths and beliefs, and have stated that this role is conducive to public order, religious harmony and

[27] Consultation on the Northern Ireland Freedom of Conscience Amendment Bill, p.11
[28] UN Committee on Economic, Social and Cultural Rights, General comment No. 20 , para 11. Similar recommendations have been made by the CoE Committee of Ministers. See, for example, Recommendation CM/Rec(2010)5 of the Committee of Ministers to member states on measures to combat discrimination on grounds of sexual orientation or gender identity, para 37.
[29] Bull and Bull (Appellants) Hall & Preddy (Respondents) (2012), para 47
[30] Eweida and Others v the UK 48428/10, 36516/10, 5167/10

tolerance in a democratic society. The ECtHR recently emphasised a duty to

> ensure mutual tolerance between opposing groups… Accordingly, the role of the authorities in such circumstances is not to remove the cause of tension by eliminating pluralism, but to ensure that the competing groups tolerate each other.[31]

26. In *McFarlane and Relate Avon Limited*[32] Lord Justice Laws concluded as follows:

> The common law and ECHR Article 9 offer vigorous protection of the Christian's right and every other person's right to hold and express his or her beliefs, and so they should. By contrast, they do not, and should not, offer any protection whatever of the substance or content of those beliefs on the ground only that they are based on religious precepts… 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; it imposes compulsory law not to advance the general good on objective grounds, but to give effect to the force of subjective opinion. This must be so, since, in the eye of everyone save the believer, religious faith is necessarily subjective, being incommunicable by any kind of proof or evidence. It may, of course, be true, but the ascertainment of such a truth lies beyond the means by which laws are made in a reasonable society.

27. **The NIHRC advises that manifestation of a religious belief that involves discrimination against a protected group does not have the protection of human rights law.**

[31] S.A.S. v. France (2014)(Application no. 43835/11) July 2014. See also, see Manoussakis and Others v. Greece, 1996, § 47, Reports 1996-IV; Hasan and Chaush v. Bulgaria [GC], no. 30985/96, § 78, ECHR 2000 XI; Refah Partisi (the Welfare Party) and Others v. Turkey [GC], nos. 41340/98, 41342/98, 41343/98 and 41344/98, § 91, ECHR 2003-II; Serif v. Greece, no. 38178/97, § 53, ECHR 1999 IX.

[32] McFarlane and Relate Avon Limited (2010) EWCA Civ 880 , para 21.