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House of Commons
Joint Committee on Human
Rights

Legislative Scrutiny: Sexual Orientation Regulations

Sixth Report of Session 2006–07

Report, together with formal minutes

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Joint Committee on Human Rights

The Joint Committee on Human Rights is appointed by the House of Lords and the House of Commons to consider matters relating to human rights in the United Kingdom (but excluding consideration of individual cases); proposals for remedial orders, draft remedial orders and remedial orders.

The Joint Committee has a maximum of six Members appointed by each House, of whom the quorum for any formal proceedings is two from each House.

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Current Staff

The current staff of the Committee are: Nick Walker (Commons Clerk), Bill Sinton (Lords Clerk), Murray Hunt (Legal Adviser), Judy Wilson (Inquiry Manager), Angela Patrick and Joanne Sawyer (Committee Specialists), Jackie Recardo (Committee Assistant), Suzanne Moezzi (Committee Secretary) and James Clarke (Senior Office Clerk).

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Summary

In its recent Report on its future working practices the Committee indicated it would undertake more work in future on pre-legislative scrutiny and post-legislative scrutiny, the latter including the implementation of primary legislation through regulations. This is the Committee's first post-legislative scrutiny Report this Session (paragraph 1).

The Government intends to use its power in Part 3 of the Equality Act 2006 to make Regulations prohibiting discrimination on the grounds of sexual orientation in the provision of goods, facilities and services, in education and in the exercise of public functions. Its Consultation Paper received over 3,000 responses but the Government has still not published its analysis and summary. In the meantime the Northern Ireland Regulations have raised difficult questions about the human rights implications of prohibiting sexual orientation discrimination, particularly in the context of faith-based organisations delivering social and other public services. The purpose of this Report is for the Committee to draw the attention of Parliament to its views on the human rights issues likely to be raised by the sexual orientation Regulations for Great Britain (paragraphs 2-5).

In its Consultation Paper, the Government notes that there is clear evidence that lesbian, gay and bisexual people still face unacceptable discrimination and that its broad intention is to provide protection from sexual orientation discrimination in line with the approach taken in other anti-discrimination legislation. The new Regulations would come into effect at the same time as provisions prohibiting discrimination on grounds of religion or belief. In the Committee's view the Consultation Paper and the Northern Ireland Sexual Orientation Regulations raise a number of significant human rights issues (paragraphs 6-20).

The Committee welcomes the premise of the Consultation Paper and the Northern Ireland Regulations that there is now a firmly established principle that it is not acceptable for someone to be discriminated against because of their sexual orientation. The Committee therefore welcomes the Government's proposal to introduce regulations prohibiting discrimination on grounds of sexual orientation as a significant human rights-enhancing measure (paragraphs 21-30).

The Consultation Paper recognised that the new Regulations might have an impact on religious activity or practice. But any exceptions for religious organisations would have to be clearly defined and the Consultation Paper saw no case for exempting social or welfare services provided by religious organisations. Under Article 9 (1) of the ECHR the right to freedom of thought, conscience and religion is absolute and cannot be restricted, while the right to manifest one's religion or belief in practice is qualified and capable of limitation under Article 9 (2) including for the protection of the rights of others. The Northern Ireland Regulations contain an exemption for "organisations relating to religion or belief". In the Committee's view some exemption is necessary to protect the right to freedom of conscience, religion and belief. The Committee considers the scope of the exemption in Regulation 16 of the Northern Ireland Regulations to be compatible with human rights but recommends that no wider exemption should be contained in the Regulations for Great Britain when they are introduced (paragraphs 31-46).

The Committee welcomes the Prime Minister's statement indicating that the exemption sought by religious organisations when performing public functions will not be granted and

looks forward to the Regulations for Great Britain containing the same provision as in the Northern Ireland Regulations that no exemption applies where a religious organisation is performing a public function on behalf of a public authority (paragraphs 47-53).

The Committee welcomes the inclusion of harassment as a separate instance of unlawful discrimination within the Northern Ireland Regulations and recommends that it should also be included in the forthcoming Regulations for Great Britain. The Committee is nevertheless concerned that the harassment provision in the Northern Ireland Regulations is drawn too widely and defined too vaguely and recommends that the new Regulations for Great Britain should contain a more precise and narrower definition of harassment (paragraphs 54-59).

The Committee welcomes the Government's acceptance that the prohibition of discrimination on the grounds of sexual orientation should apply to all schools in the maintained and independent sectors, without any exemption for particular types of school such as faith schools. The Committee does not consider that the right to freedom of conscience and religion requires the school curriculum to be exempted from the sexual orientation Regulations. The Committee recommends that the Regulations for Great Britain should make clear that the prohibition on discrimination would apply to the curriculum and thereby avoid the considerable uncertainty to which the Northern Ireland Regulations have given rise on this question. The Committee further recommends that the Government clarifies its understanding of the Northern Ireland Regulations on this matter (paragraphs 60-67).

1 Introduction

Background

1. In our recent Report on our future working practices, we indicated that we intended to undertake more work in future on pre-legislative scrutiny, such as examining the human rights implications of consultation papers, and on post-legislative scrutiny, including the implementation of primary legislation through regulations.¹

2. Part 3 of the Equality Act 2006 gives the Secretary of State the power to make provision by regulations about discrimination or harassment on grounds of sexual orientation.² The power to make such provision was introduced into the Equality Bill during its passage through Parliament to match the provision made in Part 2 making it unlawful to discriminate on the grounds of religion or belief in the provision of goods, facilities and services. The Government intends to use this power in Part 3 of the Equality Act to make regulations prohibiting discrimination on the grounds of sexual orientation in the provision of goods, facilities and services, in education and in the exercise of public functions. It consulted between March and June 2006 on the basis of its *Getting Equal Consultation Paper*,³ with a view to making regulations that would take effect in October 2006. The Consultation Paper explained that the regulations are intended to bring protection from sexual orientation discrimination into line with existing legislation that prohibits discrimination on the grounds of race, sex, and for reasons related to a disability. The consultation sought views about the range of activities that should be covered by the regulations and on whether any exceptions should be provided from them to ensure that the protection provided is effective and appropriately targeted.

3. The Government received over 3,000 responses to its Consultation Paper and subsequently announced that in light of the number of responses it was putting back the timetable for introducing regulations. In December 2006 the Secretary of State for Communities and Local Government indicated that the Government would shortly be publishing its response to the consultation on its proposals to prohibit sexual orientation discrimination in the provision of goods and services in Great Britain with a view to laying and implementing draft regulations in April 2007.⁴ At the time of drafting this Report, the Government had still not published its analysis and summary of the responses to its consultation.

4. In the meantime the introduction of the Equality Act (Sexual Orientation) Regulations (Northern Ireland) 2006 (henceforth the “Northern Ireland Regulations”), and parliamentary debate on them, has helped to identify the significant human rights issues which are raised by the drafting of such regulations concerning discrimination and

¹ Twenty-third Report of Session 2005-06, *The Committee's Future Working Practices*, HL Paper 239, HC 1575, at paras 55-57 and 77.

² Section 81 Equality Act 2006.

³ *Getting Equal: Proposals to Outlaw Sexual Orientation Discrimination in the Provision of Goods and Services*, Consultation Paper issued by the Women and Equality Unit in the Department of Trade and Industry, 13 March 2006 (hereafter “CP”).

⁴ Uncorrected transcript of evidence of Rt Hon Ruth Kelly MP, Secretary of State for Communities and Local Government, to the Communities and Local Government Committee, 4 December 2006, Q187.

harassment on grounds of sexual orientation. The debates have revealed some interesting questions about the human rights implications of prohibiting sexual orientation discrimination and harassment, particularly in the context of faith-based organisations delivering social and other public services.

5. At the time of the Equality Act's passage through Parliament, we welcomed the inclusion of the provision in Part 3 as an important step in advancing protection against discrimination on grounds of sexuality.⁵ In view of the importance of the subject matter of the regulations, we subsequently decided to scrutinise the Consultation Paper preceding the regulations as an exercise in both pre- and post-legislative scrutiny. The purpose of this Report is to provide Parliament with our views on the human rights issues which are likely to be raised by the sexual orientation regulations in order to inform parliamentary debate on the draft regulations when they are laid. The regulations must be approved by each House.

The Consultation Paper

6. The Consultation Paper states that the Government's broad intention is to extend Great Britain's current anti-discrimination laws to cover people facing unfair treatment because of their sexual orientation. It describes the sorts of discriminatory behaviour that the Government is proposing to make unlawful and gives examples of the sort of situations where some organisations or individuals might currently operate or act in ways that would be unlawful once the regulations take effect.

7. In its Consultation Paper, the Government notes that there is clear evidence that lesbian, gay and bisexual people still face unacceptable discrimination in their everyday lives, including direct discrimination such as refusal of services or access to basic healthcare on grounds of their sexuality, and in addition are often subjected to hostility and abuse.

8. The Government states that broadly speaking its aim is to provide protection from sexual orientation discrimination which generally accords with the approach taken in the Sex Discrimination Act, the Race Relations Act and the religion and belief provisions in Part 2 of the Equality Act 2006 in respect of goods, facilities and services, public functions, education and premises. It also identifies areas where it says it will be necessary to consider whether or not there are good reasons to consider excluding certain activities from the scope of the regulations.

9. The Government intends to bring the new regulations into effect at the same time, in April 2007, as the provisions in Part 2 of the Equality Act prohibiting discrimination on grounds of religion or belief.

The Northern Ireland Regulations

10. Part 3 of the Equality Act 2006 also gives the Office of the First Minister and deputy First Minister in Northern Ireland the power to make provision about discrimination or harassment on grounds of sexual orientation.⁶

⁵ Fourth Report of 2005-06, *Legislative Scrutiny: Equality Bill*, HL Paper 89, HC 766, at paras 28 and 53.

⁶ Section 82 Equality Act 2006.

11. The Office of the First Minister and deputy First Minister issued a Consultation Paper in July 2006.⁷ The consultation closed on 25 September 2006. The Government published its analysis of the consultation responses in late November 2006, after making the Regulations. 373 responses were received. A significant majority of the responses addressed only the consultation questions concerning exemptions for religion and religious organisations. The Government believe that the concerns of many of those who responded have been met by the inclusion of a religious exemption in the Regulations.

12. The Equality Act (Sexual Orientation) Regulations (Northern Ireland) 2006 were made on 8 November 2006, laid before Parliament on 24 November and came into operation on 1 January 2007. Although subject to the affirmative resolution procedure of the Northern Ireland Assembly, during the Assembly's suspension they are laid before Parliament and subject to negative resolution.⁸ The Northern Ireland Transitional Assembly debated the regulations on 11 December 2006 and divided 39-39 on a motion to withdraw them.⁹ The motion was therefore not carried.

13. The House of Lords Merits of Statutory Instruments Committee drew special attention to the Regulations on the ground that they give rise to issues of public policy likely to be of interest to the House.¹⁰ A motion to annul was defeated in the Lords on 9 January 2007,¹¹ and the Regulations were debated and voted on in a Commons Delegated Legislation Committee on 17 January 2007¹² following a prayer being tabled against them. The Joint Committee on Statutory Instruments considered the Regulations at its meeting on 24 January 2007 and decided to report the statutory instrument to both Houses for defective drafting but not on the ground that there was doubt about its vires.¹³

14. The purpose of the Regulations is to prohibit discrimination on the grounds of sexual orientation in the provision of goods, facilities, services, education, functions of public authorities and the disposal of property. The Regulations protect people from four types of discrimination on grounds of sexual orientation:

- direct discrimination, i.e. where a person treats another person less favourably because of his sexual orientation;¹⁴
- indirect discrimination, e.g. where a person applies to another person a requirement or condition which he would apply equally to everyone, but it disproportionately affects people of the same sexual orientation and cannot be shown to be justifiable;¹⁵
- harassment, i.e. where, on the ground of sexual orientation, a person engages in unwanted conduct towards another person which has the purpose or effect of violating

⁷ *Getting Equal: Proposals to outlaw discrimination on the ground of sexual orientation in the provision of goods and services in Northern Ireland.*

⁸ Under para. 7(3) of the Schedule to the Northern Ireland Act 2000.

⁹ <http://www.niassembly.gov.uk/transitional/plenary/061211.htm>.

¹⁰ Third Report of 2006-07, HL 11.

¹¹ HL Deb 9 January 2007 cols 179-213.

¹² Stg Co Deb, Second Delegated Legislation Committee, 17 January 2007.

¹³ Joint Committee on Statutory Instruments, Sixth Report of 2006-07, HL Paper 37, HC 82-vi.

¹⁴ Reg 3(1)(a).

¹⁵ Reg 3(1)(b) and (c).

that other person's dignity, or creating an intimidating, hostile, degrading, humiliating or offensive environment for them;¹⁶ and

- victimisation, where a person treats another person less favourably because they have, e.g., brought proceedings under these Regulations.¹⁷

15. The Regulations go on to provide that it is unlawful to discriminate on grounds of sexual orientation, or to subject a person to harassment on those grounds, in the provision of goods, facilities or services;¹⁸ in the disposal or management of premises;¹⁹ in the provision of education;²⁰ and in the course of a public authority carrying out any of its functions of providing any form of social security, healthcare, any other form of social protection, or any form of social advantage.²¹

16. The Regulations contain certain exemptions from some of the prohibitions, eg.

- a small dwellings exemption from the prohibition on discrimination in the provision of goods and services;²²
- an exemption from the same prohibition for anything done by a person as a participant in arrangements under which he (for reward or not) takes into his home, and treats as if they were members of his family, children, elderly persons, or persons requiring a special degree of care and attention;²³
- an exemption for organisations relating to religion or belief.²⁴

17. The exemption for religious organisations is the Government's response to the large number of responses to its consultation which raised this issue. It permits such organisations to:

- restrict membership of the organisation
- restrict participation in activities undertaken by the organisation
- restrict the provision of goods, facilities and services in the course of activities undertaken by the organisation; or
- restrict the use or disposal of premises owned and controlled by the organisation,

but only if one of two conditions is satisfied: either it is necessary to comply with the doctrine of the organisation, or so as to avoid conflicting with the strongly held religious

¹⁶ Reg 3(3).

¹⁷ Reg 4(1).

¹⁸ Reg. 5. Reg 5(3) gives examples of the sorts of facilities and services mentioned in Reg 5(1), including accommodation in a hotel or B & B, facilities by way of insurance, and facilities for education.

¹⁹ Reg 6.

²⁰ Regs 9-11.

²¹ Reg 12.

²² Reg 7.

²³ Reg 8(2).

²⁴ Reg 16.

convictions of a significant number of the religion's followers.²⁵ The exemption does not apply to an organisation whose sole or main purpose is commercial, to bodies concerned with education, or to organisations providing goods, facilities or services, or performing certain functions, on behalf of a public authority under the terms of a contract for provision of that kind.

18. Because the Northern Ireland Regulations are subject to negative procedure and do not amend primary legislation, there is no accompanying statement of ECHR compatibility containing the Government's reasons for concluding that the Regulations are compatible with Convention rights. There is, however, a Departmental Memorandum from the Office of the First Minister and Deputy First Minister to the Joint Committee on Statutory Instruments²⁶ which sets out the reasons why the Department considers that the Regulations are compatible with the Convention rights and do not discriminate against a person or class of person on the ground of religious belief or political opinion.²⁷

The human rights issues

19. In our view the Consultation Paper *Getting Equal* and the Northern Ireland Sexual Orientation Regulations raise a number of significant human rights issues.

20. We report our views on those issues here in the hope that this might help to inform parliamentary debate on the GB regulations when they are introduced.

²⁵ Reg 16(5).

²⁶ Appendix to Joint Committee on Statutory Instruments Sixth Report of 2006-07, *op. cit.*

²⁷ As required by s. 24 of the Northern Ireland Act 1998.

2 The right of non-discrimination on grounds of sexual orientation

Introduction

21. The Consultation Paper states that there is now a firmly established principle that “in a modern and diverse society, it is not acceptable for someone to be discriminated against because of their sexual orientation.”²⁸ It notes that this principle has become established largely because of legislative steps such as equalising the age of consent for gay men, repealing s. 28 of the Local Government Act 1988, prohibiting sexual orientation discrimination in the workplace and introducing civil partnerships.

The relevant human rights standards

22. The Consultation Paper does not mention that the principle that it is wrong to discriminate on grounds of sexual orientation has also in recent years become established as an important human rights standard, particularly under the European Convention on Human Rights. As our predecessor Committee pointed out in its report on the Civil Partnership Bill,²⁹ it is now established in Convention case-law that a difference of treatment based on sexual orientation is covered by Article 14 ECHR (which guarantees enjoyment of the other rights without discrimination on certain grounds), and that where sexual orientation is the ground for different treatment, there is a need for particularly weighty and convincing reasons to justify such a difference of treatment. The European Court of Human Rights has held, for example, that the refusal to allow a same-sex partner to succeed to the lease of his deceased partner was in breach of Article 14 in conjunction with the right to respect for home in Article 8 ECHR.³⁰ As our predecessor Committee observed, although this case concerned a particular social protection for security of the home, the reasoning behind it is of wider application.

23. This recognition by the European Court of Human Rights that different treatment on grounds of sexual orientation is not only covered by Article 14 ECHR but requires particularly cogent reasons in order to be justified, has also been given effect under the Human Rights Act 1998 by the House of Lords in *Mendoza*.³¹ In that case the Law Lords held that the Rent Act’s protection for spouses or unmarried cohabitantes of deceased tenants now had to be interpreted so as to include same-sex partners within the scope of the protection. Protecting the security of tenure of heterosexual unmarried couples but not same-sex couples was a difference of treatment based solely on sexual orientation and could not be justified as being necessary to protect the traditional family. The House of Lords therefore found a breach of Article 14 ECHR in conjunction with the right to respect for home in Article 8, and remedied the breach by interpreting the statutory words so as to extend the scope of the protection to same-sex couples.

²⁸ CP para. 2.2.

²⁹ Fifteenth Report of Session 2003-04, *Civil Partnership Bill*, HL 136, HC 885, at para. 10.

³⁰ *Karner v Austria* (2003) 38 EHRR 24.

³¹ *Ghaidan v Godin-Mendoza* [2004] UKHL 30; [2004] 2 AC 557.

24. Baroness Hale grounded the human rights guarantee of equal treatment in the foundational democratic principle that each individual has equal value:

“Democracy is founded on the principle that each individual has equal value. Treating some as automatically having less value than others not only causes pain and distress to that person but also violates his or her dignity as a human being. The essence of the Convention, as has often been said, is respect for human dignity and human freedom ... Power must not be exercised arbitrarily. If distinctions are to be drawn, particularly upon a group basis, it is an important discipline to look for a rational basis for those distinctions.”³²

25. We note that in a recent case, *Secretary of State for Work and Pensions v M*, the House of Lords held by a majority of 4-1 (Baroness Hale dissenting) that treating unmarried same-sex couples differently from unmarried different-sex couples in relation to their liability for child support was not a breach of Article 14 ECHR because it did not fall within the ambit of any other Convention right, and even if it did the difference in treatment was justified by the need to allow the Government time to change the law in this area.³³ We find the reasoning in this case difficult to reconcile with that of the European Court of Human Rights in *Karner v Austria* and of the House of Lords itself in *Mendoza*, and we doubt whether, as a matter of Convention law, the European Court of Human Rights will reach the same conclusion.

Implementing human rights obligations

26. In light of these significant developments in relation to sexual orientation discrimination under the European Convention on Human Rights, it is now clear that discrimination on grounds of sexual orientation in relation to any matter which is within the ambit of any of the Convention rights would be very likely to be in breach of Article 14 ECHR, in the absence of any compelling justification. In its Departmental Memorandum to the JCSI, the Office of the First Minister and Deputy First Minister expressly acknowledges that the right to be protected from discrimination on grounds of sexual orientation attracts the protection of Article 8 and 14 of the Convention.

27. Sexual orientation discrimination also potentially engages a range of other rights. Discrimination against gay people in relation to access to publicly provided services such as housing, health or education, for example, would be very likely to lead to breaches of Article 14 ECHR in conjunction with the right to respect for home in Article 8 ECHR, the right to physical integrity in the same Article and the right to education in Article 2 Protocol 1. It is also possible that there may be a breach of the right to an effective remedy in Article 13 ECHR because of the lack of any means of obtaining redress for the discrimination against them in the enjoyment of their Convention rights. Rights to non-discrimination are also protected by other international human rights treaties, such as Article 26 of the International Covenant on Civil and Political Rights, Article 2 of the Convention on the Rights of the Child, and Article 2.2 of the International Covenant on Economic Social and Cultural Rights.

³² *Ibid.*, at para. 32.

³³ [2006] UKHL 11, [2006] 2 AC 91.

28. By introducing regulations prohibiting sexual orientation discrimination, the Government will therefore be giving effect to our international human rights obligations, making it less likely that breaches of Article 14 ECHR and other non-discrimination provisions will be found in future in the circumstances of particular cases, and less likely that the state of UK law will be found to be in breach of Article 13 ECHR for failing to provide an effective remedy for arguable violations of Convention rights.

29. We welcome the premise of both the Government's Consultation Paper and the Northern Ireland Regulations that there is now a firmly established principle that it is not acceptable for someone to be discriminated against because of their sexual orientation. We agree that people suffering unfair treatment on grounds of their sexual orientation is unacceptable in a society which purports to be founded on equal opportunities for all, respect for the equal dignity and worth of each person and mutual respect between communities.

30. We regard the right not to be discriminated against on grounds of sexual orientation as a fundamental human right, and we note the recognition in international human rights law that sexual orientation has now joined race and sex as being a ground for different treatment which requires particularly weighty justification. We also consider that the Government has an obligation to protect individuals from such treatment, whether from a public or a private source, and to provide them with the means to challenge it. We therefore welcome the Government's proposal to introduce regulations prohibiting discrimination on grounds of sexual orientation as a significant human rights enhancing measure, giving more effective protection in our national law for rights of non-discrimination which already exist under the Human Rights Act and are already binding on the UK internationally.

3 Freedom of thought, conscience and religion

Introduction

31. The Consultation Paper recognised that there may be circumstances where the new regulations could have an impact on aspects of religious activity or practice in light of the doctrines of some faiths concerning sexual orientation and the beliefs of their followers.³⁴ It therefore sought views on the areas where the proposed regulations might impede religious observance or practices that arise from the basic doctrines of a faith. The Government's starting point was that any exceptions from the regulations for religious organisations would need to be clearly defined and should be limited to activities closely linked to religious observance or practices that arise from the basic doctrines of a faith.

32. The Government also recognised in its Consultation Paper that religious organisations have a role in providing various social or welfare services to the community. However, it said that it did not see a case for exempting such services provided by religious organisations from the general prohibition on sexual orientation discrimination. It was not proposing to exempt activities provided by an organisation related to religion or belief, or by a private individual with strongly held religious beliefs, where the sole or main purpose of the organisation offering the service is commercial. It also proposed to apply the prohibition to organisations contracted by a public authority to deliver a service on its behalf, including churches, charities or similar groups with a religious ethos.

The relevant human rights standards

33. The first limb of Article 9(1) of the ECHR guarantees the right to freedom of thought, conscience and religion. This is an absolute right which cannot be subject to any limitation or restriction.

34. The right to manifest one's religion or belief in practice is protected by the second limb of Article 9(1). This is a qualified right capable of limitation under Article 9(2), including for the protection of the rights of others.

35. The human rights issue which arises is whether Article 9 ECHR requires there to be any exemptions from the prohibitions on discrimination on grounds of sexual orientation, in order to protect freedom of conscience and belief, and, if so, what the scope of those exemptions should be.

The Northern Ireland Regulations

36. The Northern Ireland Regulations do contain an exemption for "organisations relating to religion or belief".³⁵

³⁴ CP paras 3.32-3.36.

³⁵ Regulation 16.

37. The exemption applies to an organisation the purpose of which is to practice a religion or belief, to advance a religion or belief, to teach the practice or principles of a religion or belief, or 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.

38. The exemption provides that nothing in the Regulations makes it unlawful for such an organisation to restrict, on grounds of sexual orientation: membership of the organisation; participation in activities undertaken by the organisation; the provision of goods, facilities and services in the course of such activities; or the use or disposal of premises owned or controlled by the organisation. Such restrictions are permitted only if imposed because it is necessary to comply with the doctrine of the organisation, or so as to avoid conflicting with the strongly held religious convictions of a significant number of the religion's followers.

39. The exemption does not apply to:

- an organisation whose sole or main purpose is commercial,
- bodies concerned with education, or
- organisations providing goods, facilities or services, or performing certain functions, on behalf of a public authority under the terms of a contract for provision of that kind.

The scope of the exemption to respect freedom of conscience and religion

40. In the Government's view, the concerns expressed about exemptions for religion in response to its consultation on the Northern Ireland Regulations have been addressed by the wording of this exemption which, it says, clearly protects the right to hold a religious belief and key doctrinal practices.³⁶

41. In the debates on the Northern Ireland Regulations, opponents of the Regulations argued that the exemption for religious organisations is too narrow and that the Regulations interfere with religious freedom, because they require people to approve of or facilitate practices which their faith teaches them, or their conscience tells them, are contrary to the central tenets of their religion, or morally wrong.³⁷ According to this view, the Regulations threaten to override the consciences of Christians and others who object to homosexual practice. A frequently cited example was that of a Christian proprietor of a bed and breakfast establishment, who would be forced, by the Regulations to rent out a double room to a homosexual couple, an act of facilitation of homosexual practice which would be "against his conscience".

42. Others in the debate argued that the Regulations do not require anyone to approve of anything, they merely require the holders of religious beliefs about homosexuality to

³⁶ Departmental Memorandum to JCSI, *op. cit.*

³⁷ See e.g. Lord Morrow, moving the prayer that the Regulations be annulled in the House of Lords, HL Deb 9 January 2007, col. 183; David Simpson MP, moving the motion that the Committee has considered the Regulations in the House of Commons Delegated Legislation Committee, St Co Deb Second Delegated Legislation Committee 17 January 2007, col. 3.

refrain from putting them into action in ways that have an adverse impact on other people.³⁸

43. In our view, the human rights issue at the heart of this disagreement has a relatively straightforward answer. The question is whether the prohibitions on discrimination in the Regulations interfere with freedom of conscience and religion per se, in which case they are incompatible with Article 9(1) ECHR because that freedom is absolute, or with the manifestation of such conscience and religion, in which case they are capable of limitation if they can be shown to be justified as being necessary to protect the rights of others not to be discriminated against.

44. In our view, some exemption from the Regulations is necessary in order to protect the right to freedom of conscience, religion and belief in Article 9 ECHR. Regulation 16 of the Northern Ireland Regulations ensures that nobody will be required to perform same-sex marriages, or to admit homosexual people to their religious organisations, or allow them to join in their activities or use their premises if this would be contrary to their religious belief. In our view, the scope of the exemption in Regulation 16 gives adequate protection to the absolute right in Article 9(1) to freedom of conscience and religion. Nobody is required by the Regulations not to have beliefs about the morality of different sexual orientations, or its compatibility with the tenets of one's religion, or punished or subjected to any other disadvantage for having such beliefs. In our view, the prohibitions on discrimination in the Regulations limit the manifestation of those religious beliefs and that limitation is justifiable in a democratic society for the protection of the right of gay people not to be discriminated against in the provision of goods, facilities and services.

45. It also follows from the above that there *would* be a compatibility problem if the Regulations provided for a wider exemption which expressly exempted religious bodies from the obligation not to discriminate on grounds of sexual orientation. This would be likely to be in breach of Article 14 in conjunction with Article 8. Exemptions from the prohibition must have a reasonable and objective justification in order to be compatible with Article 14. An exemption to protect the absolute right of freedom of conscience and religion (as in Reg 16) would therefore be likely to be justifiable, but not an exemption to protect the right to manifest one's conscience or religious belief, which, as we have sought to explain above, is capable of justified limitation and in our view can be justifiably limited in order to protect gay people from discrimination.

46. We consider the scope of the exemption in Regulation 16 of the Northern Ireland Regulations to be compatible with human rights, but an exemption which went wider and protected manifestations of belief would be likely to be in breach of Article 14 in conjunction with Article 8 ECHR. We recommend that no wider exemption than that contained in Regulation 16 be contained in the GB Regulations when they are introduced.

³⁸ See e.g. Lord Smith, HL Deb 9 Jan 2007 col. 184; Dr Evan Harris MP, St Co Deb *op. cit.*, col. 3.

Applicability to public functions

47. The Consultation Paper proposed to include the exercise of public functions in the new sexual orientation regulations, so that the new provisions will apply to the activities carried out by public bodies in addition to their provision of goods, facilities and services.³⁹ The proposal is that the new prohibition will apply to anyone exercising a public function, including where the function is being undertaken by a private or voluntary body on a public authority's behalf.⁴⁰

48. The Northern Ireland Regulations make it unlawful for a public authority to discriminate on grounds of sexual orientation, or subject a person to harassment, in the course of carrying out any functions of the authority consisting of the provision of any form of social security, healthcare, any other form of social protection or advantage.⁴¹ Public authority is given the Human Rights Act meaning, so as to include any person certain of whose functions are functions of a public nature.

49. We welcome the application of the new sexual orientation regulations to public functions as well as to goods, facilities and services. We recommend that the same approach is both necessary and should be taken in relation to the new Great Britain regulations.

50. The Consultation Paper also asked whether any specific additional exceptions might be needed from a prohibition on sexual orientation discrimination in the exercise of public functions.⁴² The Northern Ireland Regulations do not contain any such additional exceptions. Regulation 16(8) of those Regulations expressly provides that the exemption for religious organisations does not apply where the organisation is providing goods facilities or services, or carrying out various functions of the authority on behalf of that authority pursuant to a contract. This means that where, for example, a Christian charity is running a residential care home for older people, the prohibitions against discrimination on grounds of sexual orientation apply.

51. During the course of the public debate about the Northern Ireland Regulations this feature caused much controversy. Some objected to Christian older people's homes being compelled by the Regulations to provide a double bed for civil partners. Religious organisations threatened to withdraw the services they provided for the State unless an exemption from the Regulations was provided for them. Following the passage of the Northern Ireland Regulations and in respect of the Great Britain Regulations the focus of the argument became Catholic adoption agencies, which, in the absence of an exemption wider than that in Regulation 16, would be required by the Regulation to offer their services to gay couples.

52. In our view there is nothing in Article 9 ECHR, or any other human rights standard, that requires an exemption to be provided to permit religious organisations to discriminate on grounds of sexual orientation when delivering services on behalf of a public authority. Such an exemption would provide a protection not for the holding of

³⁹ CP para. 3.21.

⁴⁰ CP para. 3.22.

⁴¹ Reg 12(1).

⁴² CP Q8.

a religious belief but for the manifestation of that belief. Where such manifestation of a belief conflicts with the right of gay people not to be discriminated against in their access to services as important as adoption services, it is in our view necessary and justifiable to limit the right to manifest the belief.

53. We therefore welcome the Prime Minister's statement indicating that the exemption sought by religious organisations when performing public functions will not be granted and we look forward to the regulations for Great Britain containing the same provision as in the Northern Ireland Regulations that no exemption applies where a religious organisation is performing a public function on behalf of a public authority.

4 Harassment

54. In its Consultation Paper the Government did not propose, at that stage, to make harassment on the grounds of sexual orientation unlawful in relation to goods, facilities, services, premises and public functions.⁴³ The reason given for this was that extending protection from harassment beyond the employment sphere raises complex arguments, and the question of how harassment should be applied across all the different equality strands was being considered as part of the Discrimination Law Review.⁴⁴

55. The Northern Ireland Regulations, however, do cover harassment on grounds of sexual orientation. They provide that a person, A, subjects another person, B, to harassment “where, on the ground of sexual orientation, A engages in unwanted conduct which has the purpose or effect of (a) violating B’s dignity, or (b) creating an intimidating, hostile, degrading or offensive environment for B”.⁴⁵ Conduct shall be regarded as having such an effect only if, having regard to all the circumstances, including, in particular the perception of B, it should reasonably be considered as having that effect.⁴⁶

56. During the passage of the Equality Act, the House of Lords removed harassment on grounds of religion or belief from the Bill. Lord Lester, who moved the relevant amendment to the Bill, explained that one of the main reasons for deleting harassment from that Bill was concern for the impact on freedom of speech in respect of comments made about the beliefs of others. **In our view, however, different considerations apply in relation to sexual orientation, race and sex, because these are inherent characteristics. We therefore welcome the inclusion of harassment as a separate instance of unlawful discrimination within the Northern Ireland Regulations and we recommend that it also be included in the forthcoming Regulations for the rest of Great Britain.**

57. Nevertheless, **we are concerned that the harassment provision in the Northern Ireland Regulations is drawn too widely and defined too vaguely. Conduct which has the purpose or effect of “violating dignity” or⁴⁷ creating an “offensive environment” is potentially a very wide category of conduct given the inherent vagueness of the terms “dignity” and “offensive”.** What constitutes a violation of dignity or an offensive environment will inevitably involve a degree of subjectivity. This is mitigated to some extent by the express requirement that conduct shall be regarded as having these effects only if it should reasonably be considered as doing so,⁴⁸ but even then one of the relevant circumstances to which regard must be had “in particular”, is the perception of the person being harassed.

58. The width and vagueness of the definition of harassment in the Northern Ireland Regulations gives rise to a risk of incompatibility with both freedom of speech in Article 10

⁴³ CP para. 4.18.

⁴⁴ CP para. 4.17.

⁴⁵ Reg. 3(3).

⁴⁶ Reg 3(4).

⁴⁷ The EU Framework Directive by contrast uses the word “and”, not “or” (EU Framework Directive on Equal Treatment in Employment and Occupation, 2000/78 EC).

⁴⁸ Reg. 3(4).

ECHR and freedom of thought, conscience and religion in Article 9. The potential interference with freedom of speech arises because people may feel inhibited from saying something if they fear that a person may perceive it as a violation of their dignity or as creating an offensive environment. The potential interference with freedom of religion and belief arises because explanations of sincerely held doctrinal beliefs might be perceived as violating a person's dignity or creating an offensive environment. The exemption for religious organisation in Regulation 16 of the Northern Ireland Regulations does not provide an exemption for harassment so a person who invokes the exemption in that regulation risks being caught by the harassment provision if they explain their reasons for acting. As was explained in the debates on the Northern Ireland Regulations, where a person carrying out an exempt activity seeks to explain why a person has been excluded from that activity, there is a risk that the person being told will regard the explanation as violating their dignity or as offensive, and therefore claim that they have been harassed.

59. We recommend that the new Regulations for Great Britain contain a more precise and narrower definition of harassment, to reduce the risk of incompatibility with the right to freedom of speech and freedom of religion and belief.

5 Education

Applicability to the curriculum

60. The Consultation Paper proposes that the new Regulations prohibiting discrimination on the grounds of sexual orientation should cover access to and the provision of education in schools in both the maintained and independent sectors.⁴⁹ It makes clear that under the Regulations schools when selecting pupils for admission will not be able to treat a prospective pupil differently because of his or her sexual orientation (or that of their parent or some other person associated with them), nor will they be able to deny certain privileges or opportunities, such as the chance to become a prefect or take part in a school trip, because of a pupil's sexual orientation, nor apply disciplinary policies differently to homosexual pupils or behaviour. It makes clear that schools will also need to ensure that their current bullying policy takes proper account of the need to tackle homophobic bullying with the same seriousness as bullying motivated by other factors.

61. However, the Consultation Paper indicates that the Government will be considering whether the Regulations should cover teaching in schools⁵⁰ and whether any special provision needs to be made to enable faith schools in both the maintained and independent sectors to balance the new obligations not to discriminate with their need to operate in a way that is consistent with their school's ethos.⁵¹ It therefore asks for views as to whether there are any circumstances in which schools, or a part of the schools sector, should be exempted from the regulations, and whether there are any areas of activity for schools for which special provision should be made.

62. The Northern Ireland Regulations cover education. They make it unlawful for state and independent schools to discriminate against a person on grounds of sexual orientation in the terms on which it offers to admit him or her to the school, or by refusing to accept an application for admission, or in the way that it affords a pupil at the school access to any benefits or by refusing access to them, or by excluding a pupil from the school or subjecting him or her to any other detriment.⁵² They also make it unlawful to subject to harassment any pupil at the school or applicant for admission.⁵³ The Regulations also impose a general duty in the state sector to secure that facilities for education provided by it and any ancillary benefits and services are provided without discrimination on the grounds of sexual orientation.⁵⁴ There are no exemptions for faith schools, nor is there any specific exemption for the curriculum.

63. There appears to be considerable uncertainty of views as to whether the Northern Ireland Regulations apply to the curriculum taught in schools. In a written answer to Lord Lester, Lord Rooker said that "the regulations are not concerned with what is taught in

⁴⁹ CP at para. 3.24.

⁵⁰ CP para. 3.29.

⁵¹ CP para. 3.31.

⁵² Reg. 9(1).

⁵³ Reg. 9(2).

⁵⁴ Reg. 11(1).

schools. That is rightly a matter for the Department of Education.”⁵⁵ Lord Rooker repeated this in the debate on the Northern Ireland Regulations in the House of Lords:⁵⁶ he said that the Northern Ireland Regulations are not concerned with what is taught in schools but in ensuring fair and equal access to education and the facilities and services associated with it. He said it is not the Government’s intention to attack religious ethos, teaching or practice, and that the Regulations contain an exception intended to “protect the doctrinal nature of religious observance.”

64. Others, however, regard the curriculum as being covered by the Regulations. The Fair Employment and Treatment Order 1998, which prohibits discrimination on the grounds of religion in the provision of goods and services, provides broad exemptions for schools which would cover the curriculum. The NI Sexual Orientation Regulations, however, contain no specific exemption for the curriculum. In the absence of such an exemption, they argue, the breadth of the general duty not to discriminate is such that the curriculum would be covered by the prohibition. Faith schools in particular are concerned that if the Regulations apply to the curriculum, they will not be free to decide what is taught and how it is taught in line with the faith basis of the school.

65. We welcome the Government’s acceptance that the prohibition of discrimination on grounds of sexual orientation should apply to all schools in both the maintained and the independent sectors, without any exemption for particular types of school such as faith schools. In our view, it follows from the fact that protection against sexual orientation discrimination is rooted in recognition of the equal dignity of every individual that there should be no exemptions for faith schools. Such an exemption would be likely to lead in practice to breaches of pupils’ rights not to be discriminated against on the basis of their sexual orientation, contrary to Article 14 in conjunction with Article 8 and Article 2 of Protocol 1.

66. We are concerned, however, by the Government’s position in relation to the Northern Ireland Regulations that the prohibition on sexual orientation discrimination does not apply to the curriculum, that is, the substance of what is taught in schools. The Government appears to believe that if a faith school were not free to teach its doctrinal beliefs about sexual orientation as part of its curriculum, this would amount to an attack on the “ethos” of the school. It appears to regard Article 9 ECHR as requiring the curriculum to be exempted from the prohibitions contained in the regulations.

67. We do not consider that the right to freedom of conscience and religion requires the school curriculum to be exempted from the scope of the sexual orientation regulations. In our view the Regulations prohibiting sexual orientation discrimination should clearly apply to the curriculum, so that homosexual pupils are not subjected to teaching, as part of the religious education or other curriculum, that their sexual orientation is sinful or morally wrong. Applying the Regulations to the curriculum would not prevent pupils from being taught as part of their religious education the fact that certain religions view homosexuality as sinful. In our view there is an important difference between this factual information being imparted in a descriptive way as part of a wide-ranging syllabus about different religions, and a curriculum which teaches a

⁵⁵ HL Deb, 13 December 2006, col. WA198.

⁵⁶ HL Deb 9 January 2007 cols 208-209.

particular religion's doctrinal beliefs as if they were objectively true. The latter is likely to lead to unjustifiable discrimination against homosexual pupils. We recommend that the Regulations for Great Britain make clear that the prohibition on discrimination applies to the curriculum and thereby avoid the considerable uncertainty to which the Northern Ireland Regulations have given rise on this question. We further recommend that the Government clarifies its understanding of the Northern Ireland Regulations on this matter.

Conclusions and Recommendations

The right of non-discrimination on grounds of sexual orientation

1. We welcome the premise of both the Government's Consultation Paper and the Northern Ireland Regulations that there is now a firmly established principle that it is not acceptable for someone to be discriminated against because of their sexual orientation. We agree that people suffering unfair treatment on grounds of their sexual orientation is unacceptable in a society which purports to be founded on equal opportunities for all, respect for the equal dignity and worth of each person and mutual respect between communities. (para 29)

2. We regard the right not to be discriminated against on grounds of sexual orientation as a fundamental human right, and we note the recognition in international human rights law that sexual orientation has now joined race and sex as being a ground for different treatment which requires particularly weighty justification. We also consider that the Government has an obligation to protect individuals from such treatment, whether from a public or a private source, and to provide them with the means to challenge it. We therefore welcome the Government's proposal to introduce regulations prohibiting discrimination on grounds of sexual orientation as a significant human rights enhancing measure, giving more effective protection in our national law for rights of non-discrimination which already exist under the Human Rights Act and are already binding on the UK internationally. (para 30)

Freedom of thought, conscience and religion

3. In our view, some exemption from the Regulations is necessary in order to protect the right to freedom of conscience, religion and belief in Article 9 ECHR. Regulation 16 of the Northern Ireland Regulations ensures that nobody will be required to perform same-sex marriages, or to admit homosexual people to their religious organisations, or allow them to join in their activities or use their premises if this would be contrary to their religious belief. In our view, the scope of the exemption in Regulation 16 gives adequate protection to the absolute right in Article 9(1) to freedom of conscience and religion. Nobody is required by the Regulations not to have beliefs about the morality of different sexual orientations, or its compatibility with the tenets of one's religion, or punished or subjected to any other disadvantage for having such beliefs. In our view, the prohibitions on discrimination in the Regulations limit the manifestation of those religious beliefs and that limitation is justifiable in a democratic society for the protection of the right of gay people not to be discriminated against in the provision of goods, facilities and services. (para 44)

4. We consider the scope of the exemption in Regulation 16 of the Northern Ireland Regulations to be compatible with human rights, but an exemption which went wider and protected manifestations of belief would be likely to be in breach of Article 14 in conjunction with Article 8 ECHR. We recommend that no wider exemption than that contained in Regulation 16 be contained in the GB Regulations when they are introduced. (para 46)

Applicability to public functions

5. We welcome the application of the new sexual orientation regulations to public functions as well as to goods, facilities and services. We recommend that the same approach is both necessary and should be taken in relation to the new Great Britain regulations. (para 49)

6. In our view there is nothing in Article 9 ECHR, or any other human rights standard, that requires an exemption to be provided to permit religious organisations to discriminate on grounds of sexual orientation when delivering services on behalf of a public authority. Such an exemption would provide a protection not for the holding of a religious belief but for the manifestation of that belief. Where such manifestation of a belief conflicts with the right of gay people not to be discriminated against in their access to services as important as adoption services, it is in our view necessary and justifiable to limit the right to manifest the belief. (para 52)

Harassment

7. In our view, different freedom of speech considerations apply in relation to sexual orientation, race and sex than to comments made about the beliefs of others, because the former are inherent characteristics. We therefore welcome the inclusion of harassment as a separate instance of unlawful discrimination within the Northern Ireland Regulations and we recommend that it also be included in the forthcoming Regulations for the rest of Great Britain. (para 56)

8. We are concerned that the harassment provision in the Northern Ireland Regulations is drawn too widely and defined too vaguely. Conduct which has the purpose or effect of “violating dignity” or creating an “offensive environment” is potentially a very wide category of conduct given the inherent vagueness of the terms “dignity” and “offensive”. (para 57)

9. We recommend that the new Regulations for Great Britain contain a more precise and narrower definition of harassment, to reduce the risk of incompatibility with the right to freedom of speech and freedom of religion and belief. (para 59)

Education

10. We welcome the Government’s acceptance that the prohibition of discrimination on grounds of sexual orientation should apply to all schools in both the maintained and the independent sectors, without any exemption for particular types of school such as faith schools. In our view, it follows from the fact that protection against sexual orientation discrimination is rooted in recognition of the equal dignity of every individual that there should be no exemptions for faith schools. Such an exemption would be likely to lead in practice to breaches of pupils’ rights not to be discriminated against on the basis of their sexual orientation, contrary to Article 14 in conjunction with Article 8 and Article 2 of Protocol 1. (para 65)

11. We do not consider that the right to freedom of conscience and religion requires the school curriculum to be exempted from the scope of the sexual orientation regulations. In

our view the Regulations prohibiting sexual orientation discrimination should clearly apply to the curriculum, so that homosexual pupils are not subjected to teaching, as part of the religious education or other curriculum, that their sexual orientation is sinful or morally wrong. Applying the Regulations to the curriculum would not prevent pupils from being taught as part of their religious education the fact that certain religions view homosexuality as sinful. In our view there is an important difference between this factual information being imparted in a descriptive way as part of a wide-ranging syllabus about different religions, and a curriculum which teaches a particular religion's doctrinal beliefs as if they were objectively true. The latter is likely to lead to unjustifiable discrimination against homosexual pupils. We recommend that the Regulations for Great Britain make clear that the prohibition on discrimination applies to the curriculum and thereby avoid the considerable uncertainty to which the Northern Ireland Regulations have given rise on this question. We further recommend that the Government clarifies its understanding of the Northern Ireland Regulations on this matter. (para 67)

Formal Minutes

Monday 26 February 2007

Members present:

Mr Andrew Dismore MP, in the Chair

Lord Fraser of Carmyllie	Mr Douglas Carswell MP
Lord Judd	Nia Griffith MP
Lord Lester of Herne Hill	Dr Evan Harris MP
Lord Plant of Highfield	Mr Richard Shepherd MP
Baroness Stern	Mark Tami MP

Draft Report [Legislative Scrutiny: Sexual Orientation Regulations], proposed by the Chairman, brought up and read.

Ordered, That the draft Report be read a second time, paragraph by paragraph.

Paragraphs 1 to 67 read and agreed to.

Summary read and agreed to.

Resolved, That the Report be the Sixth Report of the Committee to each House.

Ordered, That the Chairman make the Report to the House of Commons and that Baroness Stern make the Report to the House of Lords.

Ordered, That the provisions of House of Commons Standing Order No. 134 (Select committees (reports)) be applied to the Report.

[Adjourned till Wednesday 28 February at 9.30am.]

Bills and other legislative documents reported on by the Committee (Session 2006-07)

*indicates a Government Bill

Bills which engage human rights and on which the Committee has commented substantively are in bold

<i>BILL TITLE</i>	<i>REPORT NO</i>
Bournemouth Borough Council Bill	2nd
Concessionary Bus Travel Bill*	3rd
Consolidated Fund Bill*	2nd
Consumers, Estate Agents and Redress Bill*	2nd
Corporate Manslaughter and Corporate Homicide Bill*	2nd
Crossrail Bill*	2nd
Digital Switchover (Disclosure of Information) Bill*	2nd
Fraud (Trials without a Jury) Bill*	2nd
Further Education and Training Bill*	2nd
Greater London Authority Bill*	2nd
Income Tax Bill*	2nd
Investment Exchanges and Clearing Houses Bill*	2nd
Justice and Security (Northern Ireland) Bill*	5th
Legal Services Bill*	3rd
London Local Authorities Bill	2nd
London Local Authorities and Transport for London Bill	2nd
Manchester City Council Bill	2nd
Mental Health Bill*	4th
National Trust (Northern Ireland) Bill	2nd
Northern Ireland (St Andrews Agreement) Bill*	2nd
Offender Management Bill*	3rd
Planning-Gain Supplement (Preparations) Bill*	2nd
Pensions Bill*	2nd
Sexual Orientation Regulations	6th
Statistics and Registration Service Bill*	2nd
Tribunals, Courts and Enforcement Bill*	2nd and 5th
Welfare Reform Bill*	2nd
Whitehaven Harbour Bill	2nd